Case 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

UNOPPOSED MOTION FOR LEAVE TO FILE AN EN BANC *AMICUS CURIAE* BRIEF OF THE ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS AND NATIONAL HEALTH FEDERATION IN SUPPORT OF PLAINTIFFS-APPELLEES, IN SUPPORT OF AFFIRMANCE

Andrew L. Schlafly
Attorney at Law
939 Old Chester Rd.
Far Hills, NJ 07931
(908) 719-8608
(908) 934-9207 (fax)
aschlafly@aol.com

Counsel for *Amici Curiae*

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The case number for this *amicus curiae* brief is No. 22-40043, *Feds for Medical Freedom, et al. v. Joseph R. Biden, Jr., et al.*

Amicus Curiae Association of American Physicians and Surgeons is a non-profit corporation which has no parent corporation, and no publicly held corporation owns 10% or more of its stock. Likewise, *Amicus Curiae* National Health Federation is a non-profit corporation which has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Pursuant to the fourth sentence of Fifth Circuit Rule 28.2.1, the undersigned counsel of record certifies that the parties', including *amici*'s, list of persons and entities having an interest in the outcome of this case is complete, to the best of the undersigned counsel's knowledge, with the following additions:

Association of American Physicians and Surgeons, *Amicus Curiae*

National Health Federation, *Amicus Curiae*

Andrew L. Schlafly, counsel for *Amici Curiae*.

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Dated: September 1, 2022

/s/ Andrew L. Schlafly
Andrew L. Schlafly
Counsel for *Amici Curiae*

Within the spirit of FED. R. APP. PROC. 29, the Association of American Physicians and Surgeons ("AAPS") and the National Health Federation ("NHF") request leave to file their accompanying *amicus curiae* brief in support of Plaintiffs-Appellees, and in support of affirmance of the decision below. Counsel for the parties all consent to this filing, but the *en banc* stage of this case prompts the filing of this motion for leave as this stage of the case is no longer "during a court's initial consideration of a case on the merits." FED. R. APP. PROC. 29(a)(1).

I. IDENTITIES AND INTERESTS OF *AMICI CURIAE*.[1]

Amicus curiae Association of American Physicians and Surgeons ("AAPS") is a national association of physicians. Founded in 1943, AAPS has been dedicated to the highest ethical standards of the Oath of Hippocrates and to preserving the sanctity of the patient-physician relationship. AAPS has been a litigant in federal courts. *See, e.g., Cheney v. United States Dist. Court*, 542 U.S. 367, 374 (2004) (citing *Association of American Physicians & Surgeons v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993); *Association of American Physicians & Surgeons v. Mathews*, 423 U.S. 975 (1975)). In addition, the U.S. Supreme Court has expressly made use of *amicus* briefs submitted by AAPS in high-profile cases. *See,*

[1] All parties have consented to the filing of the accompanying brief by *Amici*. Pursuant to FED. R. APP. P. 29(a)(4)(E), undersigned counsel certifies that: counsel for the *Amici* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *Amici*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

e.g., Stenberg v. Carhart, 530 U.S. 914, 933 (2000); *id.* at 959, 963 (Kennedy, J., dissenting); *District of Columbia v. Heller*, 554 U.S. 570, 704 (2008) (Breyer, J., dissenting). Over the span of more than a decade, the Fifth and Third Circuits have expressly cited an *amicus* brief by AAPS in the first paragraph of one of its decisions. *See Texas v. United States*, 945 F.3d 355, 369 (5th Cir. 2019); *Springer v. Henry*, 435 F.3d 268, 271 (3d Cir. 2006).

Amicus curiae National Health Federation ("NHF") is the first health-freedom organization in the world, founded 1955. It is a 501(c)(4) non-for-profit organization whose mission includes:

(i) protecting the health rights and freedom of individuals and healthcare practitioners, including but not limited to access to safe foods and drinks, and dietary supplements in therapeutic values for optimal health, as well as freedom of choice and true informed consent in all matters concerning healthcare, treatments, and therapy. Individual rights in health must at all times be respected and honored;

(ii) educating consumers, producers, healthcare professionals, and government and other leaders about health and healing modalities and how to secure and preserve health and health freedom; and

(iii) providing expert and positive representation in all matters relating to health and health freedom at international Codex Alimentarius meetings as the

only health-freedom organization actively shaping global policy to protect food, drink, nutritional supplements, and our general health.

Amicus AAPS members include employees of the federal government subject to the vaccine mandate, and *Amici* AAPS and NHF have long been outspoken in favor of the rights of informed consent. NHF's advocacy for health freedom includes the rights of Americans to decline treatment.

President Biden has mandated that the Covid-19 vaccine, which an estimated one-third of Americans decline when given the choice, be imposed on millions of people on the basis that they happen to work for the federal government. This matter is of national significance and is the kind of tyranny that AAPS and NHF have long advocated against. The precedent at stake in this litigation will affect many other future issues in which AAPS and NHF likewise have interests.

Accordingly, AAPS and NHF have direct and vital interests in this matter.

II. AUTHORITY TO FILE THE *AMICUS CURIAE* BRIEF OF AAPS AND NHF.

As now-Justice Samuel Alito observed while serving on the U.S. Court of Appeals for the Third Circuit, "I think that our court would be well advised to grant motions for leave to file *amicus* briefs unless it is obvious that the proposed briefs do not meet Rule 29's criteria as broadly interpreted. I believe that this is consistent with the predominant practice in the courts of appeals." *Neonatology*

Assocs., P.A. v. Comm'r, 293 F.3d 128, 133 (3d Cir. 2002) (citing Michael E. Tigar and Jane B. Tigar, *Federal Appeals – Jurisdiction and Practice* 181 (3d ed. 1999) and Robert L. Stern, *Appellate Practice in the United States* 306, 307-08 (2d ed. 1989)). Then-Judge Alito quoted the Tigar treatise for the statement that "'[e]ven when the other side refuses to consent to an *amicus* filing, most courts of appeals freely grant leave to file, provided the brief is timely and well-reasoned.'" 293 F.3d at 133.

Judge James Ho of this Circuit cited the above favorably, and added multiple additional reasons for granting leave to file *amicus* briefs:

> What John Stuart Mill once observed about "the liberty of thought and discussion" readily applies to the courtroom as well: "If opponents of all-important truths do not exist, it is indispensable to imagine them and supply them with the strongest arguments which the most skillful devil's advocate can conjure up." JOHN STUART MILL, ON LIBERTY 36 (1859) (1978 ed.).
>
> ***So courts should welcome amicus briefs*** for one simple reason: "[I]t is for the honour of a court of justice to avoid error in their judgments." *The Protector v. Geering*, 145 Eng. Rep. 394 (K.B. 1686). As Judge Higginbotham wrote in his *American College of Obstetricians* dissent, "even in a court as learned as ours, we might be able to avoid some unnecessary catastrophes if we have the will and the patience to listen." 699 F.2d at 647.

Lefebure v. D'Aquilla, 15 F.4th 670, 675 (5th Cir. 2021).

This motion for leave to file an *amicus* brief is timely because it is filed (along with the accompanying brief) within seven days of the filing of the brief of Appellees, which this brief supports.

III. REASONS WHY THIS *AMICUS CURIAE* BRIEF IS DESIRABLE AND WHY THE MATTERS ASSERTED ARE RELEVANT TO THE DISPOSITION OF THIS CASE.

The accompanying *amici curiae* brief by AAPS and NHF will be beneficial to this Court's resolution of the issues raised for the following reasons, as more fully explained in the accompanying brief:

A. Biden's Vaccine Mandate for Federal Workers Is an Abuse of Federal Power.

Biden's Covid-19 vaccine mandate constitutes an unprecedented intrusion into Americans' personal lives beyond their jobs. Nothing permits this in the limited scope of federal power. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549, 552 (1995) (explaining that the federal government is one of limited powers, and how important this is).

Judicial review of this vaccine mandate should not be precluded by the Civil Service Reform Act ("CSRA"), or by *Elgin v. Department of the Treasury*, 567 U.S. 1 (2012), upon which the government heavily relies on appeal. The CSRA is unsuitable for simultaneous applications by tens or hundreds of thousands of federal workers objecting to Biden's vaccine mandate. Biden has improperly disrupted the personal lives of millions of workers with this Covid vaccine mandate, and the possibility of relief for some of them at a distant time in the future under the CSRA is inadequate as a remedy.

Elgin is inapplicable because it concerned employment-specific issues such as constructive discharge, and the CSRA framework was designed to address those sorts of fact-intensive matters. "Of particular relevance here, preliminary questions unique to the employment context may obviate the need to address the constitutional challenge." *Elgin*, 567 U.S. at 22-23. The fundamental doctrine of avoidance of unnecessary constitutional questions is what animated the *Elgin* decision. But no such avoidance of the unauthorized nature of Biden's vaccine mandate is possible here, and thus there is no justification for this court to defer to the administrative CSRA process as urged by the government here.

B. Biden's Vaccine Mandate Is Invalid under Major Questions Doctrine.

The recent decision by the Supreme Court in favor of major questions doctrine, in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), requires affirmance of the decision below. Biden's vaccine mandate plainly presents a major question.

If a vaccine mandate against millions of federal workers were justified – and it is not – then it would be up to Congress to debate it, hold hearings about it, and vote on it, at which point its constitutionality can be challenged properly. Given the Senate's rejection of this for private employees, S.J. Res. 29, 117th Cong., 1st Sess. (2021), it seems certain that Congress would not approve this, and the president should not trying to legislate from the Oval Office something of

which Congress disapproves. The government fails to distinguish major questions doctrine in its *en banc* brief.

C. The Covid Vaccines Are Widely Opposed, which Reinforces Their Doubtful Medical Justification and Illustrates the Lack of Informed Consent.

The CDC itself admits that the Covid vaccines "can cause long-term health problems."[2] That startling admission by the government, even though it asserts such problems are rare, concedes that the Covid vaccines cause some real harm. That admission alone justifies blocking an attempt to require it of millions of federal workers. Combined with the widespread opposition to Covid vaccines by a third of Americans – and regret by many who received it – Biden's vaccine mandate against federal workers is particularly tyrannical.

This Court can and should take judicial notice that the poorer countries of the world, which lacked access to affordable Covid vaccines or have otherwise rejected them, have fared far better than the United States in combatting Covid. The data about the country-by-country performance on Covid, and their use or rejection of Covid vaccines, is readily available on the internet and cannot be credibly disputed.[3][4] Covid vaccines have not been as successful as advertised, and

[2] https://www.cdc.gov/coronavirus/2019-ncov/vaccines/expect/after.html (viewed Aug. 20, 2022).
[3] https://www.worldometers.info/coronavirus/ (viewed Aug. 29, 2022).

an objective look at country-by-country data suggests that the Covid vaccination strategy has been a failure.

D. Where, as Here, National Irreparable Harm to Americans Is Caused by an Invalid Mandate, a Nationwide Injunction Is Appropriate.

Biden's vaccine mandate of federal workers is a heart-stopping overreach in federal power that must be blocked with a nationwide injunction. In 1775, while Edmund Burke courageously declared on the floor of the House of Commons that his fellow British leaders should conciliate with the American colonists, Burke admired how Americans "augur misgovernment at a distance, and snuff the approach of tyranny in every tainted breeze." Edmund Burke, "On Moving His Resolutions for Conciliation with the Colonies," House of Commons (March 22, 1775). In Biden's vaccine mandate, there is more than a "tainted breeze" of tyranny, and more than a narrow injunction is necessary.

CONCLUSION

The accompanying *amicus curiae* brief would aid this Court with respect to the foregoing points of argument. Accordingly, movants AAPS and NHF respectfully request leave to file the accompanying *amicus curiae* brief.

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[4] https://www.cnn.com/interactive/2021/health/global-covid-vaccinations/ (viewed Aug. 20, 2022).

Respectfully submitted,

/s/ Andrew L. Schlafly

Andrew L. Schlafly
Attorney at Law
939 Old Chester Rd.
Far Hills, NJ 07931
Phone: (908) 719-8608
Fax: (908) 934-9207
Email: aschlafly@aol.com

Dated: September 1, 2022

Counsel for Amici Curiae Association of American Physicians and Surgeons and National Health Federation

CERTIFICATE OF SERVICE

I hereby certify that, on September 1, 2022, I electronically filed the foregoing motion with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the Appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

s/ Andrew L. Schlafly
Andrew L. Schlafly
Counsel for Amici Curiae Association of American Physicians and Surgeons and National Health Federation

CERTIFICATE OF COMPLIANCE

1. This motion has been prepared using 14-point, proportionately spaced, serif typeface, in Microsoft Word.

2. This motion complies with word-length requirements because it contains a total of 1,839 words, excluding material properly not to be counted.

Dated: September 1, 2022

s/ Andrew L. Schlafly
Andrew L. Schlafly
Counsel for Amici Curiae Association of American Physicians and Surgeons and National Health Federation

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Andrew L. Schlafly
Attorney at Law
939 Old Chester Rd.
Far Hills, NJ 07931
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(908) 934-9207 (fax)
aschlafly@aol.com

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/s/ Andrew L. Schlafly
Andrew L. Schlafly
Counsel for *Amici Curiae*

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IDENTITY, INTEREST AND AUTHORITY TO FILE[1]

Amicus curiae Association of American Physicians and Surgeons ("AAPS") is a national association of physicians. Founded in 1943, AAPS has been dedicated to the highest ethical standards of the Oath of Hippocrates and to preserving the sanctity of the patient-physician relationship. AAPS has been a litigant in federal courts. *See, e.g., Cheney v. United States Dist. Court*, 542 U.S. 367, 374 (2004) (citing *Association of American Physicians & Surgeons v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993)); *Association of American Physicians & Surgeons v. Mathews*, 423 U.S. 975 (1975). In addition, the U.S. Supreme Court has expressly made use of *amicus* briefs submitted by AAPS in high-profile cases. *See, e.g., Stenberg v. Carhart*, 530 U.S. 914, 933 (2000); *id.* at 959, 963 (Kennedy, J., dissenting); *District of Columbia v. Heller*, 554 U.S. 570, 704 (2008) (Breyer, J., dissenting). Over the span of more than a decade, the Fifth and Third Circuits have expressly cited an *amicus* brief by AAPS in the first paragraph of one of its decisions. *See Texas v. United States*, 945 F.3d 355, 369 (5th Cir. 2019); *Springer v. Henry*, 435 F.3d 268, 271 (3d Cir. 2006).

[1] All parties have consented to the filing of this brief by *Amici*. Pursuant to FED. R. APP. P. 29(a)(4)(E), undersigned counsel certifies that: counsel for the *Amici* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *Amici*, its members, and its counsel – contributed monetarily to this brief's preparation or submission. Because this is at the *en banc* stage, *Amici* file an accompanying motion for leave to file this brief.

Amicus curiae National Health Federation ("NHF") is the first health-freedom organization in the world, founded 1955. It is a 501(c)(4) non-for-profit organization whose mission includes:

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Amicus AAPS members include employees of the federal government subject to the vaccine mandate, and *Amici* AAPS and NHF both have direct and vital interests in the policy issue at stake in vaccine mandates.

SUMMARY OF ARGUMENT

President Biden's mandate to vaccinate all federal workers against Covid-19 fails for multiple reasons. First, this unprecedented attempt at command and control of the personal lives of millions of Americans is far beyond any federal constitutional power. Merely being an employee of the federal government does not cede control over one's personal life to the president. Second, Biden's mandate triggers major questions doctrine under the recent Supreme Court decision in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), and thereby requires, at a minimum, congressional approval. Congress has not so approved, and the U.S. Senate even voted to reject a similar vaccine mandate against employees of private companies. *See* S.J. Res. 29, 117th Cong., 1st Sess. (2021) (cited in *Nat'l Fed'n of Indep. Bus. v. DOL, OSHA*, 142 S. Ct. 661, 668 (2022) (Gorsuch, J., concurring)).

Data posted by the Centers for Disease Control and Prevention ("CDC") show that roughly a third of Americans decline to be fully vaccinated against Covid-19, despite heavy promotion of its vaccine.[2] Data posted by a widely respected scientific website shows that the approach taken by the Biden Administration to Covid-19 has been a failure, such that mortality rates in the United States from Covid-19 have been far higher than in other countries that have

[2] https://covid.cdc.gov/covid-data-tracker/#vaccinations_vacc-people-additional-dose-totalpop (viewed Sept. 1, 2022).

declined to mandate or promote vaccination. The Biden Administration seeks to fire workers, not for job-related reasons but because they, like many Americans, do not want this vaccine that has been a failure in combating Covid-19. Biden's edict was properly enjoined below, and the district court decision should be affirmed.

Nothing in the government's brief on appeal overcomes fatal defects in the federal workers vaccine mandate, or even addresses them substantively. Instead, the government generally argues for sweeping authority that would allow any president to command almost anything by federal workers under the pretext of improving their health, subject only to an administrative grievance process for aggrieved individual employees to pursue in a piecemeal manner. Under the line of reasoning urged by the government in its brief, the president could command federal workers to smoke less, drink less alcohol, eat more vegetables, and remain quarantined at home nightly if that is deemed safer. The government's logic would even authorize the president to order federal workers to give up their firearms at home under a political theory of gun safety. While the latter edict would uniquely implicate the Second Amendment, it highlights the issue here: purportedly improving the personal well-being of federal workers in a controversial way is not a valid basis for the exercise of federal power over their personal lives.

Elections may have consequences, but tyranny should never be one of them. Biden does not properly have dictatorial powers over anyone. He is restrained by

the limited scope of federal power over anyone's personal life, including that of federal workers. He is confined to what Congress has or has not authorized with respect to major questions such as a broad vaccine mandate against millions of people. Biden is further limited by fundamental principles of informed consent that are deeply ingrained in our American legal system. When challenged, Biden should demonstrate in court a modicum of rationality to what he attempts to impose on so many Americans, yet has not. Biden's vaccine mandate of federal workers fails on all these points, and cannot be salvaged by precedents merely requiring federal workers to obey a law. Biden wrongly attempted to create his own law here, and his legislating from the Oval Office should be soundly rejected.

ARGUMENT

The government's argument boils down to an assertion that a president has near total control over someone merely because he is a federal employee, which is a breathtaking and disconcerting assertion of federal power. When people take jobs with the federal government they do not relinquish all control over their personal lives to a current or future president. The happenstance of someone being an employee of the federal government cannot possibly result in a deprivation of his right to deny medical treatment away from the job. Yet that is what the government unjustifiably demands in its brief here, and its argument should be emphatically rejected for at least three reasons.

First, Biden's vaccine mandate is a medically unjustified abuse of federal power. Second, this vaccine mandate is a violation of major questions doctrine, as recently embraced by the Supreme Court. Third, the CDC itself admits that Covid vaccines can cause long-term harm; there is a lack of informed consent while data show that poorer countries without the vaccines did better than the United States with it. These considerations all require blocking Biden's mandate, and the nationwide relief ordered by the district court below was entirely appropriate.

I. Biden's Vaccine Mandate for Federal Workers Is an Abuse of Federal Power.

Federal power is not absolute, of course, and a widely opposed edict that commands people's personal lives is the epitome of tyranny. Federal workers have always been free to obtain a Covid-19 vaccine if they want one. Ordering them to, over their objections, constitutes an unprecedented intrusion into their personal lives beyond their jobs. Nothing permits this in the limited scope of federal power.

As Chief Justice Rehnquist wrote in affirming another landmark decision by the Fifth Circuit, in *United States v. Lopez*:

> We start with first principles. The Constitution creates a Federal Government of enumerated powers. See Art. I, § 8. As James Madison wrote, "the powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." The Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961). This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties." *Gregory* v. *Ashcroft*, 501 U.S. 452, 458, 115 L. Ed.

> 2d 410, 111 S. Ct. 2395 (1991) (internal quotation marks omitted). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Ibid.*

United States v. Lopez, 514 U.S. 549, 552 (1995).

As aptly described by the *Lopez* court, "healthy balance" indeed. Biden's over-the-top, one-size-fits-all mandate is neither healthy nor balanced. The district court correctly halted this federal overreach.

The Civil Service Reform Act ("CSRA"), including 5 U.S.C. §§ 7511-15, is not something that such a flagrant abuse of federal power can hide behind to avoid or delay judicial scrutiny. The government's primary argument is that the CSRA deprives jurisdiction of this Court because it enables employees to challenge disciplinary actions through an internal review process. (Govt Br. 14-18[3]) Relying heavily on *Elgin v. Department of the Treasury*, 567 U.S. 1 (2012), which concerned a challenge to termination of federal employees who "knowingly and willfully failed" to comply with a federal law, the Selective Service Act, the government argues here that thousands or even millions of federal workers opposed to Biden's unauthorized vaccine mandate should be denied judicial relief now and instead be told to challenge it under the CSRA.

[3] Citations here are to the government's *en banc* brief.

The CSRA is a slow, cumbersome review process unsuitable for simultaneous applications by tens or hundreds of thousands of federal workers objecting to Biden's vaccine mandate. Timely review would not be feasible under the CSRA for so many objecting workers, and nor should it be required or considered to have been intended for this scenario. Biden has improperly disrupted the personal lives of millions of workers, and the possibility of relief for some of them at a distant time in the future under the CSRA is inadequate as a remedy.

Central to the ruling in *Elgin* was that employment-specific issues such as constructive discharge were essential to adjudicating the claims, and the CSRA framework was designed to address those sorts of fact-intensive matters. "Of particular relevance here, preliminary questions unique to the employment context may obviate the need to address the constitutional challenge." *Elgin*, 567 U.S. at 22-23. The fundamental doctrine of avoidance of unnecessary constitutional issues is what animated the *Elgin* decision. But no such avoidance of the unauthorized nature of Biden's vaccine mandate is possible here, and thus there is no justification for this court to defer to the administrative CSRA process as urged by the government now.

Requiring federal workers merely to comply with applicable federal law – the Selective Service Act – does not implicate limitations on federal power, or the doctrine set forth in *United States v. Lopez*. Rather than being similar to the *Elgin*

case, Biden's vaccine mandate is more akin to telling federal workers that they must register with the Democratic Party or be fired, and surely no one would argue that courts lack jurisdiction due to the CSRA to block such a presidential order. *See, e.g.*, *O'Hare Truck Serv. v. City of Northlake*, 518 U.S. 712, 714 (1996) ("Government officials may not discharge public employees for refusing to support a political party or its candidates, unless political affiliation is a reasonably appropriate requirement for the job in question.") (citing *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980)).

The government argues in its brief that "[i]f 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" and that "the challenged executive order does not coerce employees to take a COVID-19 vaccine." (Govt Br. 25) That argument echoes the discredited view of Justice Oliver Wendell Holmes, Jr., when he was on the Massachusetts Supreme Court:

> The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract.

McAuliffe v. Mayor, etc., of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517-18 (1892). While Justice Holmes' rhetorical flourishes are unparalleled and immensely enjoyable to read, and have a superficial logical coherence, they also

facilitate tyranny and have been widely rejected. Modern federal court rulings "have long since rejected Justice Holmes' famous dictum" quoted above. *Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996) (O'Connor, writing for the Supreme Court).

Yet in substance the government seeks a return to the 1892 view of Justice Holmes, by arguing that federal workers are not really being forced to take the Covid vaccine, but merely face a loss of their job if they decline. Changing just a few words in Justice Holmes' position is what the government's position amounts to on this appeal. Under government's reasoning, federal workers have a right to decline the Covid vaccine, but they have no right to be a federal worker. That argument fails amid unauthorized demands on the personal lives of workers. They cannot be properly ordered to take the Covid vaccine any more than they could be ordered to turn in any guns they may lawfully keep at home, or agree to have their children vaccinated against Covid, too.

Federal workers are not guinea pigs or slaves, and Biden is not their owner. When federal workers invested their careers in the federal government, in accepting employment by the United States, these workers received no notice that their personal lives would be controlled by a current or future president whenever he may want to command that they submit to potentially life-changing treatment.

This unauthorized mandate by Biden is contrary to the well-established principle that our federal government is one of limited enumerated powers.

II. Biden's Vaccine Mandate Is Invalid under Major Questions Doctrine.

The recent Supreme Court decision in *West Virginia v. EPA* precludes the arguments on appeal by the government here. There the Supreme Court expressly embraced "major questions doctrine," which requires congressional authorization before federal agencies decide issues of major significance. Requiring millions of federal workers to receive a controversial new vaccine is plainly a "major question."

As detailed at length in the concurrence in *West Virginia v. EPA*, a long line of precedents by the Supreme Court had already been applying major questions doctrine without invoking its new name. Both the recent embrace of it and its long history require enjoining Biden's vaccine mandate for federal workers.

A. The Recent Decision by the Supreme Court in *West Virginia v. EPA* Requires Affirmance.

Two months ago the Supreme Court fully adopted "major questions doctrine" in its landmark decision of *West Virginia v. EPA*, which requires affirmance of the decision below. As Chief Justice John Roberts held for the 6-3 Court:

> A requirement of "clear congressional authorization," *ibid.*—confirms that the approach under the major questions doctrine is distinct.
>
> As for the major questions doctrine "label[ ]," *post*, at 13, it took hold because it refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted. Scholars and jurists have recognized the common threads between those decisions. So have we. See *Utility Air*, 573 U. S., at 324, 134 S. Ct. 2427, 189 L. Ed. 2d 372 (citing *Brown & Williamson* and *MCI*); *King* v. *Burwell*, 576 U. S. 473, 486, 135 S. Ct. 2480, 192 L. Ed. 2d 483 (2015) (citing *Utility Air*, *Brown & Williamson*, and *Gonzales*).
> …
> Under our precedents, this is a major questions case.

West Virginia v. EPA, 142 S. Ct. 2587 (2022).

The *West Virginia v. EPA* case concerned an issue comparable in significance to Covid-19: man-made climate change and the authority of the EPA to promulgate regulations under a stated purpose of combatting it. "A decision of such magnitude and consequence rests with Congress itself …." *West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022).

Here, "this is a major questions case" too, not only under *West Virginia v. EPA* but also on the precedents on which it relied. For example, the invalidation of an attempt by the FDA to regulate tobacco is conceptually similar to the case at bar. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). There, as here, public health authorities insisted that their regulation would save lives. There, as here, the authorities insisted on an expansion in their power far beyond

anything they had done before. There, as here, the authorities went beyond anything expressly authorized by any statute. There the Supreme Court struck down the attempt by the FDA to expand its authority, just as this Court should affirm the injunction below against Biden requiring millions of federal workers to receive the controversial Covid vaccine.

In *Brown & Williamson*, the Court expressly acknowledged that "[t]he agency has amply demonstrated that tobacco use, particularly among children and adolescents, ***poses perhaps the single most significant threat to public health in the United States***." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161, 120 S. Ct. 1291, 1315 (2000) (emphasis added). But convincing a court that the problem being solved is "the single most significant threat to public health" is not enough to justify an asserted expansion in federal power over Americans.

The Supreme Court explained in *Brown & Williamson*:

> no matter how "important, conspicuous, and controversial" the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable, post, at 31, an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress. And "'in our anxiety to effectuate the congressional purpose of protecting the public, ***we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop***.'" *United States v. Article of Drug ... Bacto-Unidisk*, 394 U.S. 784, 800, 22 L. Ed. 2d 726, 89 S. Ct. 1410 (1969) (quoting *62 Cases of Jam v. United States*, 340 U.S. 593, 600, 95 L. Ed. 566, 71 S. Ct. 515 (1951)).

Brown & Williamson, 529 U.S. 120, 161, 120 S. Ct. 1291, 1315 (2000) (emphasis added).

If a vaccine mandate against millions of federal workers were justified – and it is not – then it would be up to Congress to debate it, hold hearings about it, and vote on it, at which point its constitutionality can be challenged properly. Given the Senate's rejection of this for private employees, S.J. Res. 29, 117th Cong., 1st Sess. (2021), it seems certain that Congress would not approve this, and the president should not trying to legislate from the Oval Office something of which Congress disapproves.

B. Affirmance is Further Supported by the Concurrence in *West Virginia v. EPA*.

Justice Gorsuch, as joined by Justice Alito, explained in his concurrence in *West Virginia v. EPA* the numerous precedents for requiring more from Congress than we have here:

> So, for example, in *MCI* this Court rejected the Federal Communication Commission's attempt to eliminate rate regulation for the telecommunications industry based on a "subtle" provision that empowered the FCC to "'modify'" rates. 512 U. S., at 231, 114 S. Ct. 2223, 129 L. Ed. 2d 182. In *Brown & Williamson*, the Court rejected the Food and Drug Administration's attempt to regulate cigarettes based a "cryptic" statutory provision that granted the agency the power to regulate "drugs" and "devices." 529 U. S., at 126, 156, 160, 120 S. Ct. 1291, 146 L. Ed. 2d 121. And in *Gonzales*, the Court doubted that Congress gave the Attorney General "broad and unusual authority" to regulate drugs for physician-assisted suicide through "oblique" statutory language. 546 U. S., at 267, 126 S. Ct. 904, 163 L. Ed. 2d 748.

West Virginia v. EPA, 142 S. Ct. 2587, 2622-23 (2022) (Gorsuch, J., concurring). The above precedents further point towards enjoining Biden's vaccine mandate.

C. The Government Fails to Distinguish Major Questions Doctrine.

The government inadequately devotes only 3 pages to try to distinguish major questions doctrine from this case, and cites *West Virginia v. EPA* only once. (Govt Br. 37-39) Perhaps hoping that quantity is a substitute for quality, the government raises four arguments against applying major questions doctrine here. Each of these arguments by the government fails for the following reasons, in addition to those explained in Appellees' *en banc* brief at 53-59.

First, contrary to the government's assertion, this does "resemble the extraordinary cases in which the Supreme Court has found it appropriate to depart from ordinary principles of administrative law" (Govt Br. 37, inner quotations omitted), as the government admits that the Covid vaccine can cause long-term harm. *See* Point III, *infra.* Moreover, it does not persuade for the government to argue that the president is merely acting "as the manager of government employees." (*Id.* at 38) By imposing a mandate that affects employees in their private lives, and potentially for the rest of their lives, Biden is not managing their work. It fails for the government to rely on "the President's inherent constitutional power to exercise general administrative control … throughout the Executive

Branch of government." (*Id.*, inner quotations and citations omitted). Biden is not merely exercising general administrative control here.

The government further argues that "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." (*Id.* at 39, quoting 5 U.S.C. § 7301). But the key term there is "conduct", and Biden's vaccine mandate is not limited to regulating "conduct", as that term is commonly understood.

Finally, the government seeks reversal of the decision below by saying that the president is accountable to the people, in contrast with agencies against whom major questions doctrine often applies. But the president is not as accountable to the people as Congress is, particularly the House of Representatives with its biennial elections and requirement that all House members must be elected.

III. The Covid Vaccines Are Widely Opposed, which Reinforces Their Doubtful Medical Justification and Illustrates the Lack of Informed Consent.

People generally make their own medical decisions without being ordered by the government to pursue a particular course of treatment. This is so firmly rooted in our Anglo-American legal tradition that it cannot be seriously disputed. "[T]he common-law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment."

Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 277 (1990) (citing many precedents).

Amici would welcome this Court taking a critical look at the Covid-19 vaccine from a medical perspective. The Covid-19 vaccine is not the magic potion implicit in arguments by the government and others on this issue. But if the Court prefers not to delve deeply into the medicine, it can uphold the decision below by recognizing two indisputable facts about the Covid-19 vaccine.

First, informed consent is broadly lacking as demonstrated by how one-third of the general population declines this vaccine despite more than a year of exhortations to receive it. This enormous public opposition to the Covid vaccines, in contrast with other vaccines accepted in far higher percentages by the public, is indicative of a lack of informed consent as well as potential harm by the vaccines. *See* Aria Bendix, "Polio vaccination map: The states with highest and lowest rates," *NBC News* (Aug. 15, 2022) (describing vaccination rates around 95% for polio, measles, whooping cough and chickenpox, in contrast with Covid-19).[4] The CDC itself admits that the Covid vaccines "can cause long-term health problems."[5] That startling admission by the government, even though it asserts such problems

[4] https://www.nbcnews.com/health/health-news/polio-vaccination-map-states-highest-lowest-rates-rcna43143 (viewed Aug. 29, 2022).

[5] https://www.cdc.gov/coronavirus/2019-ncov/vaccines/expect/after.html (viewed Aug. 20, 2022).

are rare, concedes that the Covid vaccines cause some real harm. That admission alone justifies blocking an attempt to require it of millions of federal workers.

Second, this Court should take judicial notice that the poorer countries of the world, which lacked access to affordable Covid vaccines or have otherwise rejected them, have fared far better than the United States in combating Covid. This easily accessible information should not be ignored. The data about the country-by-country performance on Covid, and their use or rejection of Covid vaccines, is readily available on the internet and cannot be credibly disputed.[6] Covid vaccines have not been as successful as advertised, and an objective look at country-by-country data suggests that the Covid vaccination strategy has been a failure. *See infra* note 13.

The government's brief makes no mention of any of this. The government omits the opposition to the Covid vaccination by upwards of 100 million Americans, and the growing numbers who regret having received it. Winning the NBA championship was not enough for Golden State Warriors basketball star Andrew Wiggins to stop regretting taking the Covid vaccine, which was forced upon him by a local ordinance where his team played home games:

> Andrew Wiggins is vaccinated against COVID-19, but the Golden State Warriors star would prefer it if that wasn't the case.

[6] https://www.worldometers.info/coronavirus/ (viewed Aug. 29, 2022).

> "I still wish I didn't get (vaccinated), to be honest with you," Wiggins told FanSided on Monday. …
>
> After the NBA denied his application for a religious exemption, Wiggins received the vaccination in October. He was the last Warrior to get vaccinated, and noted at the time that it felt like he was "forced to" do so.

Jared Greenspan, "Andrew Wiggins still has vaccine regret after breakout season," *New York Post* (July 20, 2022).[7] As an aside, note that Wiggins' request for a religious exemption was rejected by the Biden-aligned NBA, just as the Navy has apparently denied nearly every request for religious exemptions by service members. *See U.S. Navy Seals 1-26 v. Biden*, 27 F.4th 336, 342 (5th Cir. 2022) ("Indeed, during the last seven years, the Navy has not granted a single religious exemption from any vaccination."). It is implausible to presume that the Biden administration would grant significant numbers of religious exemptions for federal workers with respect to Biden's vaccine mandate against them.

Many millions of additional Americans feel the same regret at receiving the Covid vaccine, as the NBA star Wiggins does. In an independent John Zogby poll taken on July 22, 2022, a remarkable 10% of Americans said they regret taking the Covid-19 vaccine.[8]

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[7] https://nypost.com/2022/07/20/andrew-wiggins-still-has-vaccine-regret-after-breakout-season/ (viewed Aug. 20, 2022).

[8] https://johnzogbystrategies.com/wp-content/uploads/2022/07/XTABS_ALL-ADULTS-and-COVID-Vaccines-Survey_July-2022.pdf (viewed Aug. 29, 2022).

The CDC itself admits now that individuals are in the best position to make their own decisions about how to address Covid-19, and the very fact that nearly 100 million Americans are saying "no" to the Covid vaccine deserves judicial notice while considering Biden's sweeping mandate of it. The highly respected Gallup polling recently reported the following decline in support for this vaccine:

> Forty-six percent of Americans are very (6%) or moderately (40%) confident that existing vaccines can protect people from new variants of the virus. A year ago, in July 2021, 71% were very or moderately confident that vaccines would protect them from new variants.[9]

The government repeatedly presumes and implies that Covid-19 vaccines are fully accepted and beneficial to virtually everyone's health, perhaps akin to stopping smoking or not drinking excessive alcohol. In fact, roughly a third of Americans reject the assertions about the Covid vaccine presumed by the government in its brief. *See supra* note 2. As Justice Thomas indicated during oral argument on Biden's employer vaccine mandate issue, there are approaches to addressing a virus other than requiring vaccination:

> JUSTICE THOMAS: Just I'm – I'm curious. This probably doesn't go to the disposition of this matter, but is a vaccine the only way to treat COVID?
>
> GENERAL PRELOGAR: It is certainly the single most effective way to target all of the

[9] https://news.gallup.com/poll/396134/americans-less-optimistic-covid-situation.aspx (viewed Aug. 20, 2022).

> hazards OSHA identified, both the – the chances of contracting the virus in the first place, the risk of infecting other workers on the worksite, and with respect to the negative health consequences, that vaccination provides protection on all of those fronts.

Nat'l Fed'n of Indep. Bus. v. DOL, OSHA, Oral argument transcript, 102:13-24 (Jan. 7, 2022).[10]

In fact, many deadly viruses, including AIDS and the 1918 flu pandemic, have never been successfully addressed by vaccination. The vast rejection by 100 million Americans of the Covid vaccine strongly suggests that it is not a universally preferred, or even effective, way to address Covid-19. Publicly available and judicially noticeable data show that Biden's approach of broad vaccine mandates was not successful in addressing Covid-19, and is rejected by multiple states. Two states, Montana and Tennessee, forbid employers from requiring Covid vaccination as the Biden Administration attempts to do for federal workers. Another nine states allow private employers to impose mandates only if there are strong restrictions on such mandates. "Can Employers Require the COVID Mandate?" Concord Law School (May 13, 2022).[11]

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[10] https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/21a244_7k47.pdf (viewed Aug. 29, 2022).

[11] https://www.concordlawschool.edu/blog/news/can-employers-require-covid-vaccine/ (viewed Aug. 31, 2022).

The scientific, independent Worldometer website, which has been properly cited as an authority by nearly two dozen federal courts as confirmed by a simple LEXIS search, has easy-to-use tabular data comparing the countries of the world with respect to Covid-19. *See* Worldometer, Covid-19 Coronavirus Pandemic.[12] Clicking on the Total Deaths column ranks the countries by that category, and the United States has reportedly had far more Covid-19 deaths than any other country, including countries having much larger populations such as India and China. Indeed, nearly one-sixth of all the Covid deaths in the world have been here in the United States, despite how the population here is merely 1/24th of the world. The United States has likewise done far worse than the rest of the world in total cases, and in currently active cases.

CNN provides a table for Covid-19 vaccination, and the United States is above average in the world, ahead of India, Poland, South Africa, and many South and Central American countries.[13] All those countries with lower vaccination rates have done better, typically far better, than the United States in combatting Covid. India, for example, has vaccinated fewer per capita than the United States, and yet has less than half the mortality rate from Covid. This is doubly significant because India is a relatively poor country, where the average annual salary in India is only

[12] https://www.worldometers.info/coronavirus/ (viewed Aug. 20, 2022).
[13] https://www.cnn.com/interactive/2021/health/global-covid-vaccinations/ (viewed Aug. 20, 2022).

about $7,000 per year, and thus one would expect Covid mortality to be higher in India than in the wealthier United States. The opposite has occurred under Biden.

While in some areas of law judicial deference to another branch of government is urged, there should not be any deference to demonstrable falsehoods. Simply put, vaccine mandates have not been demonstratively effective against Covid-19. By pushing Covid vaccines, the Biden administration did not do better against Covid than countries that did not push the Covid vaccines. In its brief here the government ignores this data, but the Court should take judicial notice of how other countries have fared better against Covid-19 without pushing Covid vaccination as Biden attempts to mandate here. *See supra* note 6.

Biden's vaccine mandate is about asserting control, not improving health. A ruling that a president may order the vaccination of all federal workers, merely by executive order, means that he could demand the injection of nearly anything into all such workers. Allowing mandatory Covid-19 vaccination today would mean allowing mandatory monkeypox vaccination tomorrow, or vaccination against any sexually transmitted disease. Indeed, the injection need not be limited to vaccination, if promoting worker health were sufficient legal justification. Future mandatory injections could consist of any biological agents thought by a few to be good for all. Traveling down that Orwellian path, future biological agents could be developed to make people more politically moderate, too. George Orwell wrote:

> Now I will tell you the answer to my question. It is this. The Party seeks power entirely for its own sake. We are not interested in the good of others; we are interested solely in power, pure power. What pure power means you will understand presently. … The object of persecution is persecution. The object of torture is torture. The object of power is power. Now you begin to understand me.

George Orwell, *1984*, at p. 263 (1949).

Mandating a controversial vaccine for millions of federal workers is simply a raw exercise of power, imposed as broadly as imaginable. The reasoning of the Supreme Court in rejecting a similar mandate by Biden for private employers rings equally true here:

> We are told … that OSHA's mandate will … cause hundreds of thousands of employees to leave their jobs. … Although Congress has indisputably given OSHA the power to regulate occupational dangers, it has not given that agency the power to regulate public health more broadly. Requiring the vaccination of 84 million Americans, selected simply because they work for employers with more than 100 employees, certainly falls in the latter category.

Nat'l Fed'n of Indep. Bus. v. DOL, OSHA, 142 S. Ct. 661, 666 (2022). Biden's vaccine mandate against large employers was blocked by the Supreme Court, and the district court correctly enjoined his similar mandate against millions of federal workers.

IV. Where, as Here, National Irreparable Harm to Americans Is Caused by an Invalid Mandate, a Nationwide Injunction Is Appropriate.

The government devotes a chunk of its brief to complaining about the breadth of the injunction and a lack of deference to proceedings in other

jurisdictions on this issue, which have held in favor of Biden's vaccine mandate against federal workers. (Govt Br. 1-2, 3, 47-51) "More than a dozen district courts have denied requests to enjoin this executive order or dismissed challenges to it," the government argues, adding that the Fourth Circuit has ruled likewise on appeal and the Third Circuit is considering challenges now. (Govt Br. 1-2)

But the same could be said about the resolution of other controversial issues. In the seminal gun control case, *District of Columbia v. Heller*, a majority of the Supreme Court agreed with this Court's own precedent despite how virtually every other court had gone in the opposite direction on the same issue:

> Until the Fifth Circuit's decision in *United States* v. *Emerson,* 270 F.3d 203 (2001), every Court of Appeals to consider the question had understood *Miller* to hold that the Second Amendment does not protect the right to possess and use guns for purely private, civilian purposes. And a number of courts have remained firm in their prior positions, even after considering *Emerson.*

District of Columbia v. Heller, 554 U.S. 570, 638 n.2 (2008) (19 citations omitted).

This Circuit has often successfully led. "But if our circuit turns out to be alone in its defense of religious liberty, I'll be grateful for our actions today all the same." *Sambrano v. United Airlines, Inc.*, No. 21-11159, 2022 U.S. App. LEXIS 23043, at *14 (5th Cir. Aug. 18, 2022) (Ho, J., concurring in denial of petition for rehearing en banc). The Supreme Court decision invalidating Biden's employer vaccine mandate reinforces the likelihood that Fifth Circuit will not be alone in

invalidating Biden's similar vaccine mandate for federal workers. *See Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 666.

Nationwide injunctions may be disfavored in typical cases, but this is not a typical case. Biden's vaccine mandate of federal workers is a heart-stopping overreach in federal power that must be blocked with a nationwide injunction. In 1775, while Edmund Burke courageously declared on the floor of the House of Commons that his fellow British leaders should conciliate with the American colonists, Burke admired how Americans "augur misgovernment at a distance, and snuff the approach of tyranny in every tainted breeze." Edmund Burke, "On Moving His Resolutions for Conciliation with the Colonies," House of Commons (March 22, 1775).[14] In Biden's vaccine mandate, there is more than a "tainted breeze" of tyranny, and more than a narrow injunction is necessary.

CONCLUSION

For the foregoing reasons and those stated in the briefs by Appellees and other *amici* in their support, the decision below should be affirmed.

Respectfully submitted,

/s/ Andrew L. Schlafly

Andrew L. Schlafly
Attorney at Law

[14] https://www.gutenberg.org/files/5655/5655-h/5655-h.htm#link2H_4_0011 (available Aug. 20, 2022).

939 Old Chester Rd.
Far Hills, NJ 07931
Phone: (908) 719-8608
Fax: (908) 934-9207
Email: aschlafly@aol.com

Dated: September 1, 2022

Counsel for Amici Curiae Association of American Physicians and Surgeons and National Health Federation

CERTIFICATE OF SERVICE

I hereby certify that, on September 1, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the Appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

s/ Andrew L. Schlafly
Andrew L. Schlafly
Counsel for Amici Curiae Association of American Physicians and Surgeons and National Health Federation

CERTIFICATE OF COMPLIANCE

1. This brief has been prepared using 14-point, proportionately spaced, serif typeface, in Microsoft Word.

2. This brief complies with FED. R. APP. P. 29(a)(5) and 32(a)(7)(B) because it contains a total of 6,162 words, excluding material not counted under Rule 32(f).

Dated: September 1, 2022

s/ Andrew L. Schlafly
Andrew L. Schlafly
Counsel for Amici Curiae Association of American Physicians and Surgeons and National Health Federation