

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, Case No. 3:21-CV-356

**MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*
AIRLINE EMPLOYEES FOR HEALTH FREEDOM
IN SUPPORT OF PETITION FOR REHEARING EN BANC**

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Pursuant to Federal Rule of Appellate Procedure 29(b)(2), Airline Employees for Health Freedom (AE4HF) respectfully requests leave to file a brief as *amicus curiae* in support of the Plaintiff-Appellees' petition for rehearing *en banc*.

AE4HF is a 501(c)(4) organization committed to protecting Americans' rights to bodily autonomy and working to ensure reasonable accommodations from employer-mandated COVID-19 vaccination requirements for religious and medical reasons. AE4HF has an interest in a separate case currently pending before this Court—*Sambrano v. United Airlines*, Case No. 21-11159—but none of the members of the organization are a party to this case. AE4HF was started to raise awareness of the issue of vaccine mandates and thus has an interest in the continued implementation of the district court's injunction here.

AE4HF's proposed brief is relevant to this case because it demonstrates the fact that COVID-19 vaccine mandates are needless at this point, as groups such as the World Health Organization have recognized. To continue fighting for the implementation of such a mandate here is both misguided and a threat to liberties everywhere.

AE4HF has conferred with the parties to this case who do not oppose this motion and have consented to the filing of an *amicus* brief by AE4HF. AE4HF thus requests that the Court grant this motion.

May 31, 2022

Respectfully submitted,

/s/ John C. Sullivan
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CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the type-volume limitations of Fed. R. App. P. 27(d) because it contains 212 words, excluding portions exempted by Fed. R. App. P. 32(f) and 5th Cir. Rule 32(b), according to the count of Microsoft Word.

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in a proportionally spaced typeface in 14-point font.

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to the Federal Rules of Appellate Procedure, the undersigned counsel certifies that, in addition to the persons and entities disclosed by the parties, the following listed persons or entities have an interest in this *amicus* brief. These representations are made so that the Judges of this Court may evaluate possible disqualification or recusal.

1. Airline Employees for Health Freedom (AE4HF) is *Amicus Curiae*.
2. John C. Sullivan, of the law firm S|L Law PLLC, serves as counsel to AE4HF.

/s/ John C. Sullivan
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STATEMENT OF INTEREST OF *AMICUS CURIAE*¹

Amicus Airline Employees for Health Freedom (AE4HF) is a 501(c)(4) organization committed to protecting Americans' rights to bodily autonomy and working to ensure reasonable accommodations from employer-mandated COVID-19 vaccination requirements for religious and medical reasons. The group is composed primarily of airline employees across the United States who believe that individual medical decisions are decidedly not the purview of employers—whether in the private or public sector—and that any intrusion into the arena of personal health requires justification of the highest order. *Amicus* has a direct interest in the outcome of this case because it addresses the purpose for which AE4HF was founded.

INTRODUCTION

Setting aside the question of whether anyone's livelihood should have *ever* been put at stake over a COVID-19 vaccine, there is no

¹ Pursuant to FRAP 29(a)(4)(E), *amicus* certifies that no counsel for any party authored this brief, in whole or in part, and that no party, party's counsel, or any other person—other than *amicus*, its members, or its counsel—contributed money to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

justification left for such an imposition in May of 2022. Given not only the high voluntary vaccination rate in the United States, but also the declining infection rate and the predictable decrease in virulence of the subsequent variants of Sars-CoV-2, most companies across the country and around the world have rightly withdrawn strict mandate requirements at this point.² These types of factors are also why the World Health Organization “does not presently support the direction of mandates for COVID-19 vaccination.” *COVID-19 and mandatory vaccination: Ethical considerations*, World Health Organization (May 30, 2022), (“WHO Ethical Considerations”), <https://www.who.int/publications/i/item/WHO-2019-nCoV-Policy-brief-Mandatory-vaccination-2022.1>.

Too many people have either chosen to be vaccinated or have natural immunity to the virus to make vaccinations mandatory—and vaccination does not prevent the contraction or transmission of COVID-19 anyway. Businesses such as Starbucks thus accept what the federal government snubs: vaccine mandates are an unnecessary and draconian

² See Kate Gibson, *More big companies are dropping vaccine requirement for workers*, CBS News (Feb. 17, 2022), <https://www.cbsnews.com/news/covid-19-vaccine-requirement-workers-adidas-intel-starbucks/>.

measure inconsistent with both science and our nation's commitment to personal liberty. Even vaccine proponent Bill Gates recently admitted—after noting that vaccines have saved lives—that there is little reason to have mandates now. Art Moore, *Bill Gates: 'What's the point' of mandates if the vaccines don't work?*, Clark County Today (May 26, 2022), <https://www.clarkcountytoday.com/news/bill-gates-whats-the-point-of-mandates-if-the-vaccines-dont-work/>. At this point, the government's persistence here in ensuring it can force health treatments on its employees can only be attributed to authoritarian caprice or a short-sighted quest to aggrandize executive power. Neither is a legitimate justification for continued implementation of the mandate at issue here.

ARGUMENT

I. A Vaccine Mandate Can No Longer Be Justified.

It has been apparent for some time that COVID-19 vaccines do not prevent infection and transmission of the virus. *See* Statement of Rochelle Walensky, Centers for Disease Control, CNN Interview (Aug. 5, 2021). The CDC, however, continued to promote vaccination, claiming that it both improved individual outcomes and also lowered potential transmission rates. At the same time, natural immunity—the immunity

obtained by recovering from a COVID-19 infection—was downplayed. The CDC has since recognized this mistake. *See* CDC, *COVID-19 Cases and Hospitalizations by COVID-19 Diagnosis—California and New York, May–November 2021* (“CDC Report”), https://www.cdc.gov/mmwr/volumes/71/wr/mm7104e1.htm?s_cid=mm7104e1_w.

The government’s insistence in fighting this case ignores the high number of individuals who have either been vaccinated or who have natural immunity—an immunity now recognized as more effective than vaccination. *Id.* While the CDC still encourages vaccinations (despite questions concerning the effectiveness of vaccines against new COVID-19 variants), it is only to provide those individuals with a better outcome when they contract the virus. A vaccine requirement thus amounts to nothing more than an outside-the-workplace requirement to better one’s own health. But the federal government was never meant to be the health police, though, or to force people into what it estimates are better outcomes by violating bodily integrity.

While the government may still encourage vaccination for the sake of individual outcomes—such as a lower hospitalization rate—the widespread prevalence of natural immunity, combined with the high rates of

vaccinated individuals and alternative therapeutics, renders sweeping mandates unjustifiable.

A. Natural Immunity—Now Widely-Prevalent—Provides Protection from COVID-19 at Least as Good as that from Vaccines.

Studies have repeatedly shown that natural immunity is effective at preventing infection and transmission of COVID-19. For example, by October of 2021 it was known both that natural immunity was robust and reduced the risk of infection by 90% or more. *See* Paul Elias Alexander, *150 Research Studies Affirm Naturally Acquired Immunity to Covid-19: Documented, Linked, and Quoted*, BROWNSTONE.ORG (Oct. 17, 2021), <https://brownstone.org/articles/79-research-studies-affirm-naturally-acquired-immunity-to-covid-19-documented-linked-and-quoted/> (collecting studies); 13 CDC, *Science Brief: SARS-CoV-2 Infection-induced and Vaccine-induced Immunity* (Oct. 29, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/vaccine-induced-immunity.html> (“SARS-CoV-2 infection decreased risk of subsequent infection by 80-93% for at least 6-9 months.”).

At the same time, a study conducted prior to the rise of the Delta variant of COVID showed that the odds of an infection for vaccinated

individuals was 13 times greater than for individuals with natural immunity. Sivan Gazit, et al., *Comparing SARS-CoV-2 natural immunity to vaccine-induced immunity: reinfections versus breakthrough infections*, MEDRXIV [preprint] (Aug. 25, 2021), <https://www.medrxiv.org/content/10.1101/2021.08.24.21262415v1>.

Additionally, it is also known that vaccine efficacy wanes substantially over time. See, e.g., Hiam Chemaitelly, et al., *Waning of BNT162b2 Vaccine Protection against SARS-CoV-2 Infection in Qatar*, N. ENGL. J. MED., Dec. 2021, at e83(5), <https://www.nejm.org/doi/full/10.1056/NEJMoa2114114>.

Further studies have shown that natural immunity is robust and enduring, even in the face of variants of COVID-19. As seen before, vaccinations are thought to produce better outcomes for individuals who become infected with COVID-19, but they are minimally (and sometimes negatively) effective at preventing infection. See, e.g., Heba N. Altarawneh et al., *Effect of prior infection, vaccination, and hybrid immunity against symptomatic BA.1 and BA.2 Omicron infections and severe COVID-19 in Qatar*, MEDRXIV (March 22, 2022), <https://www.medrxiv.org/content/10.1101/2022.03.22.22272745v1.full>

(finding that “[e]ffectiveness of only prior infection” was 50.2% “against symptomatic BA.1 [Omicron] infection” and 46.1% “against symptomatic BA.2 [Omicron] infection,” compared to -4.9% “[e]ffectiveness of only two-dose (primary series) [Pfizer] vaccination” against BA.1 and -1.1% effectiveness against BA.2, with “no discernable differences in the effects of . . . [Moderna] vaccination”).³

Moreover, natural immunity has been shown to provide continued protection against infection even with the rise of the Omicron variant. Heba Altarawneh, et al., *Protection afforded by prior infection against SARS-CoV-2 reinfection with the Omicron variant*, MEDRXIV [preprint] (Jan. 6, 2022), <https://www.medrxiv.org/content/10.1101/2022.01.05.22268782v1> (Table 3). In fact, that same study showed a

³ One study showed Pfizer and Moderna efficacy dropping from 6% effectiveness against the Omicron variant in the first two months to -39% at 4 months and -42% at 6 months. Sarah A. Buchan, et al., *Effectiveness of COVID-19 vaccines against Omicron or Delta infection*, MEDRXIV [preprint] (Jan. 1, 2022), <https://www.medrxiv.org/content/10.1101/2021.12.30.21268565v1> (Table 2). Another study showed a -76.5% efficacy for Pfizer and a -39.3% efficacy for Moderna against the Omicron variant. Christian Holm Hansen, et al., *Vaccine effectiveness against SARS-CoV-2 infection with the Omicron or Delta variants following a two-dose or booster BNT 162b2 or mRNA-1273 vaccination series: A Danish cohort study*, MEDRXIV [preprint] (Dec. 23, 2021), <https://www.medrxiv.org/content/10.1101/2021.12.20.21267966v3> (Table).

decrease in protection for naturally immune individuals who were subsequently vaccinated. *Id.* This aligns with a recent study from the National Institute of Health showing that vaccinated individuals develop fewer antibodies than unvaccinated individuals infected with COVID-19. Dean Follmann, et al., *Anti-nucleocapsid antibodies following SARS-CoV-2 infection in the blinded phase of the mRNA-1273 Covid-19 vaccine efficacy clinical trial*, MEDRXIV [preprint] (Apr. 19, 2022), <https://www.medrxiv.org/content/10.1101/2022.04.18.22271936v1.full>.

By January of this year, it was recognized that the downplaying of natural immunity was incorrect; the CDC has since acknowledged that a prior infection provides virus protection superior to a vaccine. CDC Report (noting that “persons who survived a previous infection had lower case rates than persons who were vaccinated alone”). It is thus apparent that European countries recognizing natural immunity as equivalent to vaccination were right to do so. *See EU Digital COVID Certificate*, EUROPEAN COMMISSION, https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/safe-covid-19-vaccines-europeans/eu-digital-covid-certificate_en. And by failing to even consider prior infection as an

adequate substitute for vaccination, the government is behaving capriciously.

B. Wide-Spread Vaccination and Alternative Therapeutic Measures Further Decrease the Need for Mandatory Vaccination.

As of May 20, 2022, approximately 78% of Americans have received a COVID-19 vaccine. *COVID Data Tracker Weekly Review*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html>. And as the White House recently boasted, it is providing millions of courses of Pfizer's antiviral drug—a number that will only go up. *National COVID-19 Preparedness Plan*, The White House, <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html>.

These numbers are significant because they confirm the needlessness of the vaccine mandate the government continues to defend here. The number of individuals in America with no exposure to the virus—either from a prior infection or a vaccine—is vanishingly small. And current information from the CDC is no longer able to justify mandates since individuals previously vaccinated are just as able to transmit the virus as anyone else, if not more so.

CDC Guidance recommends booster shots to keep efficacy of the vaccines higher against new COVID-19 variants. *COVID-19 Vaccine Boosters*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/booster-shot.html>. Yet those booster shots are not even part of any vaccine mandate by the government. If the increased protection against COVID-19 can only be maintained through booster shots, those who were merely vaccinated with one or two shots a year or more ago are not protected against the variants but are compliant with the government's federal worker mandate. This makes little sense, of course, and demonstrates the caprice of continuing to push for a mandate that is not needed.⁴

Vaccination is still encouraged for individual outcomes and the government is free to advertise that information. It should not be free to continue enforcing an unwarranted policy that may even do more harm than good in many cases.⁵

⁴ This has been particularly evident in the airline industry where, even though many pilots and flight attendants are unvaccinated and even though the federal mask mandate has been stayed since mid-April, there has been no noted outbreak in the number of COVID-19 cases among the unvaccinated.

⁵ This argument does not even address medical harms related to the COVID-19 vaccines.

II. Vaccine Mandates Cruelly Force Individuals To Choose Between Their Rights And Providing For Their Families.

Given that the original rationales for vaccine mandates have been undermined, such requirements should be viewed even more skeptically in light of the human toll they take. Hundreds of thousands of people have now been put to a Hobson's choice: lose their employment or else take a medical treatment that is—to some—controversial at best or scandalous at worst. And as this Court knows, thousands have been unwilling to yield to the coercion of employers or the federal government or the military. The result is that many are still out of work and suffering from employers' misguided policies—regardless of the legality of such policies.

This case may lead to a similar result. The President's mandate is *ultra vires*, but currently shielded by a procedural argument. Pet. for Rehearing En Banc at xi–xiii. And absent this Court's *en banc* review, the vaccine mandate will lead to thousands more being put out of work for no good reason.

Time and again, President Biden has touted that “vaccine mandates work.” If by “work” he means that people can be coerced into taking a medical treatment against their will because of the threat of

losing their job, then he is correct. As it turns out, people will sacrifice almost anything to protect their families. That hardly means that a mandate should have been implemented. *See* WHO Ethical Considerations. Now that it has become apparent that COVID-19 vaccines can only provide—at best—better outcomes for those who receive them, draconian mandates related to those vaccines should come to an end. The price being paid for their continued enforcement is too high.

CONCLUSION

The petition for *en banc* review should be granted.

May 31, 2022

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/s/ John C. Sullivan
John C. Sullivan

*Counsel for Amicus Curiae
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CERTIFICATE OF SERVICE

I certify that on May 31, 2022, I caused the foregoing to be filed through this Court's CM/ECF system, which will serve a notice of electronic filing on all registered users.

/s/ John C. Sullivan
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