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 United States District Court
for the Southern District of Texas

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CERTIFICATE OF INTERESTED PERSONS

Feds for Medical Freedom v. Biden, No. 22-40043

Under Fifth Circuit Rule 28.2.1, the United States, as a governmental party, need not submit a certificate of interested persons.

/s/ Daniel Winik
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INTRODUCTION

The illnesses and deaths caused by COVID-19 have led to serious disruptions for American employers. Many private employers responded by requiring employees to be vaccinated against COVID-19, because vaccination lowers employees' risk of serious disease and death. The federal government did the same in its capacity as an employer, through an executive order directing agencies to require that current and new employees be vaccinated against COVID-19, subject to legally required exceptions for medical conditions or religious objections. Exec. Order No. 14043, 86 Fed. Reg. 50,989 (Sept. 14, 2021).

More than a dozen district courts have denied requests to enjoin this executive order or dismissed challenges to it.[1] The Fourth Circuit has rejected one of the challenges, *Rydie v. Biden*, 2022 WL 1153249 (4th Cir. Apr. 19, 2022) (unpublished), and appeals from two other orders rejecting challenges to the executive order are pending

[1] *AFGE Local 2586 v. Biden*, No. 21-cv-1130, ECF No. 48 (W.D. Okla. July 22, 2022); *Payne v. Biden*, 2022 WL 1500563 (D.D.C. May 12, 2022), *appeal pending*, No. 22-5154 (D.C. Cir.); *AFGE Local 2018 v. Biden*, 2022 WL 1089190 (E.D. Pa. Apr. 12, 2022); *De Cristo Cano v. Biden*, 2022 WL 1004558 (S.D. Cal. Apr. 4, 2022); *Brnovich v. Biden*, 562 F. Supp. 3d 123 (D. Ariz. 2022); *Oklahoma v. Biden*, 2021 WL 6126230 (W.D. Okla. Dec. 28, 2021); *Brass v. Biden*, 2021 WL 6498143 (D. Colo. Dec. 23, 2021), *adopted*, 2022 WL 136903 (D. Colo. Jan. 14, 2022); *AFGE Local 501 v. Biden*, 2021 WL 6551602 (S.D. Fla. Dec. 22, 2021); *Donovan v. Vance*, 2021 WL 5979250 (E.D. Wash. Dec. 17, 2021); *McCray v. Biden*, 2021 WL 5823801 (D.D.C. Dec. 7, 2021); *Navy Seal 1 v. Biden*, 2021 WL 5448970 (M.D. Fla. Nov. 22, 2021); *Rydie v. Biden*, 2021 WL 5416545 (D. Md. Nov. 19, 2021), *vacated and remanded on other grounds*, 2022 WL 1153249 (4th Cir. Apr. 19, 2022); *Altschuld v. Raimondo*, 2021 WL 6113563 (D.D.C. Nov. 8, 2021); *Church v. Biden*, 2021 WL 5179215 (D.D.C. Nov. 8, 2021); *Smith v. Biden*, 2021 WL 5195688 (D.N.J. Nov. 8, 2021), *appeal pending*, No. 21-3091 (3d Cir.); *Foley v. Biden*, 2021 WL 7708477 (N.D. Tex. Oct. 6, 2021).

before the Third Circuit, *Smith v. Biden*, No. 21-3091, and the D.C. Circuit, *Payne v. Biden*, No. 22-5154. Yet the district court here rendered those rulings meaningless by issuing a nationwide preliminary injunction against the implementation or enforcement of the executive order.

The injunction rests on numerous errors and should be vacated. *First*, the district court lacked jurisdiction because Congress has required that covered federal employees raise workplace grievances through the comprehensive framework created by the Civil Service Reform Act (CSRA), which provides for exclusive review before the Merit Systems Protection Board (MSPB) and the Federal Circuit.

Second, even if the district court had jurisdiction, plaintiffs failed to establish a likelihood of success on the merits. Under Article II and the statutes invoked in the executive order, the President was well within his authority to impose a vaccination requirement that he reasonably found necessary to "ensur[e] the health and safety of the Federal workforce and the efficiency of the civil service." 86 Fed. Reg. at 50,989. The district court erred in grafting atextual limitations onto that broad authority based on different language in statutes addressing government regulation of *private* employers.

Third, plaintiffs cannot satisfy the equitable requirements for preliminary relief. The injunction seriously harms the public interest by impeding the government's efforts to reduce the disruption that COVID-19 causes in federal workplaces and by undermining the President's authority to establish and maintain reasonable conditions of fed-

eral employment. On the other side of the ledger, the district court identified no plaintiff who faces imminent injury in the absence of an injunction. The most severe penalty that plaintiffs could face for violating the vaccination requirement would be removal from service, but that harm is speculative because plaintiffs could request an exemption from the requirement (as some have)—and even if the prospective harm eventually comes to pass, it is not irreparable. If plaintiffs were to prevail at a later stage of this litigation, they would also prevail in any challenge to adverse employment action under the CSRA framework, which can provide them full redress.

Finally, the injunction exceeds the district court's jurisdiction and equitable authority because it extends more broadly than necessary to remedy plaintiffs' asserted injuries. It should, at a minimum, be vacated in part.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331. ROA.103. The district court entered a preliminary injunction on January 21, 2022. ROA.1751-1770. The government timely appealed the same day. ROA.1771; *see* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF ISSUES

1. Whether the CSRA precludes jurisdiction over plaintiffs' claims.

2. Whether plaintiffs failed to show a likelihood of success on the merits of their claim that the President lacked authority to issue the challenged executive order.

3. Whether plaintiffs failed to satisfy the equitable requirements for a preliminary injunction.

4. Whether the district court exceeded its jurisdiction and equitable powers in granting a nationwide preliminary injunction.

STATEMENT OF THE CASE

A. Statutory Review Framework

The CSRA establishes "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); *see United States v. Fausto*, 484 U.S. 439, 455 (1988); *Zummer v. Sallet*, 37 F.4th 996, 1003 (5th Cir. 2022). Subchapter II of Chapter 75 (*i.e.*, 5 U.S.C. §§ 7511-7515) governs review of "major adverse" employment actions, including removal. *Fausto*, 484 U.S. at 447; *see* 5 U.S.C. § 7512. It provides that a covered "employee against whom an action is proposed is" typically entitled to "30 days' advance written notice," an opportunity to be heard, and "a written decision" with "reasons." 5 U.S.C. § 7513(b); *see id.* § 7511 (identifying covered employees). Once an action is "taken," the employee can "appeal to the" MSPB, *id.* § 7513(d), which can "order relief to prevailing employees, including reinstatement, backpay, and attorney's fees," *Elgin v. Department of the Treasury*, 567 U.S. 1, 6 (2012). The Federal Circuit can review MSPB decisions. 5 U.S.C. § 7703(a)(1), (b).

B. Executive Order 14043

Consistent with the President's constitutional role as head of the Executive Branch, Congress has long recognized the President's authority to "prescribe regulations for the conduct of employees in the executive branch." 5 U.S.C. § 7301; *see* Act of Mar. 3, 1871, ch. 114, § 9, 16 Stat. 495, 514-515. Congress has also authorized the President to "prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service" and to "ascertain the fitness of applicants as to age, health, character, knowledge, and ability." 5 U.S.C. § 3301(1), (2). And Congress has delegated to the President broad authority to "prescribe rules governing the competitive service." *Id.* § 3302.[2]

These constitutional and statutory authorities provide the foundation for many familiar restrictions on federal employees' conduct. In 1986, for example, President Reagan issued an executive order requiring that federal employees abstain from illegal drugs, both on and off duty. Exec. Order No. 12564, 51 Fed. Reg. 32,889 (Sept. 17, 1986). And in 1989, President George H.W. Bush issued an executive order setting out "[p]rinciples of ethical conduct" for federal employees, requiring (for example) that they refrain from conduct on or off the job that would conflict with their official duties;

[2] Federal civilian employees are classified into the competitive service, excepted service, and Senior Executive Service. 5 U.S.C. §§ 2102, 2103, 3132.

satisfy all "just financial obligations," including taxes; and refrain from soliciting or accepting gifts from persons doing business with their agencies. Exec. Order No. 12674, 54 Fed. Reg. 15,159 (Apr. 14, 1989).

As noted above, this case concerns an executive order responding to the COVID-19 pandemic. In addition to having killed more than a million Americans, COVID-19 infections have caused millions to miss work, seriously disrupting American businesses. *White House Report: Vaccination Requirements Are Helping Vaccinate More People, Protect Americans from COVID-19, and Strengthen the Economy* 4 (Oct. 7, 2021), https://perma.cc/NCG8-3PHY. Many employers responded by requiring that employees be vaccinated against COVID-19. *Id.* at 9-13.

In September 2021, in an effort to "ensur[e] the health and safety of the Federal workforce and the efficiency of the civil service," the President announced a similar requirement for federal civilian employees. Exec. Order No. 14043, 86 Fed. Reg. 50,989 (Sept. 14, 2021). Consistent with "public health guidance," the order instructed agencies to "implement, to the extent consistent with applicable law, a program to require COVID-19 vaccination for all of [their] Federal employees, with exceptions only as required by law." *Id.* at 50,989-990.

The Safer Federal Workforce Task Force issued guidance recognizing that employees may obtain exceptions based on a disability (including medical conditions) or a sincerely held religious belief, practice, or observance. Safer Federal Workforce Task

Force, *Vaccinations*, https://perma.cc/G8T6-K8XN (last visited May 31, 2022) (*Vaccinations*). The guidance indicated that employees who request an exception should not be disciplined while the request is pending and that employees whose requests are denied should have two weeks to begin vaccination before an agency initiates any disciplinary proceedings. *Id.*

If employees refuse vaccination after having been denied an exception (or not having requested one), or refuse to disclose their vaccination status, guidance recommends a period of education and counseling, potentially followed by a letter of reprimand and suspension. *Vaccinations*, *supra*. If noncompliance continues, agencies may impose additional discipline up to and including potential removal. *Id.* Most federal employees enjoy additional procedural protections before removal from service. *See* 5 C.F.R. § 752.404.

C. This Litigation

1. Plaintiffs include a "membership organization" called Feds for Medical Freedom (FMF), a union chapter, a federal contractor, and 62 individual FMF members. ROA.74-96. They brought this suit in December 2021, more than three months after the issuance of Executive Order 14043, to challenge that order and a separate executive order that applies to federal contractors. ROA.65-139. At least one named plaintiff, and numerous FMF members identified in the complaint, filed this lawsuit only after another district court rejected their request to enjoin Executive Order 14043. *Compare* ROA.65-68; ROA.92-96, *with* First Amended Complaint, *Altschuld v. Raimondo*, No. 21-

cv-2779, ECF No. 5 (D.D.C. Oct. 20, 2021). Plaintiffs claim that Executive Order 14043 exceeds the President's authority.

2. In January 2022, the district court preliminarily enjoined the government, nationwide, from "implementing or enforcing" Executive Order 14043. ROA.1751-1770. The court denied a preliminary injunction with respect to the contractor vaccination requirement, concluding that an existing injunction barring enforcement of that order "protects the plaintiffs from imminent harm." ROA.1751.

The district court recognized that the CSRA bars federal employees from challenging disciplinary actions in district court but concluded that the bar did not apply because plaintiffs sued before any adverse employment action. ROA.1756. The court believed that plaintiffs would be denied meaningful review if they could not bring a pre-enforcement challenge. ROA.1757.

The district court acknowledged that adverse employment actions, including removal from service, typically are not irreparable. ROA.1760. The court nonetheless concluded that plaintiffs satisfied the irreparable-injury requirement because it believed that Executive Order 14043 "bar[red]" plaintiffs "from significant employment opportunities" and imposed a "Hobson's choice" between vaccination and discipline. ROA.1760.

The district court also found that plaintiffs had shown a likelihood of success on the merits, concluding that the President likely lacked authority to issue the executive order under the statutes empowering him to prescribe rules for federal employment.

ROA.1761-1766 (discussing 5 U.S.C. §§ 3301, 3302, 7301). In reaching that conclusion, the court relied heavily on the Supreme Court's decision to stay a vaccination-related rule adopted by the Occupational Safety and Health Administration for *private* employers. ROA.1764. The court also invoked cases concerning the vaccination requirement for federal contractors, issued under a separate statutory authority. ROA.1762. The district court further held that the executive order could not be upheld under the President's Article II authority, reasoning that Congress has "limited the President's authority in this field to workplace conduct." ROA.1766.

The court found that the balance of equities and the public interest favored relief. It acknowledged that "vaccines are undoubtedly the best way to avoid serious illness from COVID-19" but asserted that a preliminary injunction would not "have any serious detrimental effect" on the government's fight against COVID-19. ROA.1768-1769.

Finally, despite acknowledging the serious "'equitable and constitutional questions raised by the rise of nationwide injunctions,'" ROA.1769, the court granted relief to all federal employees who have not complied with the vaccination requirement, regardless of whether they are parties to this suit and regardless of whether they had pending exemption requests, the processing of which the injunction halted. The court suggested that "tailoring relief" would be difficult and could create confusion because FMF allegedly "has more than 6,000" widely dispersed members. ROA.1770.

3. The government appealed and sought a stay pending appeal, after the district court denied one. Over Judge Higginson's dissent, a motions panel ordered that the motion be carried with the case. *Feds for Med. Freedom v. Biden*, 25 F.4th 354, 355 (5th Cir. 2022) (per curiam).

A merits panel then vacated the preliminary injunction, holding that the CSRA precluded jurisdiction over plaintiffs' challenge. *Feds for Med. Freedom v. Biden*, 30 F.4th 503 (5th Cir. 2022). The panel majority noted that, in *Elgin*, the Supreme Court had rejected a similar "attempt by former federal employees to 'carve out an exception to CSRA exclusivity for facial or as-applied constitutional challenges to federal statutes,'" holding 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 508 (quoting *Elgin*, 567 U.S. at 5, 12). The majority explained that "granting the plaintiffs extra-statutory review would 'seriously undermine[]'" "Congress's purpose in enacting the CSRA, which was to establish 'an integrated scheme of review.'" *Id.* at 509 (quoting *Elgin*, 567 U.S. at 14). It rejected plaintiffs' argument that "proceeding through the CSRA's remedial scheme could foreclose all meaningful review," explaining that the MSPB "can order reinstatement and backpay to any nonexempt plaintiffs who are disciplined for refusing to receive a COVID-19 vaccine." *Id.* at 509-510. And it concluded that plaintiffs' claims are not "collateral to the CSRA scheme," because "this case is 'the vehicle by which [plaintiffs] seek to' avoid imminent 'adverse employment action,'" and that plaintiffs' claims fall within "the

MSPB's expertise." *Id.* at 510-511. Judge Barksdale dissented, opining that the "CSRA does not cover pre-enforcement employment actions." *Id.* at 513.

The panel then denied "as moot" the government's motion to stay the nationwide injunction pending this appeal. Four days later, the government filed a renewed motion to stay the injunction pending issuance of the mandate. That motion remains pending.

SUMMARY OF ARGUMENT

I. The district court lacked jurisdiction. As the Supreme Court recognized in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), Congress may channel the review of certain claims through a defined framework of administrative and judicial review—and when it does, federal district courts lack jurisdiction under 28 U.S.C. § 1331 over those claims. And as the Supreme Court held in *Elgin v. Department of the Treasury*, 567 U.S. 1 (2012), that is what Congress did in enacting the CSRA's comprehensive framework for the administrative and judicial review of adverse personnel actions against federal employees: It barred employees from challenging such actions in district court.

The district court erred in concluding that the CSRA does not preclude jurisdiction here because plaintiffs sued before any adverse employment action. Nothing in *Elgin* suggests that a federal employee who faces disciplinary action under a personnel policy can circumvent the CSRA framework by bringing a pre-enforcement challenge to that policy in district court. The CSRA framework provides a meaningful avenue for

judicial review of personnel policies, and challenges to such policies are neither collateral to the CSRA scheme nor beyond the expertise of the MSPB.

That is true not just in general but in the particular context of plaintiffs' challenge. Federal employees are not being forced to take a COVID-19 vaccine; the challenged policy simply informs them that they may be disciplined or removed from their jobs if they choose not to take the vaccine or obtain a legal accommodation. If an employee were to prevail in challenging that requirement through the CSRA process, after the imposition of any discipline, he could be made whole through such remedies as reinstatement and backpay. The district court accordingly lacked jurisdiction.

II. Plaintiffs also failed to show that the executive order exceeds the President's authority. The President invoked his authority under Article II and three provisions in which Congress expressly confirmed his authority to prescribe rules for admission to the federal service and for the conduct of federal employees. *See* 5 U.S.C. §§ 3301, 3302, 7301. Numerous presidents have invoked those authorities as the basis for restrictions on federal employees' conduct, such as President Reagan's limitation of on- and off-duty drug use and the ethical rules imposed by President George H.W. Bush. The district court erred in reading into those provisions limits based on the language of different statutes addressing federal regulation of private entities.

III. Plaintiffs also failed to satisfy the equitable factors for preliminary relief. Federal employees would face no irreparable injury even if they were disciplined or removed from their jobs for choosing not to become vaccinated against COVID-19,

because they could obtain complete relief through the CSRA. And the public interest and balance of harms weigh decidedly against injunctive relief. The preliminary injunction undermines the public interest in preventing federal employees from becoming seriously ill or dying of COVID-19. And it prevents the President from establishing reasonable conditions of employment, resembling those imposed by many private employer, for the federal workforce.

IV. At a minimum, the preliminary injunction should be vacated to the extent it applies more broadly than necessary to provide relief to the plaintiffs. Article III requires that a remedy "be tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018). Principles of equity likewise require that injunctive relief "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Yet the district court made no finding that a nationwide injunction was necessary to redress plaintiffs' asserted injuries, and it overrode the prior decisions of more than a dozen other district courts and pretermitted the ongoing consideration of these issues in other courts. The court concluded that an injunction limited to plaintiffs would pose practical difficulties because FMF allegedly has thousands of "members," but it failed to consider ways of limiting relief to the parties properly before it. In any event, the constitutionally grounded principle that an equitable remedy must be no broader than necessary to remedy plaintiffs' injuries does not include an exception for convenience.

STANDARD OF REVIEW

A district court's grant of a preliminary injunction is "generally reviewed under an abuse of discretion standard," but "*de novo* review is appropriate where 'a district court's ruling rests solely on a premise as to the applicable rule of law' and the applicable facts are established or of no controlling relevance." *National Football League Players Ass'n v. National Football League*, 874 F.3d 222, 225 (5th Cir. 2017) (per curiam).

ARGUMENT

"[A] preliminary injunction is an extraordinary remedy which should not be granted unless the party seeking it has clearly carried the burden of persuasion on all four requirements." *Bluefield Water Ass'n v. City of Starkville*, 577 F.3d 250, 253 (5th Cir. 2009) (quotation marks omitted). Plaintiffs satisfy none of the requirements.

I. THE DISTRICT COURT LACKED JURISDICTION

A. *Elgin* Dictates The Resolution Of This Case

Like this case, *Elgin v. Department of the Treasury*, 567 U.S. 1 (2012), involved a challenge to a policy governing federal employees—there, a provision barring from employment anyone who "knowingly and willfully failed" to comply with the Selective Service registration requirement. *Id.* at 7. Four employees discharged under that provision challenged it in district court. *Id.* Applying *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), the Supreme Court held that the challenge was jurisdictionally barred.

Under *Thunder Basin*, courts recognize that Congress can "leapfrog[] district courts by channeling claims through administrative review and directly to federal appellate courts," and that when Congress does so, "federal district courts lack subject matter jurisdiction to hear those claims." *Bank of Louisiana v. FDIC*, 919 F.3d 916, 922 (5th Cir. 2019). "To discern an implicit preclusion," courts "first ask whether it is 'fairly discernible' from the 'text, structure, and purpose' of the statutory scheme that Congress intended to preclude district court jurisdiction." *Id.* at 923. Where Congress meant to preclude district-court review, courts next ask "whether the 'claims at issue are of the type Congress intended to be reviewed within th[e] statutory structure.'" *Id.* (quotation marks omitted). They answer that question by applying "three 'factors,'" known "as the '*Thunder Basin* factors'": first, "whether precluding district court jurisdiction 'could foreclose all meaningful judicial review'" of the claim; second, whether the claim "'is wholly collateral to a statute's review provisions'"; and third, whether the claim lies "'outside the agency's expertise.'" *Id.*

1. The CSRA framework is exclusive

Elgin resolves the first prong of the *Thunder Basin* inquiry—that is, whether it is "'fairly discernible'" that Congress meant for the CSRA "to preclude initial judicial review" in district court, *Thunder Basin*, 510 U.S. at 207. *See, e.g.*, *Rydie v. Biden*, 2022 WL 1153249, at *4 (4th Cir. Apr. 19, 2022) (unpublished) (reaching the same conclusion in a similar challenge to the COVID-19 vaccination requirement); *AFGE Local 2586 v. Biden*, No. 21-cv-1130, ECF No. 48, at 5-9 (W.D. Okla. July 22, 2022) (same); *Payne v.*

Biden, 2022 WL 1500563, at *4-5 (D.D.C. May 12, 2022) (same), *appeal pending*, No. 22-5154 (D.C. Cir.). In *Elgin*, the Supreme Court held that "employees to whom the CSRA grants administrative and judicial review" may not sue except under the CSRA. 567 U.S. at 11 (emphasis omitted). And as to "employees to whom the CSRA *denies* statutory review," the Court explained that "the CSRA's 'elaborate' framework demonstrates Congress' intent to entirely foreclose judicial review." *Id.* (citation omitted). In other words, the Court recognized that Congress meant to make the CSRA scheme "exclusive, even for employees who bring constitutional challenges to federal statutes." *Id.* at 13; *see also, e.g.*, *Zummer v. Sallet*, 37 F.4th 996, 1006 (5th Cir. 2022) ("[T]he Court [in *Elgin*] stressed its conclusion that the CSRA was meant to be comprehensive and exclusive.").

2. Plaintiff's claims are of the type channeled through the CSRA framework

Where Congress meant to preclude district-court review (as in the CSRA), courts next ask whether "whether the 'claims at issue are of the type Congress intended to be reviewed within th[e] statutory structure.'" *Bank of Louisiana*, 919 F.3d at 923 (quotation marks omitted). They do so, as noted above, by considering "whether precluding district court jurisdiction 'could foreclose all meaningful judicial review'" of the claim; whether the claim "'is wholly collateral to a statute's review provisions'"; and whether the claim lies "'outside the agency's expertise.'" *Id.*

Here, all three factors point toward preclusion. That conclusion follows from *Elgin*, which applied the factors to a similar challenge to a federal-employee policy. In

Elgin, the Supreme Court held that requiring adherence to the CSRA framework would not foreclose meaningful judicial review because the Federal Circuit was "fully competent to adjudicate" challenges to the registration requirement. 567 U.S. at 17. It explained that those claims were not "wholly collateral to the CSRA scheme" because they were "the vehicle by which" the plaintiffs sought "to reverse" the consequences of "adverse employment action." *Id.* at 22. It elaborated that "reinstatement, backpay, and attorney's fees are precisely the kinds of relief that the CSRA empowers the MSPB and the Federal Circuit to provide." *Id.* And it held that the plaintiffs' claims were within the MSPB's expertise, including because the MSPB's resolution of "preliminary questions unique to the employment context" could "obviate the need to address the constitutional challenge." *Id.* at 22-23; *see also Zummer*, 37 F.4th at 1005-1007 (summarizing *Elgin*'s analysis).

That analysis applies here with equal force. Requiring plaintiffs to channel their challenge through the CSRA scheme would not foreclose meaningful judicial review because the Federal Circuit is "fully competent to adjudicate" plaintiff's claims, *Elgin*, 567 U.S. at 17, and because plaintiffs can be made whole if they prevail. Nor is plaintiffs' challenge "wholly collateral to the CSRA scheme," because as in *Elgin*, this challenge is "the vehicle by which" plaintiffs seek to avoid adverse employment action, and any such action could be remediated through the CSRA (including with "reinstatement,

backpay, and attorney's fees") if plaintiffs prevail. *Id.* at 22. Finally, plaintiffs' constitutional challenge is within the MSPB's expertise for the same reasons as in *Elgin*. *Id.* at 22-23.

B. The District Court's Contrary Reasoning, And Plaintiffs' Efforts To Bolster It, Are Meritless

The district court's analysis of the CSRA consumes fewer than three pages of its 20-page opinion, ROA.1755-1757, and misinterprets *Elgin* and the CSRA framework.

1.a. The district court principally reasoned that because the CSRA generally does not allow preemptive review of adverse employment actions that have not yet occurred, it does not preclude employees from bringing such preemptive claims in district court.

That logic is irreconcilable with *Elgin*. As discussed above, when Congress creates "a special statutory review scheme" for a particular set of cases, courts "'ordinarily suppose[] that Congress intended that procedure to be the exclusive means of obtaining judicial review in those cases to which it applies.'" *Jarkesy v. SEC*, 803 F.3d 9, 15 (D.C. Cir. 2015). That does not just mean that claims that *can* be brought through the statutory framework *must* be brought through that framework. It means that claims that *cannot* be brought through the framework cannot be brought at all. *Elgin* thus explains that to the extent the CSRA "*grants* administrative and judicial review" for a particular type of claim, it forecloses "extrastatutory review"—and to the extent "the CSRA *denies*

statutory review" of a given claim, "judicial review" of that claim is "entirely foreclose[d]." 567 U.S. at 11.

This Court recently applied these principles to reject a plaintiff's attempt to circumvent the CSRA framework. In *Zummer*, a former FBI agent "asked a federal district court to order the FBI to issue him a top secret clearance and reinstate his employment," reasoning that the MSPB could not provide him with meaningful relief because it "lacks authority to 'examine the merits of … security-clearance denial[s].'" 37 F.4th at 1000, 1004. In other words, the plaintiff "claim[ed] the ability to seek immediate judicial review because the CSRA [gave] him 'no means of relief.'" *Id.* at 1005. But this Court rejected his argument, explaining that the Supreme Court "meant what it said in *Elgin* when it declared the CSRA's remedial scheme 'exclusive.'" *Id.* at 1007. The *Elgin* Court knew, this Court explained, "that some [employees] were denied any judicial review under the CSRA,'" but it recognized that "'Congress did not neglect expressly to create a judicial remedy where it wanted one to exist.'" *Id.* Thus, the Court concluded, "any gaps in the CSRA's remedial scheme are intentional; they do nothing to upset its global exclusivity." *Id.*

Notably, the Court reached that conclusion in *Zummer* even though—given the MSPB's inability to restore the plaintiff's security clearance—there was "no way for [the plaintiff] to be reinstated or awarded back pay if he pursue[d] his claim as the CSRA directs." 37 F.4th at 1007. *Zummer*'s conclusion applies a fortiori here, where federal employees *can* be made whole through reinstatement and back pay if they successfully

challenge, through the CSRA, any adverse employment action arising from noncompliance with the vaccine requirement.

The D.C. Circuit, which regularly considers challenges to policies governing federal employees, has interpreted the CSRA in the same way. It has explained that "Congress designed the CSRA's remedial scheme with care, 'intentionally providing—*and intentionally not providing*—particular forums and procedures for particular kinds of claims.'" *Grosdidier v. Chairman, Broad. Bd. of Governors*, 560 F.3d 495, 497 (D.C. Cir. 2009) (emphasis added). And, like this Court, it has recognized that "this comprehensive employment scheme preempts judicial review under the more general [Administrative Procedure Act] even when that scheme provides no judicial relief." *Filebark v. U.S. Dep't of Transp.*, 555 F.3d 1009, 1010 (D.C. Cir. 2009); *see also Grosdidier*, 560 F.3d at 497 (similar); *Nyunt v. Chairman, Broad. Bd. of Governors*, 589 F.3d 445, 449 (D.C. Cir. 2009) (similar). In other words, as then-Judge Roberts wrote for the court in *Fornaro v. James*, 416 F.3d 63 (D.C. Cir. 2005): "[W]hat you get under the CSRA is what you get." *Id.* at 67.

The district court attempted to support its analysis by asserting that the D.C. Circuit permits "pre-enforcement challenges to government-wide policies" notwithstanding the CSRA. ROA.1756 n.3. But the cases on which the district court relied all preceded and are abrogated by *Elgin*. *See Rydie*, 2022 WL 1153249, at *6 (concluding as much); *Payne*, 2022 WL 1500563, at *7 (same, in a case within the D.C. Circuit); *AFGE Local 2586*, *supra*, at 7-8 n.5 (same). And as discussed above, more recent D.C. Circuit precedents are consistent with *Elgin*. In *Fornaro*, for example, that court held that the

CSRA barred a putative class of federal retirees from bringing a "systemwide challenge to" an Office of Personnel Management (OPM) "policy" that they claimed would diminish future benefit payments. 416 F.3d at 67. Those plaintiffs argued, as plaintiffs do here, "that the CSRA regime's exclusivity for individual … determinations [did] not preclude what they contend[ed] [was] a collateral, systemwide challenge to OPM policy." *Id.* But the court disagreed, explaining that allowing plaintiffs' "systemic challenge" to proceed "would plainly undermine the whole point of" the CSRA scheme. *Id.* at 68-69; *see also AFGE v. Trump*, 929 F.3d 748 (D.C. Cir. 2019) (similar); *AFGE v. Secretary of the Air Force*, 716 F.3d 633 (D.C. Cir. 2013) (similar).

In short, because plaintiffs' challenge to the vaccination requirement is the type of claim Congress meant to channel through the CSRA framework, plaintiffs cannot bring that challenge in district court on the theory that the CSRA framework does not supply a pathway for pre-enforcement review of systemic challenges to policies governing federal employees. Rather, to the extent the CSRA limits judicial review of a policy to post-enforcement challenges to particular adverse employment actions under the policy, that is how plaintiffs must proceed. As another court recently observed, federal employees "are not foreclosed from all meaningful judicial review" of the vaccination requirement challenged here; "[r]ather, they are foreclosed from judicial review when and where they want it." *AFGE Local 2586*, *supra*, at 11.

Nor can plaintiffs evade the CSRA framework by attempting to characterize their claims as something other than a challenge to potential adverse employment actions in

response to their refusal to take a COVID-19 vaccine. Plaintiffs' standing to bring this suit rests, after all, on the prospect of injury from future adverse employment actions. If plaintiffs were facing no risk of discipline or removal from service as a result of the vaccination requirement, they would lack standing to challenge it.

b. The district court's contrary view would gut the CSRA scheme. If the district court were correct in its understanding of CSRA preclusion, then "the plaintiffs in *Elgin* could have avoided the CSRA entirely if they had just sued while their adverse personnel actions were proposed or pending"—which would be a "conspicuous (and unexplained) loophole" in an "'exhaustively detail[ed]'" review framework. *Payne*, 2022 WL 1500563, at *8. Nothing in *Elgin*'s discussion of the CSRA's "exclusive" framework, 567 U.S. at 5, suggests such a gaping loophole.

Permitting plaintiffs to preemptively attack potential adverse employment actions that might someday result from a broadly applicable policy would also "reintroduce the very potential for inconsistent decisionmaking and duplicative judicial review that the CSRA was designed to avoid." *Elgin*, 567 U.S. at 14. District courts nationwide would be left to deal with preemptive challenges, while challenges to actual employment actions—arising from the same policy being litigated in the district-court challenges—would continue to arise under the CSRA's scheme. Such bifurcated review would contravene "[t]he CSRA's objective of creating an integrated scheme of review." *Id.*

Those harmful consequences would not be limited to challenges to Executive Order 14043 or other vaccination requirements; they could apply equally to any federal

employee who wished to preemptively attack a government-wide policy (no matter how mundane) before suffering any adverse consequences for violating it, or even an employee who wanted to attack an expected or anticipated adverse personnel action that was *not* based on a broader policy. *Cf. AFGE v. Secretary of the Air Force*, 716 F.3d at 635 (challenge to policy requiring Air Reserve Technicians "to wear military uniforms while performing civilian duties"). Allowing plaintiffs to circumvent the CSRA by bringing pre-enforcement suits would be especially inappropriate where, as here, a challenged policy allows exceptions for individual employees.

2. The district court also concluded that adhering to the CSRA would deprive plaintiffs of "meaningful review," ROA.1757, by requiring them "to 'bet the farm'" in order to "'test[] the validity of'" a challenged requirement, *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 490-491 (2010). Plaintiffs have offered the related argument that a statutory review scheme does not offer a meaningful opportunity for judicial review of "structural" challenges, *Cochran v. SEC*, 20 F.4th 194, 207 (5th Cir. 2021) (en banc), *cert. granted*, 147 S. Ct. 2707 (2022). Neither point is persuasive.

The CSRA framework allows federal employees to pursue a challenge to the COVID-19 vaccination requirement without fear that doing so will itself be costly. If an employee is disciplined or removed from his job as a result of his choice not to become vaccinated against COVID-19 (absent an exception from the requirement), he is free to challenge that personnel action under the CSRA, and if he prevails, he can be

made whole through "reinstatement, backpay, and attorney's fees," *Elgin*, 567 U.S. at 6. If he does not prevail, he can hardly complain about being disciplined or discharged for violating a policy that has been upheld as lawful. It is in no way unusual for federal employees to have to violate a policy, and incur discipline for doing so, to challenge the policy. That is the necessary consequence of Congress's choice to channel such challenges into administrative review of adverse employment actions, with judicial review available only after the administrative review.

Nor is *Cochran*'s exception for "structural" challenges relevant here, even assuming the Supreme Court affirms this Court's decision. In *Cochran*, this Court held that a "structural" challenge to the constitutionality of SEC adjudications was "wholly collateral to the … statutory-review scheme" because it was not "depend[ent] on the validity of any substantive aspect of the" securities laws and its outcome would "have no bearing on [the plaintiff's] ultimate liability for allegedly violating the securities laws." 20 F.4th at 207. But here, plaintiffs' challenge *does* "depend on the validity of" the "substantive" policy under which they would be subject to discipline, and the outcome of that challenge would have a "bearing on" (indeed, it would determine) whether they are properly subject to discipline, *id.* In *Cochran*, this Court regarded the challenge as "outside the SEC's expertise" because it did "not depend on a special understanding of the securities industry." *Id.* at 207-208. But the challenge here is within the MSPB's expertise because it depends on "a special understanding of" the authorities for regulating

federal employment, *id.* And whereas this Court held in *Cochran* that requiring the plaintiff to proceed through the statutory scheme would deprive her of "meaningful judicial review" because she was "challenging the constitutional authority of" the "adjudicator," *id.* at 208-209, there is no such challenge here to the constitutionality of the administrative review process.

Plaintiffs have also invoked *BST Holdings, LLC v. OSHA*, 17 F.4th 604 (5th Cir. 2021), which addressed a safety standard requiring COVID-19 vaccination for employees of large private-sector companies, for the proposition that the vaccination requirement subjects federal employees to unconstitutional coercion to receive an unwanted vaccine; *see also* ROA.1757 (district court opinion). But even if plaintiffs had asserted that a vaccination requirement would violate their constitutional rights (which they have not, *see* ROA.118-138), the challenged executive order does not coerce employees to take a COVID-19 vaccine, any more than the government coerces employees to perform their jobs, respect workplace policies, or fulfill other prerequisites of continued employment (such as random drug testing). If an employee chooses not to receive a COVID-19 vaccine (and is ineligible for an exception), he simply may no longer be permitted to continue in federal employment, just as an employee would be subject to removal if she chose to stop performing her job or to violate workplace policies like submitting to drug testing. *BST Holdings* is also inapplicable here because it addressed a requirement for private-sector employees, who could not obtain full redress through the CSRA framework as plaintiffs here can.

3. Finally, plaintiffs have argued that if their claims are precluded, then federal employees would lack immediate recourse to challenge obviously unlawful directives, such as orders requiring them to vote for the reelection of a sitting President. But such outlandish directives—which the President would have every disincentive to impose, given the government's need to attract and retain talented workers—bear no resemblance to the order challenged here, which simply imposes on the federal workforce the same precaution that many private companies have required. In any event, there are at least two ways federal employees might challenge such unlikely requirements.

One is that Congress has authorized the Office of Special Counsel (OSC) to investigate whether a challenged "personnel action"—a phrase defined broadly, *see* 5 U.S.C. § 2302(a)—constitutes a "prohibited personnel practice." *Id.* §§ 1212(a)(2), 1214(a)(1)(A); *see id.* § 2302 (enumerating prohibited personnel practices). If OSC finds a prohibited personnel practice, it can petition the MSPB for corrective action, *id.* § 1214(b)(2)(B)-(C), and the MSPB's decision is reviewable by the Federal Circuit, *id.* §§ 1214(c), 7703(b)-(c). *See Rydie*, 2022 WL 1153249, at *5 (discussing this process).

The second is that, under the All Writs Act, a court of appeals that would have jurisdiction to review agency action under a statutory review scheme—here, the Federal Circuit—could have jurisdiction to issue writs of mandamus. *See, e.g.*, *Mylan Labs. Ltd. v. Janssen Pharmaceutica, N.V.*, 989 F.3d 1375, 1379-1380 (Fed. Cir. 2021); *see also, e.g.*, *JTB Tools & Oilfield Servs., LLC v. United States*, 831 F.3d 597, 599-601 (5th Cir. 2016) (similar).

Such relief is "drastic and extraordinary," but it may be warranted where the party seeking relief has "no other adequate means to attain the relief he desires," the "right to issuance of the writ is clear and indisputable," and "the issuing court, in the exercise of its discretion," is "satisfied that the writ is appropriate." *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380-381 (2004) (quotation marks omitted).

* * *

Thus, *Elgin* compels the conclusion that the district court lacked jurisdiction over this suit. The Court should accordingly vacate the preliminary injunction and remand with instructions to dismiss the suit.

II. PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIM THAT THE PRESIDENT LACKED AUTHORITY TO ISSUE EXECUTIVE ORDER 14043

The district court also erred in concluding that plaintiffs are likely to succeed on their claim that the President lacked authority to promulgate Executive Order 14043.

A. The President Had Ample Authority To Issue The Executive Order

The executive order challenged here is a straightforward exercise of the President's authority to exercise "general administrative control of" the Executive Branch, *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2197-2198 (2020), including his "wide latitude" in managing employees, *NASA v. Nelson*, 562 U.S. 134, 148, 154 (2011). *Cf. Appointment and Promotion of Women in Federal Civil Service*, 42 Op. Att'y Gen. 157, 160 (1962) (noting that "[t]he power of the President to prescribe rules for the promotion of the efficiency

of the Federal Service" derives in part "from his constitutional power as Chief Executive"). The President has exercised his authority as CEO of the federal workforce to do the same thing countless private CEOs have done: require the workforce he manages to be vaccinated against COVID-19 (subject to exemptions required by law) in order to mitigate the workplace disruptions that this virus creates.

The President's authority to undertake that preventive measure would be clear if it rested solely on Article II, but it is considerably bolstered by the specific grants of statutory authority that Congress has conferred. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 349 U.S. 579, 635 (1952) (Jackson, J., concurring in the judgment) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."). Congress has expressly authorized the President to "prescribe regulations for the conduct of employees in the executive branch," 5 U.S.C. § 7301; to "prescribe rules governing the competitive service," *id.* § 3302; to "prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service," *id.* § 3301(1); and to "ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought," *id.* § 3301(2). As numerous courts have recognized, these provisions underscore the President's "broad authority … to regulate employment matters." *Clarry v. United States*, 85 F.3d 1041, 1047 (2d Cir. 1996); *see also Old Dominion Branch No. 496,*

Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 273 n.5 (1974) (executive order governing federal labor relations was both "plainly a reasonable exercise of the President's responsibility for the efficient operation of the Executive Branch" and "express[ly]" authorized by 5 U.S.C. § 7301); *Crandon v. United States*, 494 U.S. 152, 180, 183 (1990) (Scalia, J., concurring in the judgment) (noting "the President's discretion-laden power" to regulate the Executive Branch under 5 U.S.C. § 7301); *DiLuigi v. Kafkalas*, 584 F.2d 22, 24 n.3 (3d Cir. 1978) ("Congress delegated broad power to the President to establish … conditions of employment."); *Friedman v. Schwellenbach*, 159 F.2d 22, 24 (D.C. Cir. 1946) ("[The United States] has the right to prescribe the qualifications of its employees and to attach conditions to their employment.").

These constitutional and statutory authorities have served as the basis for many familiar conditions on federal employment. Past Presidents have, for example, required that federal employees:

- abstain from using illegal drugs either on or off duty, Exec. Order No. 12564, 51 Fed. Reg. 32,889 (Sept. 17, 1986); *see National Treasury Emps. Union v. Bush*, 891 F.2d 99, 101 (5th Cir. 1989) (upholding this requirement);

- refrain from "hold[ing] financial interests that conflict with the conscientious performance of duty" and from "engag[ing] in outside employment or activities[] … that conflict with official Government duties and responsibilities," Exec. Order No. 12674, 54 Fed. Reg. 15,159, 15,159 (Apr. 14, 1989); *see* Exec. Order No. 9 (Jan. 17, 1873) (similar restrictions on other employment);

- not take part in "influenc[ing] the minds or votes of others" during partisan elections, Circular, Dep't of State (Mar. 20, 1841), *reprinted in* U.S. Civil Serv. Comm'n, *History of the Federal Civil Service: 1789 to the Present* 148-49 (U.S. Gov't Printing Office 1941); *see* Exec. Order No. 642 (June 3, 1907) (similar);

- conduct the "internal business" of a labor organization only "during … non-duty hours," Exec. Order No. 11491, 34 Fed. Reg. 17,605, 17,614 (Oct. 31, 1969); *see Old Dominion*, 418 U.S. at 274 n.5; and

- assign title to any invention that "bear[s] a direct relation to or [is] made in consequence of the official duties of the [federal-employee] inventor," Exec. Order No. 10096, 15 Fed. Reg. 389, 389 (Jan. 25, 1950); *see Kaplan v. Corcoran*, 545 F.2d 1073, 1077 (7th Cir. 1976) (upholding this executive order).

The requirement that federal employees be vaccinated against COVID-19 unless legally entitled to an exception—in the interest of "promot[ing] the health and safety of the Federal workforce and the efficiency of the civil service," 86 Fed. Reg. at 50,989—is likewise within the President's authority, as numerous courts have recognized. *See Brnovich v. Biden*, 562 F. Supp. 3d 123, 146 (D. Ariz. 2022); *Brass v. Biden*, 2021 WL 6498143, at *3 (D. Colo. Dec. 23, 2021) (report and recommendation), *adopted*, 2022 WL 136903 (D. Colo. Jan. 14, 2022); *Oklahoma v. Biden*, 2021 WL 6126230, at *10 (W.D. Okla. Dec. 28, 2021); *Rydie v. Biden*, 2021 WL 5416545, at *3 (D. Md. Nov. 19, 2021), *vacated and remanded on other grounds*, 2022 WL 1153249 (4th Cir. Apr. 19, 2022). A requirement that Executive Branch employees become vaccinated against COVID-19 is a "regulation[] for the conduct of employees in the executive branch," 5 U.S.C. § 7301, as well as a "rule[] governing the competitive service," *id.* § 3302. And insofar as such a requirement applies to new employees, it is a "regulation[] for the admission of individuals into the civil service in the executive branch" on such terms "as will best promote the efficiency of that service," *id.* § 3301(1). Courts have long deferred to Executive Branch determinations about "[t]he remed[ies] necessary to promote efficiency of

civil service." *Giesler v. MSPB*, 686 F.2d 844, 849 (10th Cir. 1982). That deference is amply warranted here, where the President has simply required that federal workers undertake the same precaution against serious illness and death from a vaccine-preventable disease as many other private and public employers have required.

Plaintiffs have contended that, even if the President generally has authority over employees, this case is different because it involves what they call a "permanent and irreversible" "medical procedure." Panel Br. 39, 45. But the Supreme Court rejected similar arguments in *Biden v. Missouri*, 142 S. Ct. 647 (2022) (per curiam), upholding a vaccination requirement for healthcare providers notwithstanding the plaintiffs' attempt to characterize it as an "unprecedented" "mandate" to "submit to a permanent medical procedure." Response to Application for a Stay at 12-17, *Biden v. Missouri*, 142 S. Ct. 647 (No. 21A240) (2022), https://go.usa.gov/xtzjh; *see also Florida v. HHS*, 19 F.4th 1271, 1288 (11th Cir. 2021) ("mandatory vaccinations for the public at large have long been held valid," so "there was no reason for Congress to be more specific" in confirming the President's authority).

Plaintiffs have also hypothesized farfetched requirements that a President might attempt to impose, such as a requirement that employees undergo LASIK eye surgery or follow a vegan diet, but such requirements would have nothing like the close nexus to workplace safety and efficiency that this requirement does, and there is no reason to think the Federal Circuit would sustain them. *Cf. Brown v. Department of the Navy*, 229 F.3d 1356, 1358 (Fed. Cir. 2000) (explaining that an agency may remove an employee

for misconduct if "the employee's misconduct is likely to have an adverse impact on the agency's performance of its functions"). It is also difficult to imagine the President imposing such conditions in the first place. Like any employer, the President has a strong interest in retaining qualified workers, and he has no incentive to impose conditions that do not promote efficiency and that would make it hard to attract and retain talented employees. There is, after all, no history of private employers imposing LASIK or vegan-diet requirements, but there is an extensive and recent history of private employers imposing requirements for vaccination against COVID-19.

B. The District Court's Contrary Conclusions Lack Merit

1. As to the President's constitutional authority to issue Executive Order 14043, the district court suggested that the President's inherent power to manage those who execute the law might be limited to "Officers of the United States." ROA.1765 (quoting *Free Enter. Fund*, 561 U.S. at 486). But the Supreme Court has repeatedly emphasized that the President's authority to oversee the Executive Branch extends broadly and includes authority over employees. In *NASA v. Nelson*, for example, the Court rejected a constitutional challenge to the requirement of background checks probing sensitive topics as a condition of federal employment. 562 U.S. at 154. It emphasized that, whatever the limits on the government's "sovereign power 'to regulate or license,'" "the Government has a much freer hand in dealing 'with citizen employees than it does when it brings its sovereign power to bear on citizens at large.'" *Id.* at 148.

The district court's concern for a "limiting principle" was also misplaced. ROA.1766. The principal limitation here is that the challenged executive order applies only to civilian employees in the Executive Branch. The President is not purporting to regulate the conduct of private citizens. Moreover, although the President has baseline authority to regulate federal employment under Article II, Congress can limit that authority, and Congress has indeed enacted statutes that establish several important limiting principles in the federal-employment context. For example, the CSRA requires that removal, suspension, and other enumerated discipline occur only "for such cause as will promote the efficiency of the service," 5 U.S.C. §§ 7503(a), 7513(a), and Title VII and other anti-discrimination statutes applicable to federal employers prohibit adverse personnel actions on the basis of race, sex, and other protected grounds, 42 U.S.C. § 2000e-16.

2. Given the President's baseline constitutional authority, the relevant question is not whether Congress specifically authorized the President to impose a vaccination requirement in the context of federal employment, but whether Congress *prohibited* the President from exercising his inherent authority. Here, Congress has done the opposite: It has *confirmed* the President's broad authority to regulate the federal workforce. Executive Order 14043 is clearly within the President's statutory authorities as well as his constitutional power.

a. The district court erred in concluding that 5 U.S.C. § 7301, which states that "[t]he President may prescribe regulations for the conduct of employees in the

executive branch," extends only to "'workplace conduct,'" ROA.1763. The text contains no such limitation. Congress could have cabined the President's authority to regulating the "workplace conduct of employees," or the "occupational conduct of employees," or the "conduct of employees in their workspaces." Those limits might have been analogous to the Occupational Safety and Health Act's focus on "occupational" safety in private workplaces, *NFIB v. OSHA*, 142 S. Ct. 661, 665 (2022) (per curiam), and Congress "knew how" to include them, *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 826 (2018), had it meant to. By reading into the statute a limitation it does not contain, the district court violated the fundamental rule that courts cannot "'suppl[y]'" "'absent provision[s]'" to limit the reach of facially broad statutes, *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2381 (2020).

In any event, the challenged executive order *does* relate to "workplace conduct." The requirement that federal employees be vaccinated as a condition of their employment is meant to protect the safety of federal workplaces and the ability of federal employees to perform their jobs. And to the extent the requirement affects employees in their off-duty hours as well—inasmuch as an employee cannot choose to be vaccinated while at work and unvaccinated at other times—that is commonplace and unproblematic. Presidents have long regulated Executive Branch employees' on- and off-duty conduct, *see supra* pp. 29-30, given the fact (true in the public sector just as in the private sector) that off-duty conduct can have significant implications for employees' workplaces. *Cf. Biden v. Missouri*, 142 S. Ct. at 652 (looking to the "longstanding practice

of [the Executive Branch] in implementing the relevant statutory authorities" in upholding a federal vaccination requirement). Just as President Reagan concluded that federal employees' off-duty use of illegal drugs could negatively affect their workplaces, Executive Order 14043 reflects a determination that contracting and spreading a contagious virus undermines workplace efficiency. The district court's rationale would call into question requirements like drug testing of federal employees.

This Court has recognized that employees' off-duty conduct can affect their workplace performance. In *Bonet v. U.S. Postal Service*, 712 F.2d 213 (5th Cir. 1983) (per curiam), for example, the Court upheld a federal employee's discharge for serious domestic misconduct, affirming the MSPB's conclusion that discharge would promote the efficiency of the civil service because the employee's misconduct "would affect the ability of other employees to work effectively with" him. *Id.* at 217; *see also Shawgo v. Spradlin*, 701 F.2d 470, 483 (5th Cir. 1983) (similar); *Brown*, 229 F.3d at 1360 (similar).

Plaintiffs have also offered an argument, not embraced by the district court, that § 7301 does not apply because the challenged executive order does not govern "conduct." Panel Br. 34. But becoming vaccinated is obviously conduct, just like conduct that past executive orders required. Plaintiffs try to distinguish the vaccination requirement as a regulation of "status," Panel Br. 34, 36, but that semantic distinction could be applied to any regulation of conduct. President Reagan's prohibition on off-duty drug *use* could, after all, be framed as a prohibition against the employment of drug *users*.

b. The district court further erred in concluding that 5 U.S.C. §§ 3301 and 3302 do not support the executive order. Courts have recognized that § 3301, like § 7301 (discussed above), "delegate[s] broad authority to the President to establish the qualifications and conditions of employment for civil servants within the executive branch." *AFGE v. Hoffman*, 543 F.2d 930, 938 (D.C. Cir. 1976). The district court's cursory analysis of § 3301 relied principally on recent decisions concerning whether the federal government can require that employees of federal contractors be vaccinated—not the federal government's authority over its own employees. ROA.1762. But the contractor cases have nothing to do with 5 U.S.C. § 3301; they concern, among other provisions, § 3301 of *Title 41*. *See, e.g.*, *Kentucky v. Biden*, 2021 WL 5587446, at *8 (E.D. Ky. Nov. 30, 2021), *appeal pending*, No. 21-6147 (6th Cir.).

The district court also noted that § 3301 refers to "regulations for the admission of individuals into the civil service," while plaintiffs are "current federal employees." ROA.1762. But the challenged executive order applies equally to new entrants to federal service, *see Vaccinations*, *supra*, and 20,000 new employees join the federal government in a typical month, ROA.1805 ¶ 6. The district court's nationwide injunction prevents the Executive Branch from applying the order to newly hired civilian employees.

With respect to § 3302, the district court acknowledged that the provision's grant of authority to "prescribe rules governing the competitive service" "sounds broad." ROA.1762. The court viewed the next sentence, identifying particular matters that the

rules "shall" address, as "quite limited." ROA.1762. But the second sentence's identification of specific matters the President *must* address does not impliedly prohibit the President from addressing other matters under the first sentence's broad discretionary authority. The district court's reasoning would render the first sentence superfluous.

C. Major-Questions, Nondelegation, And Federalism Principles Afford No Basis To Limit The President's Powers

1. When a statute "confers authority upon an administrative agency," in certain "'extraordinary cases'" a court may find that "the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority." *West Virginia v. EPA*, 142 S. Ct. 2587, 2607-2608 (2022). The Supreme Court has, for example, skeptically viewed agency claims that threatened an "enormous and transformative expansion in … regulatory authority." *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014); *see also, e.g.*, *NFIB*, 142 S. Ct. at 665.

This case, however, does not resemble the "'extraordinary cases'" in which the Supreme Court has found it appropriate to depart from ordinary principles of administrative law. Like the vaccination requirement for healthcare workers that the Supreme Court recently upheld in *Biden v. Missouri* (*see supra* p. 31), the requirement at issue here is a sensible exercise of specific statutory authority—one that mirrors the steps taken by executives of many private corporations. Plaintiffs do not attempt to explain why Congress would have withheld from the President the authority to impose the same

vaccination requirement for the federal workforce that many private employers and other public employers have imposed for their workforces.

Even if this case did not fall so far from the cases the Supreme Court has found "extraordinary," moreover, the major questions doctrine would be inapplicable for several reasons. *First*, the executive order is not an exercise of "regulatory authority," *Utility Air*, 573 U.S. at 324, at all. It does not apply to American workplaces, or employees, in general; it specifies a condition of employment applicable only to federal civilian employees in the Executive Branch. It thus reflects the President's exercise of authority not as a regulator but as the manager of government employees. As discussed above, when the government acts "in its capacity 'as proprietor' and manager of its 'internal operation,'" it "has a much freer hand" than when it "exercise[s] its sovereign power 'to regulate.'" *Nelson*, 562 U.S. at 148.

Second, any concern about agencies' exceeding their statutory authority, *cf. NFIB*, 142 S. Ct. at 666, is diminished here in light of the President's inherent constitutional power to exercise "'general administrative control' … throughout the Executive Branch of government," *Building & Constr. Trades Dep't v. Allbaugh*, 295 F.3d 28, 32 (D.C. Cir. 2002), including by overseeing employees, *see Nelson*, 562 U.S. at 150.

Third, Congress has explicitly delegated to the President significant authority framed in broad terms, including the authority to "prescribe regulations for the conduct of employees in the executive branch." 5 U.S.C. § 7301. This case therefore does not

implicate the principle that "cryptic" statutory provisions should not be read to "delegat[e]" the resolution of significant questions, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-160 (2000). The delegation here is in plain view.

Finally, the fact that the authority here is delegated to the President himself distinguishes this case from those where courts have questioned whether Congress meant to delegate authority over a "major question" to an agency. Whereas courts have expressed the concern that agencies lack direct political accountability, *see NFIB*, 142 S. Ct. at 669 (Gorsuch, J., concurring), the President is unquestionably "accountable to the people," *Free Enter. Fund*, 561 U.S. at 513, for the consequences of his or her decisions.

2. Federalism considerations are equally irrelevant here. As a district court explained in rejecting a challenge brought by a State, the executive order does not "threaten to infringe the State's sovereignty by regulating in an area of traditional state concern or by displacing otherwise valid state law"; it is "an exercise of the President's considerable constitutional authority to regulate the internal affairs of the executive branch." *Brnovich*, 562 F. Supp. 3d at 147; *see Abbott v. Biden*, 2022 WL 2287547, at *6-7 (E.D. Tex. June 24, 2022) (similar, for military vaccination requirement), *appeal pending*, No. 22-40399 (5th Cir.); *Oklahoma*, 2021 WL 6126230, at *12 (same). The President may exercise that constitutional and statutory authority even if it "pre-empt[s] particular exercises of state police power." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 292 (1981).

3. The nondelegation doctrine is equally inapposite. "In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency." *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 472 (2001). Again, the President has constitutional authority to set Executive Branch employment policy, so the statutes at issue do not delegate legislative power that would otherwise belong exclusively to Congress. *Cf. Gundy v. United States*, 139 S. Ct. 2116, 2137 (2019) (Gorsuch, J., dissenting) ("[N]o separation-of-powers problem may arise if 'the discretion is to be exercised over matters already within the scope of executive power.'"). In any event, the statutes here are narrow in scope and limited to the federal-employment context, and they make clear that regulations must reflect factors including "the efficiency of [the] service," 5 U.S.C. § 3301(1), and "good administration," *id.* § 3302.

* * *

For all these reasons, the challenged order falls well within the President's constitutional and statutory authority.

III. PLAINTIFFS FAILED TO SATISFY THE EQUITABLE REQUIREMENTS FOR PRELIMINARY INJUNCTIVE RELIEF

Because plaintiffs cannot establish a likelihood of success on the merits, they are not entitled to a preliminary injunction. *See Lake Charles Diesel, Inc. v. General Motors Corp.*, 328 F.3d 192, 196 (5th Cir. 2003). But plaintiffs' claims also fail because the injunction inflicts public harms that far outweigh the quintessentially reparable harms that plaintiffs claim they would suffer in the absence of an injunction.

A. Plaintiffs Have Not Established Any Irreparable Injury

To obtain a preliminary injunction, plaintiffs must show that they are threatened with "imminent" harm for which they cannot be retroactively compensated. *Humana, Inc. v. Jacobson*, 804 F.2d 1390, 1394 (5th Cir. 1986). Numerous courts have declined to enjoin Executive Order 14043 because the plaintiffs before them could not demonstrate irreparable harm. *See, e.g.*, *Church v. Biden*, 2021 WL 5179215, at *13-15 (D.D.C. Nov. 8, 2021); *Altschuld v. Raimondo*, 2021 WL 6113563, at *3-5 (D.D.C. Nov. 8, 2021); *Smith v. Biden*, 2021 WL 5195688, at *8-9 (D.N.J. Nov. 8, 2021), *appeal pending*, No. 21-3091 (3d Cir.). Indeed, the district court that issued the injunction here previously recognized that federal employees with pending exception requests are not "in imminent danger of irreparable harm" and therefore are not entitled to relief. *Rodden v. Fauci*, 2021 WL 5545234, at *2 (S.D. Tex. Nov. 27, 2021) (Brown, J.).

The most severe penalty that any plaintiff could face for refusing to become vaccinated is removal from service. But this Court and the Supreme Court have repeatedly recognized that job loss is not irreparable harm absent a "genuinely extraordinary situation." *Sampson v. Murray*, 415 U.S. 61, 92 & n.68 (1974); *see also Garcia v. United States*, 680 F.2d 29, 31 (5th Cir. 1982) ("It is practically universal jurisprudence … that there is an adequate remedy for individual wrongful discharge after the fact of discharge."). Even assuming that plaintiffs are ultimately disciplined for refusing vaccination (not a foregone conclusion, particularly for plaintiffs who have requested medical or religious exceptions), and assuming the discipline is ultimately held unlawful, "the remedy by way

of reinstatement and back pay is well established and is universally used." *Garcia*, 680 F.2d at 31-32. A discharged employee could pursue reinstatement and back pay under the CSRA; depending on the nature of her claims, she might also be able to seek relief under Title VII of the Civil Rights Act or the Rehabilitation Act. Plaintiffs can therefore be "adequately compensated" for their alleged injuries if they prevail, rendering a preliminary injunction unnecessary. *Prewitt v. U.S. Postal Serv.*, 662 F.2d 311, 314 (5th Cir. Unit A Nov. 1981).

Nor does any possible injury meet the "imminen[ce]" requirement, *Humana*, 804 F.2d at 1394. For one thing, the vast majority of individual plaintiffs here have requested exceptions from their employing agencies. Those requests remained pending when the injunction was issued; the issuance of the injunction paused all processing of the requests, and guidance states that employees with pending exception requests should not be disciplined. *See Vaccinations*, *supra*. If employees obtain exceptions, they will not be disciplined and will not be required to be vaccinated. Even the district court thus recognized that plaintiffs with pending exemption requests "at least arguably" do not have constitutionally ripe claims, ROA.1757-1759; much less do they have an imminent irreparable injury that would warrant a preliminary injunction. *See Trump v. New York*, 141 S. Ct. 530, 535 (2020) (per curiam) (dispute is constitutionally unripe if it is "dependent on 'contingent future events that may not occur as anticipated, or indeed may not occur at all'").

Even plaintiffs who have not submitted exception requests cannot show that they are at imminent risk of discharge. The Task Force guidance encourages progressive discipline beginning with a period of education and counseling, possibly followed by a letter of reprimand, then suspension, and only then, if noncompliance continues, additional discipline up to and including potential removal from service. *See Vaccinations*, *supra*. Even when discipline has been initiated, therefore, plaintiffs would not necessarily be discharged, and any adverse action would be subject to a host of procedural protections. *See* 5 C.F.R. § 752.404. Disciplinary proceedings are necessarily fact- and context-specific.[3] The mere possibility that plaintiffs would be removed from service after disciplinary proceedings thus would not support a preliminary injunction, even if plaintiffs' claimed injuries could not be redressed in the event of a successful challenge to any adverse employment action. *See Humana*, 804 F.2d at 1394 (requiring "a significant threat of injury from [an] impending action").

Despite the established principle that employment-related harms can be retroactively compensated, the district court concluded that plaintiffs were entitled to preliminary relief because it believed the executive order would "bar[]" them "from significant employment opportunities in their chosen profession." ROA.1760. But the sole authority the court cited, *Burgess v. FDIC*, 871 F.3d 297, 304 (5th Cir. 2017), involved a

[3] *See Connor v. Department of Veterans Affairs*, 8 F.4th 1319, 1324 (Fed. Cir. 2021) (listing twelve "nonexclusive" factors that an agency must consider in determining appropriate workplace discipline under the CSRA).

plaintiff who was threatened with complete exclusion from "the banking industry." By contrast, if plaintiffs here do not receive exceptions, choose to remain unvaccinated, and are subsequently discharged, they can seek similar employment while simultaneously challenging their discharge under the CSRA. *Cf. Sampson*, 415 U.S. at 92 n.68 ("difficulties in immediately obtaining other employment" are not irreparable harm).

Relying on *BST Holdings*, the district court also concluded that plaintiffs were threatened with irreparable injury because they faced a "Hobson's choice" between vaccination and discipline. ROA.1760. But plaintiffs in this case do not claim a violation of their "liberty interests" or other "constitutional freedoms," *BST Holdings*, 17 F.4th at 618; they allege only that the executive order exceeds the President's authority. *See* ROA.118-138. *BST Holdings* is also inapposite because it involved private-sector employees; this Court has repeatedly held that *federal employees* are not irreparably harmed by job loss because they can generally obtain reinstatement and other remedies if they successfully challenge their discharge pursuant to the CSRA. *See White v. Carlucci*, 862 F.2d 1209, 1212-1213 (5th Cir. 1989); *Garcia*, 680 F.2d at 31-32; *Morgan v. Fletcher*, 518 F.2d 236, 239-240 (5th Cir. 1975).

B. The Public Interest And The Balance Of Harms Favor The Government

The district court further erred in finding that the balance of the equities and public interest favor preliminary relief. ROA.1768-1769; *see Nken v. Holder*, 556 U.S. 418, 435 (2009) (these factors "merge" when relief is sought against the government). As

Judge Higginson explained in dissent from the motions panel's decision, the injunction "places federal employees at a greater risk of hospitalization and death, not to mention being unable to work because of illness or the need to quarantine"; "greatly impede[s]" the government's operational efficiency; and leaves "the President of the United States, in his capacity as CEO of the federal workforce," disabled to "take the same lifesaving workplace safety measures as" a broad range of "private sector CEOs." *Feds for Med. Freedom v. Biden*, 25 F.4th 354, 359-360 (5th Cir. 2022) (Higginson, J., dissenting).

The injunction seriously harms the government and the public. It imposes significant unrecoverable costs on federal agencies by substantially increasing the likelihood of COVID-19-related absences among unvaccinated employees due to serious illness. ROA.1805-1806 ¶¶ 8-10. More than a hundred thousand federal employees are not vaccinated against COVID-19, and "tens of thousands do not have a pending or approved request for an exception." ROA.1805 ¶ 5. In addition, "over 20,000 federal civilian employees are hired in a typical month"; this constant influx likely compounds the problems noted above by continually reducing the percentage of the federal workforce that is vaccinated. ROA.1805 ¶ 6. By contrast, requiring employees to become vaccinated against COVID-19, with exceptions as required by law, reduces disruptions caused by worker absences and increases efficiency. *See* Ctrs. for Disease Control & Prevention (CDC), *COVID-19 Vaccines Are Effective*, https://go.usa.gov/xtEDp (last updated June 29, 2022); ROA.1804-1805 ¶ 4.

Like many private employers, the federal government has determined that an employee-vaccination requirement will increase operational efficiency, but the injunction leaves it unable to implement that judgment. That disruption cannot be remedied after the fact. And it is especially significant because the injunction represents "an improper intrusion by a federal court into the workings of a coordinate branch of the Government." *INS v. Legalization Assistance Project of the L.A. Cty. Fed'n of Labor*, 510 U.S. 1301, 1305-1306 (1993) (O'Connor, J., in chambers) (staying injunction).

The injunction also has disrupted the processing of employees' requests for exemptions to the vaccination requirement. Agencies had expended significant resources preparing to process exemption requests, and tens of thousands of such requests were pending when the injunction was issued. ROA.1808 ¶ 17. Halting adjudication of the requests has left agencies uncertain about what percentage of their workforce might be deemed legally entitled to remain unvaccinated and has left employees with pending requests uncertain about their status if the government prevails in this litigation.

The district court minimized the public interests the executive order serves, declaring without evidence that the public interest can "be served via less restrictive measures than the mandate, such as masking, social distancing, or part- or full-time remote work," ROA.1769. But the district court lacks expertise in public health. The challenged executive order, by contrast, rests on the CDC's expert judgment that "the best way" for federal employees to protect themselves—and, by extension, the efficiency of the civil service—"is to be vaccinated." 86 Fed. Reg. at 50,989.

IV. AT A MINIMUM, THE PRELIMINARY INJUNCTION SHOULD BE VACATED IN PART

Finally, the district court erred in enjoining the executive order nationwide, as to millions of federal employees who are not parties to this case.

1. Because a federal court's "constitutionally prescribed role is to vindicate the individual rights of the people appearing before it," "[a] plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, 138 S. Ct. 1916, 1933-1934 (2018). When a court orders "the government to take (or not take) some action with respect to those who are strangers to the suit, it is hard to see how the court could still be acting in the judicial role of resolving cases and controversies." *Department of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring). These constitutional limitations are reinforced by traditional principles of equity, which dictate that "'relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.'" *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)).

This injunction flouts those principles. The district court made no finding that nationwide relief was necessary to redress plaintiffs' alleged injuries. Nor could it have; plaintiffs have no cognizable interest in whether other federal employees may remain unvaccinated.

The district court's view that it would be "'unwieldy'" to limit relief to plaintiffs because Feds for Medical Freedom (FMF) allegedly has "more than 6,000 members,"

ROA.1770, provided no license for the court to transgress its jurisdiction or equitable authority. The principle that a remedy must be no broader than necessary to redress the plaintiff's injury, *Gill*, 138 S. Ct. at 1934, makes no exception for convenience. Nor did the court explain why relief limited to readily identifiable members of FMF would be unworkable: The court could direct FMF to notify the government of its members' names and employing agencies in order to provide them relief. As for the court's view that tailored relief would be unworkable because FMF "is actively adding new member[s]," ROA.1770, it is far from clear that FMF has standing to litigate on behalf of so-called "members" who have merely submitted a name, employer's name, and email address through its website, Feds for Medical Freedom, *Become a Member*, https://feds4medfreedom.org/joinus (last visited July 6, 2022). *See Funeral Consumers All., Inc. v. Service Corp. Int'l*, 695 F.3d 330, 344 n.9 (5th Cir. 2012) (associational standing for organization without "traditional members" requires "'indicia of membership'"—*i.e.*, a showing that "members elect leadership, serve as the organization's leadership, and finance the organization's activities, including the case's litigation costs"). Even if FMF could establish associational standing, moreover, neither the district court nor plaintiffs identified any authority suggesting that an organizational plaintiff could properly obtain relief for individual members who joined after this suit was filed. The court's practicality concern would more appropriately be addressed by granting relief only to individuals who possessed bona fide indicia of FMF membership when FMF brought this suit.

Indeed, the district court's approach would allow the named plaintiffs to circumvent Rule 23's class-action requirements by seeking relief on behalf of unnamed individuals. Class actions are the proper "mechanism for applying a judgment to third parties," and "Rule 23 carefully lays out the procedures for permitting a district court to bind nonparties to an action." *Arizona v. Biden*, 31 F.4th 469, 484 (6th Cir. 2022) (Sutton, C.J., concurring). When a court certifies a class—which it must do at "an early practicable time" after the suit is filed, Fed. R. Civ. P. 23(c)(1)(A)—the absent class members will be bound by a favorable or unfavorable judgment, *see Califano*, 442 U.S. at 702. Nationwide relief, by contrast, amounts to an inequitable one-way class action. *See Department of Homeland Sec.*, 140 S. Ct. at 601 (Gorsuch, J., concurring); *cf. American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547 (1974) (rule against one-way intervention prevents potential parties from "await[ing] developments in the trial or even final judgment on the merits in order to determine whether participation would be favorable to their interests").

The nationwide injunction is also irreconcilable with the district court's recognition that the claims of plaintiffs with pending exception requests are "arguably unripe." ROA.1757; *see also Rodden*, 2021 WL 5545234, at *3; *Donovan v. Vance*, 2021 WL 5979250, at *4-5 (E.D. Wash. Dec. 17, 2021); *Church*, 2021 WL 5179215, at *8-9. The district court made no effort to explain why it could contravene Article III's limits and grant relief to plaintiffs over whom it lacked jurisdiction, much less to federal employees at large. *See Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) ("[S]tanding

is not dispensed in gross."); *Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 434 n.27 (5th Cir. 2021) (ripeness is assessed "claim by claim").

2. This case exemplifies the "toll" that nationwide injunctions take "on the federal court system." *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring). Nationwide relief has the perverse effects of "encouraging forum shopping[] and making every case a national emergency for the courts and for the Executive Branch." *Id.* It impedes the government's ability to implement policies, because the government must "prevail in all 94 district courts and all 12 regional courts of appeals" while one plaintiff can derail a nationwide policy with a single victory. *Arizona*, 31 F.4th at 484 (Sutton, C.J., concurring). It may erode confidence in the Judiciary by creating an impression that an Article III judge, unaccountable due to life tenure, is setting national policy. And it can "prevent[] legal questions from percolating through the federal courts." *Hawaii*, 138 S. Ct. at 2425 (Thomas, J., concurring).

Here, for example, the government prevailed in its defense of the challenged executive order before the Fourth Circuit, *Rydie*, 2022 WL 1153249, and is defending the dismissal of similar challenges in the Third Circuit, *Smith v. Biden*, No. 21-3091, and the D.C. Circuit, *Payne v. Biden*, No. 22-5154. But those cases are rendered essentially meaningless by this nationwide injunction. For example, even though the Fourth Circuit held that the plaintiff employees in *Rydie* were not entitled to relief, the district court ruling here effectively overrules the Fourth Circuit by granting relief in favor of those same employees. The district court's injunction also undercuts the Supreme

Court's decision in *United States v. Mendoza*, 464 U.S. 154 (1984), which explained—in holding that the government is not subject to nonmutual offensive collateral estoppel—that "[a]llowing only one final adjudication would deprive" it "of the benefit it receives from permitting several courts of appeals to explore a difficult question before [the] Court grants certiorari." *Id.* at 160; *see also, e.g.*, *Gun Owners of Am., Inc. v. Garland*, 992 F.3d 446, 474 (6th Cir.) (cutting off the development of the law in different jurisdictions eliminates the "value in having legal issues 'percolate' in the lower courts"), *vacated on other grounds*, 19 F.4th 890 (6th Cir. 2021) (en banc).

This Court recently invoked "[p]rinciples of judicial restraint" in staying a preliminary injunction against the enforcement of a vaccination requirement for healthcare workers to the extent it applied beyond the plaintiff States. *Louisiana v. Becerra*, 20 F.4th 260, 263-264 (5th Cir. 2021) (per curiam). It explained that "[o]ther courts [were] considering the[] same issues, with several courts already and inconsistently ruling," and that the concerns that have occasionally been held to justify uniform relief did not apply with respect to a vaccination requirement. *Id.* Exactly the same is true here. If the Court does not vacate the preliminary injunction in full, it should do as it did in *Louisiana* and cabin the reach of the preliminary injunction.

CONCLUSION

The preliminary injunction should be vacated in full or, at a minimum, narrowed to extend only as far as necessary to redress the injuries of the named plaintiffs and any bona fide members of FMF when the complaint was filed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,964 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in 14-point Garamond, a proportionally spaced typeface.

/s/ Daniel Winik
Daniel Winik

ADDENDUM

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5 U.S.C § 3301

§ 3301. Civil service; generally

The President may—

(1) prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service;

(2) ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought; and

(3) appoint and prescribe the duties of individuals to make inquiries for the purpose of this section.

5 U.S.C § 3302

§ 3302. Competitive service; rules

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

(1) necessary exceptions of positions from the competitive service; and

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

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

5 U.S.C § 7301

§ 7301. Presidential regulations

The President may prescribe regulations for the conduct of employees in the executive branch.

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No. 22-40043 Feds for Medical Freedom v. Biden
USDC No. 3:21-CV-356

Dear Mr. Winik,

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