

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**

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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 more context and analysis of the government's claimed authorities for the federal employee vaccine mandate, and how those statutory authorities are insufficient to justify the mandate they seek to impose. This context and analysis will benefit the Court as it considers the decision below.

The Plaintiffs-Appellees consent to the submission of this brief. The Defendants-Appellants oppose the submission of this brief.

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

Respectfully submitted,

s/ Gene P. Hamilton

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Dated: February 17, 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 205 words according to the word count function of Microsoft Word.

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d) and 5th Cir. R. 25.2.5, I hereby certify that on February 17, 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
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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.

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INTEREST OF AMICUS CURIAE¹

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 constitutionally protected personal liberties. AFL also 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*, 1:21-cv-03077-JEB (D.D.C. 2021); *Vierbuchen v. Biden*, 22-cv-001-SWS (D. Wyo. 2022). Both employees 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 preliminary injunction below.

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.

INTRODUCTION AND SUMMARY OF ARGUMENT

The federal employee vaccine mandate affects 2.1 million civilian employees, their families, and their dependents. It “substantially burden[s] the liberty interests of reluctant individual recipients put to a choice between their job(s)”—including benefits for their families—and a mandatory vaccine. *BST Holdings, LLC v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021). Worse, like other recent mandates imposed unilaterally by the federal executive, this vaccine mandate has no legal foundation. Congress did not delegate to the President the authority to decree that vaccination is a condition of federal employment, and nothing in Article II provides the President such limitless and standardless power.

The court below correctly concluded that federal employee vaccine mandate, imposed by fiat and carried out through agency memoranda, is unlawful. Because this illegal mandate has an immediate and irreversible impact on all federal employees nationwide, the nationwide injunction should not be disturbed. The government’s arguments are self-contradictory and the cases they cite are neither controlling nor persuasive.

ARGUMENT

I. The Statutes Cited as the Basis for Executive Order 14,043 Do Not Authorize the Vaccine Mandate.

“The challenges posed by a global pandemic do not allow” the executive branch “to exercise power that Congress has not conferred upon it,” *Biden v. Missouri*, 142 S. Ct. 647, 654 (2022) (per curiam), and a vaccine mandate is no “everyday exercise of federal power,” *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661, 665 (2022) (citation omitted). “It is instead a significant encroachment into the lives—and health—of a vast number of employees.” *Id.* Courts “expect Congress to speak clearly when authorizing [the executive] to exercise powers of vast economic and political significance.” *Id.* The first question here, then, is whether any of the statutes cited as the basis of Executive Order 14,043 clearly grant the President, or his subordinates, authority to compel federal employees to take a vaccine. They do not.

Executive Order 14,043 cites three statutes as its source of authority: 5 U.S.C. §§ 3301, 3302, and 7301. These statutes “must be read in their context and with a view to their place in the overall statutory scheme.” *Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644,

666 (2007). So interpreted, none of these statutes gives the government the authority to impose a vaccine mandate.

First, Section 3301, titled “Civil Service; generally,” 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. Section 3301 is a generic hiring authority pertaining to “the admission of individuals into the civil service” and “the fitness of applicants.” *Id.* Here, the Appellees are not seeking employment with the federal government; they already are employees. This provision provides no authority for an employee vaccine mandate.

Next, Section 3302, titled “Competitive service; rules,” says that “[t]he President may prescribe rules governing the competitive service.” 5 U.S.C. § 3302. But the rest of the provision shows that it does not provide sweeping authority over federal employment. Instead, it is a generic organizational statute. The relevant “rules” that the President “may prescribe” “shall provide” for “necessary exceptions of positions from the competitive service.” *Id.* Under the Civil Service Reform Act (“CSRA”),

“[m]ost federal civil service employees are employed in either the competitive service or the excepted service.” *Dean v. Dep’t of Labor*, 808 F.3d 497 (Fed. Cir. 2015); see *Elgin v. Dep’t of Treasury*, 567 U.S. 1, 5 n.1 (2012). Thus, section 3302 merely gives the President authority “to designate civil service positions that are in the excepted service,” as opposed to the competitive service. *Patterson v. Dep’t of Interior*, 424 F.3d 1151, 1155 n.4 (Fed. Cir. 2005). The statute provides the President with a routine hiring and managerial authority, not the authority to impose a nationwide vaccine mandate.

Finally, section 7301, titled “Presidential Regulations,” provides: “The President may prescribe regulations for the conduct of employees in the executive branch.” 5 U.S.C. § 7301. The question under section 7301 is whether the President’s authority to regulate employee “conduct” permits the government to require federal employees to take a vaccine. It does not. *Contrast Biden v. Missouri*, 142 S. Ct. 647, 652 (2022) (Vaccine mandate specific to health care workers “fits neatly within the language of the statute.”).

Tellingly, no other President has invoked section 7301 to regulate federal employees’ healthcare decisions. The reason is clear from the

statutory text. Congress enacted section 7301 in 1966, and the pertinent definition 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 cannot serve as the basis for the government to compel federal employees to take a vaccine, because vaccination status has nothing to do with behavior and deportment. A conduct-based regulation requires, allows, or proscribes a type of ongoing behavior for covered employees. It does not require a status.

Executive orders issued by Republican and Democratic presidents exemplify the actual scope of section 7301. “[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). 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 executive orders regulated the federal employees’ *ongoing workplace conduct*.

Neither had anything to do with off-the-job medical status. And under both orders, every covered employee was subject to the same behavioral allowance or prohibition.

By contrast, President Biden has commanded federal employees to have “fully vaccinated” status. “A vaccination, after all, cannot be undone at the end of the workday.” *NFIB*, 142 S. Ct. at 665. As a status-based regulation, the President’s order does not require, allow, or proscribe any type of ongoing behavior. Nor does it cover the behavior of all employees. President Biden’s executive order does not regulate the conduct of federal employees who were “fully vaccinated” prior to September 9 at all. Contrast this with President Clinton’s smoking prohibition, which applied to smokers and non-smokers alike. President Clinton did not, and could not, require that all federal employees be “non-smokers” away from the workplace.

Yet that is the authority the government now claims. As shown next, this “almost unlimited discretion” is not a plausible reading of the executive’s limited authority over workplace conduct. *NFIB*, 142 S. Ct. at 669 (Gorsuch, J., concurring). Thus, the government has no statutory authority to impose the federal employee vaccine mandate.

II. Congress Has Not Given Implicit Authority to the Executive Branch to Issue a Sweeping Mandate of this Nature.

Congress does not hide an elephant the size of a vaccine mandate in mouseholes. *See Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001). Courts “expect Congress to speak clearly when authorizing an agency to exercise powers of ‘vast economic and political significance.’” *Alabama Assoc. of Realtors v. Dep’t of Health and Human Servs.*, 141 S. Ct. 2485, 2489 (2021) (quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)).

The President’s vaccine mandate is precisely such a claim of power. The “economic and political significance” of the vaccine mandate is unmistakable. *Id.* The federal workforce comprises 2.1 million civilian employees. *See* Julie Jennings & Jared C. Nagel, *Federal Workforce Statistics Sources: OPM and OMB*, Cong. Research Serv., at 1 (June 24, 2021). The mandate prescribed by Executive Order 14,043 falls on all of them—along with their families and dependents. The mandate is also a matter of serious political controversy.

Because the mandate is a rule of vast economic and political significance, there should be clear statutory authority. But, as just discussed,

the government's cited statutes do not provide a clear delegation of this authority.

Additionally, there is no “longstanding practice” of using these provisions for such purposes. *Missouri*, 142 S. Ct. at 662. Historically, executive orders citing sections 3301, 3302, and 7301 have been used to justify routine federal personnel matters only. *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).

Regulations from the Office of Personnel Management promulgated in 2021 citing these authorities read much the same. *See, e.g.*, “Hiring

Authority for Post-Secondary Students,” 86 Fed. Reg. 46103; “Promotion and Internal Placement,” 86 Fed. Reg. 30375; “Noncompetitive Appointment of Certain Military Spouses,” 86 Fed. Reg. 52395; “Hiring Authority for College Graduates,” 86 Fed. Reg. 61043.

These are the types of routine, general updates that Congress has delegated via statute to the Executive Branch. The “lack of historical precedent” for a vaccine mandate, or any other regulation that reaches every serving federal employee, is yet another “telling indication” that the mandate extends beyond the statute’s legitimate reach. *NFIB*, 142 S. Ct. at 666. In the Supreme Court’s words, the vaccine mandate does *not* “fit[] neatly within the language of the statute.” *Missouri*, 142 S. Ct. at 652.

III. The Executive Lacks Constitutional Authority.

The government also lacks Article II authority for its actions. As the court below pointed out, if the President indeed has the constitutional authority to mandate vaccination as a condition of employment, then there is no logical stopping point to presidential authority over the lives and livelihoods of federal employees. *Feds for Med. Freedom v. Biden*, No. 3:21-CV-356, 2022 WL 188329, at *6 (S.D. Tex. Jan. 21, 2022).

To justify the President acting beyond his statutory authority, the government argues he may mandate vaccines because his Article II power over federal employees is akin to that of a corporate executive's control over at-will employees. Appellant's Opening Brief at 2-3. But in the very next paragraph, the government argues that the CSRA precludes this Court's jurisdiction. *Id.* at 3. The government cannot use Article II as a sword and the CSRA as a shield. The President must claim either statutory authority or he must declare that Article II provides him with unbounded power over federal civilian workers and that the CSRA, to the extent it limits such power, is unconstitutional and unenforceable.

If Article II impliedly gives the President all the power he needs here, then the CSRA, and the independent civil service, are nullified.

IV. The Cases Denying Injunctions Are Not Persuasive.

As support for the position that the decision below was incorrect in granting the injunction, the government cites a dozen cases where district court have denied motions to enjoin Executive Order 14,043. Those cases, however, are irrelevant here. First, all the cases cited are out-of-circuit district court decisions that are not binding. Second, the cited cases do not have the same fact pattern or present the same legal

questions as the case before this Court. Four of the cases were dismissed because the court lacked jurisdiction to enjoin the President—which is not at issue here. *See Navy Seal 1 v. Biden*, 2021 WL 5448970 (M.D. Fla. Nov. 22, 2021); *Foley v. Biden*, No. 4:21-cv-1098, ECF No. 18 (N.D. Tex. Oct. 6, 2021); *McCray v. Biden*, 2021 WL 5823801 (D.D.C. Dec. 7, 2021); *Brass v. Biden*, 2021 WL 6498143 (D. Colo. Dec. 23, 2021). Two more were dismissed as nonjusticiable due to plaintiff's pending requests for exemptions. *See Church v. Biden*, 2021 WL 5179215 (D.D.C. Nov. 8, 2021); *Brnovich v. Biden*, 2022 WL 252396 (D. Ariz. Jan. 27, 2022).

Oklahoma v. Biden was dismissed because the court found the plaintiffs challenged the incorrect mandate. 2021 WL 6126230 (W.D. Okla. Dec. 28, 2021). *American Fed'n of Gov't Emps. Local 501 v. Biden* was dismissed because the plaintiffs failed to allege harm. 2021 WL 6551602 (S.D. Fla. Dec. 22, 2021). Two other cases claimed that the order violated other authorities, including religious freedom and anti-discrimination laws. *See Donovan v. Vance*, 2021 WL 5979250 (E.D. Wash. Dec. 17, 2021); *Altschuld v. Raimondo*, 2021 WL 6113563 (D.D.C. Nov. 8, 2021). In *Smith v. Biden*, the plaintiffs unsuccessfully argued that the injection did not constitute a vaccine. To the extent that case bears

at all upon the case before this Court, the district court there found that the CSRA did not preclude judicial review of the government's behavior. 2021 WL 5195688 (D.N.J. Nov. 8, 2021).

The one exception, *Rydie v. Biden*, 2021 WL 5416545 (D. Md. Nov. 19, 2021), lacks reasoned analysis for its conclusion. It determined, without citing authority, that the President derives his authority to mandate vaccinations from the Constitution and not Congress. This is not only contradictory to other district court decisions, but, as shown above, is not persuasive (much less binding).

Thus, not one of the cases cited by the government—in its attempt to argue that a multitude of courts have already decided these issues the other way—was actually decided on the issue presented to this court.

V. The Court Should Affirm the Preliminary Injunction.

This Court's rationale in granting the injunction in *BST Holdings* applies with at least equal force here. For the employees in this case, and for the employees AFL represents, lifting the injunction will cause irreparable harm. The mandate threatens all federal employees and their families with immediate and irreversible harm and substantially burdens their fundamental liberty interest in bodily integrity. 17 F.4th at 618.

Additionally, the government's conduct runs afoul of the statutes from which they draw their power and violates the constitutional structure that safeguards our collective liberty. *Id.* at 619. The separation of powers is designed to preserve the liberty of all American citizens, and this Court has the authority to protect it. *See Collins v. Yellen*, 141 S. Ct. 1761, 1780 (2021); *I.N.S. v. Chadha*, 462 U.S. 919, 947 (1983).

If this Court lifts the injunction, the government will continue its unlawful pattern of intimidation and compulsion against AFL's clients and other federal employees. *See Payne v. Biden*, 1:21-cv-03077-JEB (D.D.C. 2021); *Vierbuchen v. Biden*, 22-cv-001-SWS (D. Wyo. 2022). Already the government has established a notable record of failing to respect constitutional and statutory barriers that might impede or prevent the accomplishment of their political aims. *See, e.g., Ala. Assoc. of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2490 (2021) (allowing a nationwide eviction moratorium to be vacated because "our system does not permit agencies to act unlawfully even in pursuit of desirable ends."); *Texas v. Biden*, 20 F.4th 928, 1004 (5th Cir. 2021) (rejecting the Administration's assertion of "unreviewable and unilateral discretion to create and to eliminate entire components of the federal

bureaucracy that affect countless people, tax dollars, and sovereign States” because the government cannot “supplant the rule of law with the rule of say-so”). To protect the separation of powers and the rule of law, this Court should affirm the preliminary injunction.

CONCLUSION

Lifting the injunction would embolden and further facilitate the government's unlawful conduct, leaving little to no remedy for federal employees harmed in the process. This Court should affirm the preliminary injunction.

Respectfully submitted,

Dated: February 17, 2022

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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 under fifteen (15) pages in length, following the required font and formatting regulations.

Dated: February 17, 2022

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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 February 17, 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.

Dated: February 17, 2022

s/ Gene P. Hamilton
GENE P. HAMILTON