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 AS SECRETARY OF TREASURY; ET AL,
DEFENDANTS-APPELLANTS.

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

MOTION OF AMERICA FIRST LEGAL FOUNDATION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF THE PLAINTIFFS-APPELLEES

GENE P. HAMILTON
Counsel of Record
AMERICA FIRST LEGAL FOUNDATION
REED D. RUBINSTEIN
ANDREW J. BLOCK
300 Independence Avenue S.E.
Washington, D.C. 20003
(202) 964-3721
gene.hamilton@aflegal.org
Attorneys for Amicus Curiae

Pursuant to Federal Rule of Appellate Procedure 29(b)(2), America First Legal Foundation ("AFL") respectfully requests leave to file the accompanying brief as amicus curiae in support of the Plaintiffs-Appellees.

AFL is a public interest law firm that represents two federal employees in separate litigation challenging the same federal employee vaccine mandate at issue in this case. *See Payne v. Biden*, 1:21-cv-03077-JEB (D.D.C. 2021); *Vierbuchen v. Biden*, 22-cv-001-SWS (D. Wyo. 2022). AFL's clients are not parties to this case, nor are they members of any of the organizations that are a party to the case. They do, however, benefit from the nationwide preliminary injunction issued by the lower court in this case and have an interest in the continued existence of that preliminary injunction.

AFL's proposed brief is relevant to this case as it provides additional analysis of the lack of authority for the government's actions in this case. This context and analysis will benefit the Court as it considers the case at hand.

AFL has also conferred with the parties and all parties have consented to AFL's filing of an *amicus curiae* brief at this stage.

Accordingly, AFL respectfully requests that the Court grant this motion and accept the attached amicus brief for filing.

Respectfully submitted,

s/ Gene P. Hamilton
GENE P. HAMILTON
Counsel of Record
VICE-PRESIDENT AND GENERAL COUNSEL
AMERICA FIRST LEGAL FOUNDATION
300 Independence Avenue S.E.
Washington, D.C. 20003
(202) 964-3721
gene.hamilton@aflegal.org

Attorney for Amicus Curiae
America First Legal Foundation

Dated: September 1, 2022

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and 5th Cir. R. 32(b), this document contains 204 words according to the word count function of Microsoft Word.

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

s/ Gene P. Hamilton
GENE P. HAMILTON

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d) and 5th Cir. R. 25.2.5, I hereby certify that on September 1, 2022, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

s/ Gene P. Hamilton
GENE P. HAMILTON

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 AS SECRETARY OF TREASURY; ET AL,

DEFENDANTS-APPELLANTS.

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

BRIEF FOR *AMICUS CURIAE* AMERICA FIRST LEGAL FOUNDATION IN SUPPORT OF THE PLAINTIFFS-APPELLEES

GENE P. HAMILTON
Counsel of Record
AMERICA FIRST LEGAL FOUNDATION
REED D. RUBINSTEIN
ANDREW J. BLOCK
300 Independence Avenue S.E.
Washington, D.C. 20003
(202) 964-3721
gene.hamilton@aflegal.org
Attorneys for Amicus Curiae

SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

22-40043
Feds for Medical Freedom; et al. v. Joseph R. Biden, Jr.; et al.

Pursuant to Fifth Circuit Rule 29.2, undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Amicus Curiae:

America First Legal Foundation (AFL)

Counsel for Amicus Curiae:

Gene P. Hamilton
Vice-President and General Counsel
America First Legal Foundation
Reed D. Rubinstein
Andrew J. Block
300 Independence Avenue S.E.
Washington, D.C. 20003
(202) 964-3721
gene.hamilton@aflegal.org

s/ Gene P. Hamilton
GENE P. HAMILTON

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTEREST OF AMICUS CURIAE[1]

America First Legal Foundation ("AFL") is a public interest law firm dedicated to vindicating Americans' constitutional and common-law rights, protecting their civil liberties, and advancing the rule of law.

AFL believes that the federal civilian employee COVID–19 vaccine mandate violates the separation of powers and individual constitutionally protected liberty interests. Also, AFL represents two federal civilian employees—an engineer with the Department of Defense and an Assistant United States Attorney with the Department of Justice—in cases challenging the federal government's authority to impose this mandate. *Payne v. Biden*, 2022 WL 1500563 (D.D.C. May 12, 2022) *appeal pending*, No. 22-5154 (D.C. Cir.); *Vierbuchen v. Biden*, 22-cv-001-SWS (D. Wyo. 2022). In both cases, the employee-plaintiffs recovered from COVID–19, refused the vaccine, and—until the court below enjoined the mandate—faced termination despite decades of outstanding service. Accordingly, AFL has a strong interest in this Court affirming the district court's order and injunction.

---

[1] This brief was not written in whole or in part by counsel for any party, and no person or entity other than the amicus has made a monetary contribution to the preparation and submission of this brief. Amicus files this brief with all parties' consent.

INTRODUCTION AND SUMMARY OF ARGUMENT

The President and his bureaucracy unilaterally decreed a federal employee COVID–19 vaccination mandate. This unprecedented decree is a "significant encroachment" into the lives and health of approximately 2.1 million federal civilian employees and their families, is contrary to the clear weight of scientific evidence,[2] and it substantially burdens the liberty interests of workers "put to a choice between their job(s) and their jab(s)." *Nat'l Fed'n of Indep. Bus. v. Dept. of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661, 665 (2022) (per curiam); *BST Holdings, LLC v. Occupational Safety & Health Admin.*, 17 F.4th 604, 618 (5th Cir. 2021).

The President does not have inherent constitutional authority to decree injections for all civilian federal workers—any argument that he does would render most, if not all, statutory restraints on him meaningless. Nor does the Civil Service Reform Act plainly authorize

[2] Revised CDC guidance, issued on August 11, 2022, acknowledges two years of studies from around the world and "brings the recommendations for unvaccinated people in line with people who are fully vaccinated." Will Stone, Pien Huang, *With new guidance, CDC ends test-to-stay for schools and relaxes COVID rules*, NPR.org (Aug. 11, 2022), https://n.pr/3e6auxF.

such a measure. Accordingly, the President's vaccination mandate is unlawful.

Congress has not delegated to the President clear and plain authority to impose COVID–19 vaccination as a condition of federal employment. This Court should affirm the district court's ruling that judicial review is not precluded. Then, it should reach the merits of the case, and hold that the vaccine mandate is *ultra vires*.

ARGUMENT

I. THE DISTRICT COURT HAS JURISDICTION TO HEAR THIS CASE AND REACH THE MERITS.

Amicus has previously addressed the district court's jurisdiction to hear this case. It explained why the district court ruled correctly and it described the practical consequences of a ruling that the Civil Service Reform Act ("CSRA") precludes jurisdiction over a government-wide, pre-enforcement separation-of-powers action, including both a flood of potential federal employment claims and a denial of meaningful review for federal workers' serious constitutional claims. *See* Brief for Amicus Curiae America First Legal Foundation in Support of the Appellees' Petition for Rehearing En Banc, Case 22-40043, Document: 00516336314 (Filed 5/27/2022), at 3–6, 8–10.

This is a pre-enforcement separation-of-powers case affecting millions of federal workers. In light of the critical constitutional and personal interests at stake, it is particularly important to highlight first, that the separation of powers safeguards individual liberty, *see Bowsher v. Synar*, 478 U.S. 714, 730 (1986); second, that Article III courts have a very strong institutional interest in maintaining the constitutional plan of diffused legislative and executive power, *see*

Clinton v. City of New York, 524 U.S. 417, 449–50 (1998) (Kennedy, J., concurring) and *Glidden Co. v. Zdanok,* 370 U.S. 530, 536 (1962); and, third, that the judiciary's heightened duty to hear and resolve well-pled separation-of-powers claims, particularly in a pre-enforcement setting, is well established. *See Carr v. Saul,* 141 S. Ct. 1352, 1361 (2021); *Cochran v. U.S. Sec. & Exch. Comm'n*, 20 F.4th 194 (5th Cir. 2021); *Feds for Medical Freedom v. Biden*, No. 3:21-cv-356, 2022 WL 188329 (S.D. Tex. Jan 21, 2022). These first principles should inform this Court's consideration of CSRA preclusion.

II. THE PRESIDENT LACKS STATUTORY AUTHORITY TO MANDATE INJECTIONS.

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989). Where the statute at issue is one that delegates executive authority, that inquiry must be "shaped, at least in some measure, by the nature of the question presented"—whether Congress in fact meant to confer the power the executive has asserted. *See W. Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2607–

08 (2022); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

Extraordinary grants of regulatory authority are rarely accomplished through "modest words," "vague terms," or "subtle device[s]." *W. Virginia,* 142 S. Ct. at 2609 (citation omitted). Nor does Congress typically use oblique or elliptical language in empowering the executive branch to take new and unprecedented action by discovering, in a long-extant statute, an unheralded power. *Id.* (citations omitted); *Nat'l Fed'n of Indep. Bus. v. Dept. of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661, 665–66 (2022).

Thus, both separation-of-powers principles and a practical understanding of legislative intent should make this Court "reluctant to read into ambiguous statutory text" the new and broad delegation claimed to be lurking there. Something more than a merely plausible textual basis for the subject action is necessary. Instead, the government must point to "clear congressional authorization" for the power it claims. *W. Virginia*, 142 S. Ct. at 2609 (citations omitted).

The CSRA does not clearly authorize the President to mandate that all federal civilian workers receive a COVID–19 injection as a

condition of employment. And tellingly, no President has ever claimed explicit, implied, constitutional, or statutory power to decree this—especially with respect to "a threat that is untethered, in any causal sense, from the workplace." *NFIB*, 142 S. Ct. at 666.

A. The CSRA must plainly authorize mandatory injections for Executive Order 14,043 to survive scrutiny.

The federal vaccine mandate is precisely the sort of action for which clear congressional authorization should be required. *Id.* at 665–66, 668 (Gorsuch, J., concurring); *Alabama Assoc. of Realtors v. Dept. of Health and Human Servs.*, 141 S. Ct. 2485, 2489 (2021); *Utility Air Regulatory Group v. Env't Prot. Agency*, 573 U.S. 302, 324 (2014). Thus, if the mandate is to survive, then the CSRA sections cited in Executive Order 14,043 must clearly authorize the government to mandate government-wide injections for all civilian workers. *NFIB,* 142 S. Ct. at 665–66, 668 (Gorsuch, J., concurring).

B. The CSRA does not clearly authorize mandatory injections.

Executive Order 14,043 cites three CSRA sections as authority for the mandate: 5 U.S.C. §§ 3301, 3302, and 7301. Each section must be read and construed based on the ordinary public meaning of its terms at

the time of enactment, in context, and with a view to its place in the overall statutory scheme. *See Bostock v. Clayton Cnty., Georgia,* 140 S. Ct. 1731, 1738 (2020); *New Prime Inc. v. Oliveira,* 139 S. Ct. 532, 538–39 (2019); *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 666 (2007). None of these sections plainly authorizes the President's decree, and the vaccine mandate does *not* fit "neatly within the language of the statute." *Contrast Biden v. Missouri*, 142 S. Ct. 647, 652 (2022). Congress does not hide an elephant such as the government-wide vaccine mandate in a statutory mousehole. *Whitman v. Am. Trucking Ass'n,* 531 U.S. 457, 468 (2001). Accordingly, it is *ultra vires* and should be struck down. *NFIB,* 142 S. Ct. at 665–66.

1. *5 U.S.C. §§ 3301 and 3302*

Sections 3301 and 3302 are organizational statutes. They set out the general parameters of how the federal workforce is organized and their placement in the U.S. Code is indicative of their scope. *Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008) (While "a subchapter heading cannot substitute for the operative text of the statute … statutory titles and section headings are tools available

for the resolution of a doubt about the meaning of a statute") (cleaned up).

Section 3301 is titled "Civil Service; generally," and permits 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," "ascertain the fitness of applicants," and "appoint and prescribe the duties of individuals to make [these] inquiries." 5 U.S.C. § 3301. It is a generic hiring authority pertaining to "the admission of individuals into the civil service" and "the fitness of applicants." *Id.*

Section 3302 is titled "Competitive service; rules," and says that "[t]he President may prescribe rules governing the competitive service." 5 U.S.C. § 3302. Under the CSRA "[m]ost federal civil service employees are employed in either the competitive service or the excepted service." *Dean v. Dept. of Labor*, 808 F.3d 497 (Fed. Cir. 2015). Thus, section 3302 gives the President authority "to designate civil service positions that are in the excepted service," as opposed to the competitive service. *Patterson v. Dept. of Interior*, 424 F.3d 1151, 1155 n.4 (Fed. Cir. 2005).

These sections appear in Title 5, Part III, Subpart B of the United States Code. Title 5 of the Code is titled "Government Organization and Employees" and it consists of three parts. Part III is titled "Employees" and it, in turn, has ten subparts. Sections 3301 and 3302 appear in Subpart B, which is titled "employment and retention." Other subparts in this section include "employee performance," "pay and allowances," "attendance and leave," and "labor-management and employee relations."

Nothing in the plain language of these statutes—or in their context and overall place in the Code—supports the government's claim that the President has the power to declare that injection is a condition of employment. Moreover, to the extent that the President has power rolling about in the statutory penumbra, he may exercise it only by "rules"[3] or "regulations."[4] These words have specific, congressionally defined meanings and can be adopted only pursuant to notice-and-comment procedures that were not followed in issuing the Executive Order. 5 U.S.C. § 553. No rule or regulation was promulgated here, and

[3] "The President may prescribe *rules*" 5 U.S.C. § 3302 (emphasis added).
[4] "The President may … prescribe such *regulations*" 5 U.S.C. § 3301 (emphasis added).

an Executive Order is not a rule or regulation as those terms are used in sections 3301 and 3302.

2. *5 U.S.C. § 7301*

Section 7301 is titled "Presidential Regulations," and provides that "[t]he President may prescribe regulations for the conduct of employees in the executive branch." 5 U.S.C. § 7301. As discussed above, the Executive Order was not adopted pursuant to notice-and-comment procedures and is not a regulation, so it *cannot* have been authorized by the CSRA. But even if it had been subject to notice and comment, it is not authorized by section 7301.

First, the vaccine mandate is a major question. *NFIB,* 142 S. Ct. at 668–69 (Gorsuch, J., concurring). The government may not lawfully impose such a thing without clear statutory authorization. *Id.* at 665–66; *W. Virginia*, 142 S. Ct. at 2595. There is none in this case.

Second, Congress enacted section 7301 in 1966, and the ordinary public meaning of "conduct" at that time was "personal behavior; deportment; way that one acts." WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE 380 (2d ed. 1960). By this definition, section 7301 authorizes the President to regulate how federal

employees *act* at work: their behavior and deportment. It does not authorize the government to compel federal employees to take a vaccine, because vaccination has nothing to do with behavior and deportment.

Third, section 7301's context demonstrates that the government lacks authority to impose COVID–19 vaccination as a condition of federal employment. The CSRA either authorizes or requires federal worker dismissal for only a limited universe of conduct outside the workplace such as certain political activities, *see* 5 U.S.C. §§ 7323 and 7324; excessive and habitual use of intoxicants, *see* 5 U.S.C. § 7352; and a felony conviction, *see* 5 U.S.C. § 7371. The CSRA does not authorize the President to bar persons from federal employment or remove federal workers for other types of personal conduct or characteristics such as health status, weight, height, misdemeanor or infraction record, or marital status. Having specifically prescribed certain categories of conduct as precluding federal employment, the CSRA left no room for the President to augment the list by regulation, much less by Executive Order.

C. The government's longstanding practice contradicts its claimed authority.

"[T]he longstanding practice of the government can inform our determination of what the law is." *NLRB v. Noel Canning*, 573 U.S. 513,

525 (2014) (cleaned up). The federal government has never cited the CSRA as authority to regulate federal workers' medical status. A survey of executive orders, preceding Executive Order 14,043, that cite sections 3301, 3302, and 7301 for support reveals that these statutes have been used to justify only routine federal personnel matters.[5] Regulations from the Office of Personnel Management promulgated in 2021 citing these authorities read much the same.[6] These regulations are the types of routine, general updates that Congress has empowered the Executive Branch to effect without additional legislation. But they are of a different cloth than the injection mandate.

---

[5] *See, e.g.*, "Ethics Commitments by Executive Branch Personnel," E.O. 13,989, 86 Fed. Reg. 7029 (2021); "Modernizing and Reforming the Assessment and Hiring of Federal Job Candidates," E.O. 13,932, 85 Fed. Reg. 39457 (2020); "Establishing an Exception to Competitive Examining Rules for Appointment of Certain Positions to the United States Marshals Service, Department of Justice," E.O. 13,942, 83 Fed. Reg. 32753 (2018); "Excepting Administrative Law Judges from the Competitive Service," E.O. 13,843, 83 Fed. Reg. 32755 (2018), "Providing for the Appointment in the Competitive Service of Certain Employees of the Foreign Service," E.O. 13,749, 81 Fed. Reg. 87391 (2012); "Recruiting and Hiring Students and Recent Graduates," E.O. 13,562, 75 Fed. Reg. 82585 (2010).

[6] *See, e.g.*, "Hiring Authority for Post-Secondary Students," 86 Fed. Reg. 46103; "Promotion and Internal Placement," 86 Fed. Reg. 30375; "Non-competitive Appointment of Certain Military Spouses," 86 Fed. Reg. 52395; "Hiring Authority for College Graduates," 86 Fed. Reg. 61043.

No President has ever invoked section 7301 to mandate vaccination or other healthcare as a condition to federal employment. In 1969, President Nixon allowed many federal employees to participate in labor organizations. Exec. Order No. 11491, 34 Fed. Reg. 17605 (Oct. 29, 1969). In 1997, President Clinton prohibited smoking in the federal workplace. Exec. Order No. 13058, 62 Fed. Reg. 43451 (Aug. 9, 1997). Both orders regulated *ongoing workplace conduct*, whereas "A vaccination, after all, cannot be undone at the end of the workday." *NFIB*, 142 S. Ct. at 665. Neither the Clinton nor the Nixon order had anything to do with off-the-job medical status. And, under both orders, every covered employee was subject to the same allowance or prohibition.

By contrast, President Biden has commanded federal employees to have "fully vaccinated" status. This status-based decree does not require, allow, or proscribe any type of ongoing behavior. Instead, it is an attempt to regulate personal health decisions regarding "a threat that is untethered, in any causal sense, from the workplace." *Id.* at 666.

The government's prior use confirms that the CSRA sections cited in Executive Order 14,043 cannot be legitimately bootstrapped into a delegation of authority to mandate vaccinations. *Contrast Missouri*, 142

S. Ct. at 652 (vaccine mandate specific to health care workers "fits neatly within the language of the statute."). Doing so would give the President "almost unlimited discretion" to regulate all aspects of a federal worker's life in exchange for his or her job. This construction is, at best, implausible. *See NFIB*, 142 S. Ct. at 669 (Gorsuch, J., concurring).

If these three sections authorize the President to decree injections, then there is no clear stopping point. The government offers no limiting principle—beyond citing the facts of the case—to cabin the use of this newfound authority. To be clear, however, under the government's position, a President could mandate, as a condition for federal employment, that employees engage in or abstain from any private activity. The possibilities are limited only by the imagination of whoever inhabits the White House, with no further congressional input whatsoever.

The lack of historical precedent, coupled with the breadth of the claimed authority, is a "telling indication" that the mandate extends beyond the President's legitimate reach under the statues enacted by Congress. *NFIB,* 142 S. Ct. at 666 (citation omitted).

III. THE PRESIDENT LACKS CONSTITUTIONAL AUTHORITY TO MANDATE INJECTIONS.

The district court correctly held that if the President has the constitutional authority to mandate vaccination as a condition of employment, then there is no logical stopping point to presidential authority over federal workers' lives and families. *Feds for Med. Freedom*, 2022 WL 188329, at *6.

At most, the President's Article II authority extends to constitutional officers. Constitutional officers are principal officers (persons appointed by Presidential nomination with the advice and consent of the Senate) and inferior officers (persons whose work is directed and supervised by a principal officer). *Edmond v. United States,* 520 U.S. 651, 663 (1997). Beyond that is the federal civilian workforce, the category into which the Plaintiff-Appellees fall. And over them, the President's authority is entirely dependent on a clear statutory delegation.

Federal workers are "protected [from the President] by an elaborate, comprehensive scheme" that includes the CSRA and due process. *Bush v. Lucas*, 462 U.S. 367, 385 (1983), *Arnett v. Kennedy*, 416 U.S. 134, 147 (1974). But if the government contends that the President

has Article II authority to mandate injections, then it must necessarily concede that the CSRA and its limits on executive power are unconstitutional. This proposition logically follows from the separation of powers principle that Congress may not lawfully qualify, narrow, or channel the President's constitutional authority. *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2191–92 (2020); *Lucia v. U.S. Sec. & Exch. Comm'n,* 138 S. Ct. 2044, 2051 (2018).

Simply stated, if the President's authority to mandate vaccinations resides in Article II, then federal workers are functionally at-will employees, the CSRA and all federal employment laws dating back to the Pendleton Act of 1883 are unconstitutional, and the litany of employment cases since then have all missed the constitutional bullseye. *See Arnett*, 416 U.S. at 148–49. This simply cannot be correct.

CONCLUSION

This Court should affirm the district court's ruling that judicial review is not precluded. Then, it should reach the merits of the case, and hold that the vaccine mandate is *ultra vires*.

Respectfully submitted,

s/ Gene P. Hamilton
GENE P. HAMILTON
Counsel of Record
VICE-PRESIDENT AND GENERAL COUNSEL
AMERICA FIRST LEGAL FOUNDATION
REED D. RUBINSTEIN
ANDREW J. BLOCK
300 Independence Avenue S.E.
Washington, D.C. 20003
(202) 964-3721
gene.hamilton@aflegal.org

Attorney for Amicus Curiae
America First Legal Foundation

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(a)(4)(G), the undersigned counsel certifies compliance with Fed. R. App. P. 32(g)(1), that the brief is 3,201 words, under six thousand five hundred (6,500) words in length, following the required font and formatting regulations.

s/ Gene P. Hamilton
GENE P. HAMILTON

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d) and 5th Cir. R. 25.2.5, I hereby certify that on September 1, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

s/ Gene P. Hamilton
GENE P. HAMILTON