No. 22-40043

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FEDS FOR MEDICAL FREEDOM; LOCAL 918, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES; HIGHLAND ENGINEERING, INCORPORATED; RAYMOND A. BEEBE, JR.; JOHN ARMBRUST; et al.,

Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, JR., in his official capacity as President of the United States; THE UNITED STATES OF AMERICA; PETE BUTTIGIEG, in his official capacity as Secretary of Transportation; DEPARTMENT OF TRANSPORTATION; JANET YELLEN, in her official capacity as Secretary of Treasury; et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Texas

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CERTIFICATE OF INTERESTED PERSONS

Feds for Medical Freedom v. Biden

A certificate of interested persons is not required, as defendants-appellants are government agencies and government officials sued in their official capacities. *See* 5th Cir. R. 28.2.1.

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INTRODUCTION AND SUMMARY

The merits issue before the Court is narrow: whether the President, acting in his capacity "as CEO of the federal workforce," Stay Order 7 (Feb. 9, 2022) (Higginson, J., dissenting), can establish for federal employees a vaccination requirement resembling requirements that numerous employers around the country have adopted to prevent disruption of their own workforces. As Judge Higginson explained, that requirement is well within the President's constitutional and statutory authority to manage Executive Branch operations, and the district court erred in issuing a nationwide injunction halting its implementation.

This Court should not reach the merits, however, because the comprehensive and exclusive scheme that Congress enacted in the Civil Service Reform Act (CSRA) deprives the district court of jurisdiction over plaintiffs' challenges to Executive Order 14043. By plaintiffs' own account (Br. 10), many of their members have refused to be vaccinated and therefore face discipline. Although plaintiffs argue that they can bring a preemptive suit challenging a policy pursuant to which they might be disciplined, the cases on which they rely pre-date the Supreme Court's decision in *Elgin v. Department of the Treasury*, 567 U.S. 1 (2012). Plaintiffs' standing to bring this suit derives from the threat of employment discipline for refusing to be vaccinated. That discipline would undisputedly be subject to exclusive CSRA review, and plaintiffs may not circumvent Congress's carefully crafted limitations by rushing to court before discipline occurs.

Plaintiffs also failed to establish that their claims are likely to succeed on the merits. Whatever limits there might be on agencies' authority to regulate *private entities*, "the Government has a much freer hand in dealing with citizen employees." *NASA v. Nelson*, 562 U.S. 134, 148-49 (2011) (quotation marks omitted). The President has Article II authority to establish terms and conditions of employment that promote the efficiency of the civil service, and Congress has confirmed that authority by statute. As Judge Higginson summarized, "the President, as head of the federal executive workforce, has authority to establish the same immunization requirement that many private employers have reasonably imposed to ensure workplace safety and prevent workplace disruptions caused by COVID-19." Stay Order 6 (Higginson, J., dissenting).

Plaintiffs also failed to satisfy the equitable requirements for a preliminary injunction. They do not meaningfully dispute that employment-related harms are quintessentially reparable, and they cannot establish that this is a "genuinely extraordinary situation," *Sampson v. Murray*, 415 U.S. 61, 92 & n.68 (1974), warranting departure from that rule. Plaintiffs do not claim that the Executive Order violates their constitutional rights, and they will have ample opportunity to seek compensation for any future disciplinary measures in the CSRA scheme.

Plaintiffs offer no substantive response to the serious harms flowing from the injunction. They cannot dispute that the injunction significantly complicates plans to return more employees to physical workspaces, interferes with the President's

management of Executive Branch operations, and leaves the President unable to implement workplace-safety measures that numerous other employers have reasonably adopted.

At a minimum, Article III and basic principles of equity require that the nationwide injunction be substantially narrowed. Plaintiffs cannot explain why an injunction limited to plaintiffs and their bona fide members would provide ineffective relief.

ARGUMENT

I. Plaintiffs' Claims Are Barred By The Civil Service Reform Act

A. As explained in the government's opening brief (at 20-27), the district court lacks jurisdiction over plaintiffs' challenge to Executive Order 14043 because the CSRA provides the exclusive avenue for covered federal employees to challenge adverse personnel actions. Plaintiffs seek to distinguish their claims on the ground that they bring "facial, pre-enforcement challenges to an executive order." Br. 6. But in *Elgin v. Department of the Treasury*, 567 U.S. 1 (2012), the Supreme Court held that "facial constitutional challenges" to statutes must be presented through the CSRA scheme. *Id.* at 15. Although plaintiffs assert that the CSRA "applies only" when employees "seek[] typical employment relief like backpay or reinstatement," Br. 16, *Elgin* made clear that the CSRA precludes district-court review of requests for "equitable relief," including a "declaratory judgment" that a policy is "unconstitutional" or "an injunction prohibiting [its] enforcement," 567 U.S. at 7-8.

Plaintiffs assert that *Elgin* involved only a challenge to a "prior employment action," Br. 21, but nothing in the Supreme Court's analysis turned on the timing of the plaintiffs' discharge. Congress did not "exhaustively detail[] the system of review before the [Merit Systems Protection Board (MSPB)] and the Federal Circuit," including for facial constitutional challenges, only to allow end-runs so long as employees race to the courthouse before actually suffering cognizable discipline. *Elgin*, 567 U.S. at 11. The Supreme Court instead recognized in *Elgin* that Congress's "objective" was to "creat[e] an integrated scheme of review"—an objective that would be "seriously undermined" if plaintiffs could refuse to comply with an employment-related policy and then sue to circumvent the expected disciplinary process. *Id.* at 14.

B. Plaintiffs seek refuge in D.C. Circuit decisions from the 1980s, which pre-date both *Elgin* and *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). *See* Br. 16-19. The D.C. Circuit's more recent decisions, however, make clear that the CSRA precludes covered federal employees from bringing pre-enforcement suits to challenge employment-related policies.

Plaintiffs have no response to then-Judge Roberts's opinion in *Fornaro v. James*, 416 F.3d 63 (D.C. Cir. 2005), for example, which held that the CSRA barred a putative class of federal retirees from bringing a "systemwide challenge to" an Office of Personnel Management (OPM) "policy" that they claimed would diminish future benefit payments. *Id.* at 67. The D.C. Circuit held that the CSRA required plaintiffs to seek administrative review, then Federal Circuit review, of actual benefit payments.

Id. "Nothing about the fact that plaintiffs' action [was] a systemic challenge to OPM policy" changed that result. *Id.* at 69; *see also, e.g.*, *American Fed'n of Gov't Emps. v. Trump*, 929 F.3d 748 (D.C. Cir. 2019) (unions could not pursue "systemwide challenge" to executive orders and must "litigat[e] their claims in the context of concrete bargaining disputes" that had not yet arisen).[1]

C. Plaintiffs mistakenly contend (Br. 16) that this Court is "foreclosed" from applying *Elgin* because of *American Federation of Government Employees v. Federal Labor Relations Authority* (*FLRA*), 794 F.2d 1013 (5th Cir. 1986), and *National Treasury Employees Union v. Bush* (*NTEU*), 891 F.2d 99 (5th Cir. 1989). Those cases did not resolve the jurisdictional questions presented here. In *FLRA*, the Court concluded that a labor dispute involving an OPM regulation fell outside the parties' statutory duty to bargain and that the FLRA could not adjudicate the regulation's validity in reviewing a negotiability dispute. 794 F.2d at 1015-16. The Court observed in passing dicta that, if the union "wishe[d] to challenge the validity of th[e] OPM

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[1] Although plaintiffs cite (Br. 20-22) a handful of district court decisions permitting Administrative Procedure Act (APA) challenges to OPM regulations, those cases involve a narrow exception to CSRA preclusion under statutes specifically allowing pre-enforcement review of certain types of OPM rulemaking. *See* 5 U.S.C. §§ 1103(b), 1105. Those cases provide no basis for allowing pre-enforcement review of Executive Order 14043, which is not reviewable under the APA in any event. *See infra* pp. 19-20. Moreover, this Court has long held that a federal employee may not "circumvent th[e] [CSRA's] detailed scheme governing federal employer-employee relations by suing under the more general APA." *Broadway v. Block*, 694 F.2d 979, 986 (5th Cir. 1982).

regulation, there [were] other means available," citing a 1983 case in which a D.C. district court had reviewed a challenge to OPM regulations. *Id.* In *NTEU*, the Court upheld President Reagan's drug-testing executive order on the merits without any discussion of jurisdiction. *See* 891 F.2d 99.

At most, therefore, *FLRA* and *NTEU* might be read to incorporate "drive-by jurisdictional rulings" on the scope of CSRA preclusion. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998). They certainly do not contain jurisdictional holdings entitled to "precedential effect." *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996). In any event, even if *FLRA* and *NTEU* had considered the jurisdictional issues presented here, both cases significantly pre-date *Elgin* and *Thunder Basin*, and this Court must follow "an intervening Supreme Court case explicitly or implicitly overruling [its] prior precedent." *United States v. Short*, 181 F.3d 620, 624 (5th Cir. 1999).

D. *Elgin* establishes that plaintiffs must present their claims through the CSRA scheme, and the *Thunder Basin* factors only confirm that result. *See Elgin*, 567 U.S. at 10-12, 15-23.

Plaintiffs contend (Br. 24-26) that the CSRA does not demonstrate a clear intent to preclude pre-enforcement review. But the Supreme Court already held that "the CSRA's elaborate framework demonstrates Congress' intent" both "to entirely foreclose judicial review to employees to whom the CSRA *denies* statutory review" and to deny "extrastatutory review . . . to those employees to whom the CSRA *grants* administrative and judicial review." *Elgin*, 567 U.S. at 11 (quotation marks omitted).

Plaintiffs claim this holding does not apply because they are not "seeking employment relief," Br. 25, but the crux of their claims is that they violated the federal vaccination requirement and are being "threatened with imminent discipline unless they give in and get vaccinated," Br. 10. They identify no other basis on which they would have standing. *See Elgin*, 567 U.S. at 8 (CSRA preclusive as to equitable relief facially invalidating a statute).

Plaintiffs also mistakenly characterize their claims as "wholly collateral" to the CSRA scheme. Br. 29 (quotation marks omitted). As this Court has explained, "whether a claim is collateral to the relevant statutory-review scheme depends on whether that scheme is intended to provide the sort of relief sought by the plaintiff." *Cochran v. SEC*, 20 F.4th 194, 207 (5th Cir. 2021) (en banc). Plaintiffs "ultimately s[eek] to avoid compliance with" the Executive Order's vaccination requirement, and they seek to avoid employment discipline for doing so. *Id.*; *see, e.g.*, Br. 27 (emphasizing that plaintiffs face a choice between their "job(s) and jab(s)"). That is precisely the type of relief the CSRA can provide.

Plaintiffs' claims are also squarely within the expertise of the MSPB and the Federal Circuit—a dispute over workplace discipline would raise many "questions unique to the employment context." *Elgin*, 567 U.S. at 22-23; *see Cochran*, 20 F.4th at 207. A primary question on CSRA review, for example, is whether discipline "will promote the efficiency of the service." 5 U.S.C. §§ 7503(a), 7513(a). The MSPB and Federal Circuit "regularly construe[]" that standard, *Elgin*, 567 U.S. at 23, and many of

plaintiffs' arguments against the Executive Order address the same underlying issues, *see, e.g.*, Br. 51-54 (suggesting that vaccination is unnecessary to promote workplace efficiency in at least some circumstances).

Finally, plaintiffs err in contending that CSRA preclusion would "'foreclose all meaningful judicial review.'" Br. 26. As in *Thunder Basin* and *Elgin*, plaintiffs do not seek "structural relief," nor do they claim a right not to "appear before the" MSPB; they seek to avoid adverse personnel actions for having violated the vaccination requirement. *Cochran*, 20 F.4th at 208-09. These are harms that the MSPB could "fully redress[]." *Id.* at 209.[2]

II. Plaintiffs Failed To Demonstrate A Substantial Likelihood of Success On The Merits

As explained in the government's opening brief (at 27-38), the Executive Order, issued in the President's "role as CEO of the federal workforce," is well within his authority. Stay Order 7 (Higginson, J., dissenting). Several courts have addressed the merits of this claim, and aside from the court here, they unanimously recognized that the President had constitutional and statutory authority to issue the order. *See*

[2] Plaintiffs note (Br. 29 n.10) that the MSPB currently lacks a quorum, but they cite nothing in the CSRA's text that conditions preclusion on a quorum. Administrative judges continue to issue initial decisions on employees' claims pursuant to their delegated authority. *See* 5 U.S.C. §§ 1204(b)(1), 7701(b)(1), (k); 5 C.F.R. § 1201.4(a). If neither party files a petition for review to the MSPB, the administrative judge's decision is the Board's final decision, and the appellant may seek judicial review. *See* 5 U.S.C. § 7703.

Brnovich v. Biden, No. CV-21-1568, 2022 WL 252396, at *12 (D. Ariz. Jan. 27, 2022); *Oklahoma v. Biden*, No. CIV-21-1136, 2021 WL 6126230, at *10 (W.D. Okla. Dec. 28, 2021); *Brass v. Biden*, No. 21-cv-2778, 2021 WL 6498143, at *3 (D. Colo. Dec. 23, 2021) (report and recommendation), *adopted*, 2022 WL 136903 (D. Colo. Jan. 14, 2022); *Rydie v. Biden*, No. 21-2696, 2021 WL 5416545, at *3 (D. Md. Nov. 19, 2021); *see also Smith v. Biden*, No. 1:21-cv-19457, 2021 WL 5195688, at *6-7 (D.N.J. Nov. 8, 2021). Plaintiffs' objections to these analyses lack merit.[3]

A. Plaintiffs cannot dispute that Article II gives the President "general administrative control of those executing the laws," *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2197-98 (2020) (quotation marks omitted), including Executive Branch employees. They have no response to decisions like *NASA v. Nelson*, 562 U.S. 134 (2011), and *Department of the Navy v. Egan*, 484 U.S. 518 (1988), that recognize that constitutional responsibility.

Indeed, long before Congress expressly authorized the President to manage federal employees by statute, Presidents issued executive orders imposing an array of

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[3] Plaintiffs' forfeiture arguments are baseless. The Executive Order specifically invokes the same constitutional and statutory authorities on which the government relies here. In district court, plaintiffs made scant effort to explain why those authorities were inapposite, *see* ROA.762, and the government properly responded to plaintiffs' arguments. In doing so, the government pressed the same arguments presented here, *see* ROA.1543-50, ROA.1780-1800, and the district court passed on them. The preliminary injunction obviously had not yet been issued when the government opposed plaintiffs' request for that relief, and the government was not required to anticipate all of the arguments contained in the district court's order.

requirements on employees. For example, President Lincoln ordered in 1862 that "all the clerks and employees of the civil Departments . . . be immediately organized into companies" and "be armed and supplied with ammunition, for the defense of the capital." Special Order No. 218 (Sept. 2, 1862), 7 *A Compilation of the Messages and Papers of the Presidents* 3323 (Bureau of National Literature 1897). And President William Henry Harrison prohibited federal employees from "influenc[ing] the minds or votes of others" during partisan elections. Circular, Dep't of State (Mar. 20, 1841), *reprinted in* U.S. Civil Serv. Comm'n, *History of the Federal Civil Service: 1789 to the Present* 148-49 (U.S. Gov't Printing Office 1941). President Van Buren also issued an order addressing employment conditions for all "persons employed on the public works." Executive Order (Mar. 31, 1840), *reprinted in* 4 *Presidential Messages and State Papers* 1361 (Julius W. Miller ed., Review of Reviews Co. 1917).

Plaintiffs contend that, even if the President generally has authority over employees, this case is different because it involves what they characterize as a "permanent and irreversible" "medical procedure." Br. 39, 45. The Supreme Court rejected similar arguments in *Biden v. Missouri*, 142 S. Ct. 647 (2022) (per curiam), upholding a federal vaccination requirement for health care providers notwithstanding the plaintiffs' attempt to characterize it as an "unprecedented" "mandate" to "submit to a permanent medical procedure." Response to Application for a Stay at 12-17, *Biden v. Missouri*, 142 S. Ct. 647 (No. 21A240) (2022), https://go.usa.gov/xtzjh; *see also Florida v. HHS*, 19 F.4th 1271, 1288 (11th Cir. 2021) ("[M]andatory vaccinations for

the public at large have long been held valid," so "there was no reason for Congress to be more specific" in confirming the President's authority.). Plaintiffs imagine far-fetched requirements that a President might attempt to impose on federal employees, *see, e.g.*, Br. 46 (hypothesizing that a President could require "LASIK eye surgery" or a vegan diet), but those examples do not remotely resemble vaccination against diseases transmissible in workplaces, and there is no reason to think the Federal Circuit would sustain such requirements under the CSRA. *Cf. Brown v. Department of the Navy*, 229 F.3d 1356, 1358 (Fed. Cir. 2000) (explaining that an agency may remove an employee for misconduct if "the employee's misconduct is likely to have an adverse impact on the agency's performance of its functions"). It is also difficult to imagine the President—"the most singularly accountable elected official in the country," Stay Order 7 (Higginson, J., dissenting)—imposing such conditions in the first place. *See Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 493 (2010) ("The buck stops with the President."). Like any employer, the President has a strong interest in retaining qualified workers, and he has incentives not to impose conditions that do not promote efficiency and that employees—who are free to seek other employment—might view as unacceptable. The employment conditions here, however, parallel conditions that many private employers have reasonably imposed after concluding that vaccination requirements advance their economic and other interests. *See* Stay Order 10-11 (Higginson, J., dissenting); Gov't Br. 7.

Plaintiffs' contention (Br. 44, 46) that the President may not rely on "inherent Article II power to circumvent" the CSRA misunderstands the point. The government does not dispute that Congress can limit the President's presumptive authority to impose conditions on federal employment, including through the CSRA. But because federal employment is a context in which the President has baseline constitutional authority, the question is not whether Congress has affirmatively authorized the vaccination requirement but whether Congress has *prohibited* it. Plaintiffs identified no such prohibition.

B. The statutes cited in the Executive Order confirm the President's authority to require that federal employees be vaccinated as a condition of employment. Far from identifying any relevant statutory prohibition, plaintiffs' arguments underscore the statutes' broad *authorizing* language.

1. Plaintiffs contend that 5 U.S.C. § 7301, which authorizes the President to "prescribe regulations for the conduct of employees in the executive branch," does not apply because the Executive Order does not govern "conduct." Br. 34. It is unsurprising that the district court did not adopt this argument: becoming vaccinated is obviously conduct, just like conduct that past executive orders required. *See, e.g.*, Exec. Order No. 12674, 54 Fed. Reg. 15,159, 15,159 (Apr. 14, 1989) (requiring that federal employees "disclose waste, fraud, abuse, and corruption to appropriate authorities," satisfy "all just financial obligations," and "not hold financial interests that conflict with the conscientious performance of duty"). Plaintiffs try to

distinguish the vaccination requirement as a regulation of "status," Br. 34, 36, but that semantic distinction could be applied to any order. President Reagan's prohibition on off-duty drug use could be framed as a prohibition on drug *users*; or President Bush's requirement that employees satisfy their financial obligations could be framed as a prohibition on tax evaders. *Cf. United States v. Flores-Alejo*, 531 F. App'x 422, 425 (5th Cir. 2013) (per curiam) (upholding a conviction for remaining in the United States while under a criminal sentence because the conviction was not an improper criminalization of "status").

Plaintiffs further mistakenly contend that, if the Executive Order governs conduct, it still is not authorized by section 7301 because it does not govern "*workplace* conduct." Br. 35. By its plain terms, section 7301 addresses "conduct"—not "workplace conduct"—and Congress would have written the statute differently if it intended to impose plaintiffs' imagined limitation. *Cf. NFIB v. OSHA*, 142 S. Ct. 661, 665 (2022) (per curiam) (emphasizing that statutory text addressed "'*occupational* safety and health'"). Plaintiffs suggest that section 7301 is limited to workplace conduct because it addresses the conduct of those "in the executive branch," Br. 35, but that language simply makes clear that Executive Branch employees, rather than some other population, are the object of the provision.

Plaintiffs' "workplace conduct" construction is inconsistent with the longstanding recognition that employees' on- and off-duty conduct is subject to regulation as long as it has a nexus to the workplace. In requiring employee drug-

testing, President Reagan found that "employees who use illegal drugs, *on or off duty*, tend to be less productive, less reliable, and prone to greater absenteeism." Exec. Order No. 12564, 51 Fed. Reg. 32,889, 32,889 (Sept. 17, 1986) (emphasis added). Contrary to plaintiffs' suggestion (Br. 36-37), that order was not limited to drug use for which employees faced imprisonment, nor is section 7301 limited to regulating illegal conduct or "employees with 'sensitive positions.'" *Cf.* 54 Fed. Reg. at 15,159 (establishing "standards of ethical conduct" that require "each Federal employee" to refrain from various actions, most of which are not otherwise illegal). The drug-testing order instead rested on President Reagan's determination that off-duty drug use has negative ramifications for federal workplaces. Plaintiffs do not dispute that this Court has likewise endorsed that principle. *See Bonet v. U.S. Postal Service*, 712 F.2d 213, 215-17 (5th Cir. 1983) (per curiam) (federal employee's "removal, based on his [off-duty] misconduct, would promote the efficiency of the [Postal] Service").

Just as President Reagan concluded that employee drug use would diminish federal-workforce efficiency, President Biden concluded that the Executive Order was necessary to "promote . . . the efficiency of the civil service" because unvaccinated federal employees are at higher risk of becoming "infected and severely ill," Exec. Order No. 14043, 86 Fed. Reg. 50,989, 50,989 (Sept. 14, 2021). Plaintiffs do not, and cannot, take issue with the substance of that finding, nor do they dispute that many other employers, having reached the same conclusion, require their employees to be vaccinated against COVID-19. The President's authority to regulate "the conduct of

employees in the executive branch," 5 U.S.C. § 7301, allows the President to prescribe similar measures. Plaintiffs' reliance (Br. 38-39) on *NFIB*, 142 S. Ct. 661, is misplaced because the purpose of the Executive Order is not to protect employees from workplace hazards; it is to prevent the workplace disruption that occurs when federal employees become ill or are quarantined because of COVID-19, regardless of whether they were exposed at home or at work.

Indeed, plaintiffs identify (Br. 36) yet another Presidential directive addressed at off-duty conduct: in 2012, President Obama instructed agencies to develop policies to address domestic violence affecting federal employees, explaining that "[t]he effects of domestic violence *spill over* into the workplace." 77 Fed. Reg. 24,339, 24,339 (Apr. 23, 2012) (emphasis added). Contrary to plaintiffs' suggestion (Br. 36), the guidance was not limited to domestic violence that occurs *in* the federal workplace.

Plaintiffs essentially concede that, as applied to the approximately 20,000 new employees who join the Executive Branch each month, the Executive Order is a valid exercise of the President's authority under 5 U.S.C. § 3301. *See* Br. 34 (asserting that section 3301 "do[es] not extend to whether *existing* employees can keep their jobs" (emphasis added)). Plaintiffs attempt (Br. 32-33) to rehabilitate the district court's unexplained reliance on contractor-mandate cases by noting that section 3301 permits measures that "promote the efficiency of [the civil] service," but they do not dispute that the vaccination requirement here—aimed at ensuring that federal employees do not become seriously ill with a highly contagious virus—promotes efficiency. *Cf.*

American Fed'n of Gov't Emps. v. Hoffman, 543 F.2d 930, 938 (D.C. Cir. 1976) (recognizing "the obvious intent of Congress to confer broad discretion upon the President" under this provision); *see* ROA.1769 (acknowledging that "vaccines are undoubtedly the best way to avoid serious illness from COVID-19"). And although plaintiffs assert, without citation, that section 3301 cannot support the Executive Order's application to existing employees, this Court has previously noted that section 3301 supported the issuance of new medical-qualification standards that were applied to a longtime employee. *See Atkins v. Salazar*, 677 F.3d 667, 670-71 & n.1 (5th Cir. 2011) (per curiam).

Plaintiffs' constricted reading (Br. 33) of 5 U.S.C. § 3302 is also meritless. They do not dispute that section 3302's broadly permissive first sentence authorizes the Executive Order. Nor do they dispute that their reading—under which the President could address only matters that the second sentence says he "shall" address—would render the first sentence, with its broader discretionary authority, superfluous. The second, mandatory sentence does not cabin the President's discretionary authority under the first sentence. Plaintiffs seem to suggest (Br. 34), based on the title of the statutory subchapter containing sections 3301 and 3302, that both provisions are limited to new employees. The title of section 3302 is broad, however—"Competitive service; rules"—and nothing in the provision's text limits it to new employees. *See Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008) ("[A] subchapter heading cannot substitute for the operative text of the statute.").

2. Plaintiffs' resort (Br. 40-44) to purported "clear-statement doctrines" provides no basis to narrow these statutes' broad text.

Plaintiffs mistakenly invoke "major-questions" principles, which they say "require[] Congress to 'speak[] clearly' when it delegates 'powers of "vast economic and political significance."'" Br. 40 (second alteration in original) (quoting *Alabama Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (per curiam)). An issue's economic and political significance is relevant only when an agency action would "bring about an enormous and transformative expansion in . . . regulatory authority." *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014). No such expansion occurred here because the President exercised only his proprietary authority—as CEO of the federal workforce—to impose reasonable conditions on federal employment. Nor must Congress speak clearly to "delegate" authority to decide major questions to the President, who has independent constitutional authority and is both "the head of a co-equal branch of government and the most singularly accountable elected official in the country." Stay Order 7 (Higginson, J., dissenting); *see also Free Enter. Fund*, 561 U.S. at 513 ("The Constitution that makes the President accountable to the people for executing the laws also gives him the power to do so.").

Nor is the Executive Order "at the outer limit[] of Congress's power." Br. 41. It is an exercise of the President's authority to "deal[] with 'citizen employees,'" *Nelson*, 562 U.S. at 148, through measures closely resembling those taken by many other private and public employers, and resembling those that the Supreme Court

recently upheld as a valid exercise of statutory authority in the health care context, *see Missouri*, 142 S. Ct. 647.

Plaintiffs also contend (Br. 40-41) that federalism considerations require the Court to narrow the statutes beyond their plain text. But the "federal workplace safety order" at issue here "displaces no state police powers." Stay Order 7 (Higginson, J., dissenting). As a district court explained in rejecting a challenge brought by a State, the Executive Order does not "threaten to infringe the State's sovereignty by regulating in an area of traditional state concern or by displacing otherwise valid state law"; it is "an exercise of the President's considerable constitutional authority to regulate the internal affairs of the executive branch." *Brnovich*, 2022 WL 252396, at *12; *see Oklahoma*, 2021 WL 6126230, at *12 (similar for military vaccination requirement). The President may exercise that constitutional and statutory authority even if it "pre-empt[s] particular exercises of state police power." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 292 (1981).

Plaintiffs' reliance (Br. 43-44) on the nondelegation doctrine is likewise misplaced. "In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency." *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 472 (2001). Again, the President has constitutional authority to set Executive Branch employment policy, so the statutes at issue do not delegate authority that would otherwise belong exclusively to Congress. *See Gundy v. United States*, 139 S. Ct. 2116, 2137 (2019) (Gorsuch, J., dissenting) ("[N]o separation-of-

powers problem may arise if the discretion is to be exercised over matters already within the scope of executive power." (quotation marks omitted)). In any event, the statutes here are narrow in scope, limited to the federal-employment context, and make clear that regulations must be tied to factors including "the efficiency of [the] service," 5 U.S.C. § 3301(1), and "good administration," *id.* § 3302.

C. Plaintiffs alternatively urge (Br. 47-55) that agencies' implementation of the Executive Order violates the APA. The district court correctly rejected these arguments, concluding that "there is nothing for the court to review under the APA." ROA.1767.

As the district court recognized and plaintiffs do not dispute, the Executive Order itself is "not reviewable under the APA," ROA.1767, nor is the Task Force guidance. And while agencies have taken steps to implement the Executive Order, those steps are not reviewable final agency actions—they are not "the consummation of the agency's decisionmaking process," nor do "rights or obligations" flow from them. *Sierra Club v. Peterson*, 228 F.3d 559, 565 (5th Cir. 2000) (quotation marks omitted). As a general matter, an agency does not consummate its decisionmaking until all administrative steps—including remedies provided by schemes like the CSRA—are exhausted. *See Qureshi v. Holder*, 663 F.3d 778, 781 (5th Cir. 2011). The relevant "final agency action" implementing Executive Order 14043 would therefore be an employing agency's ultimate decision whether an individual employee is entitled to an exception and whether and how to discipline that employee.

In any event, the vaccination requirement far exceeds "'minimal standards of rationality.'" *Baylor Cty. Hosp. Dist. v. Price*, 850 F.3d 257, 264 (5th Cir. 2017). The President relied on the CDC's expert determination that vaccination is the best way to slow the spread of COVID-19. 86 Fed. Reg. at 50,989; *see also, e.g.*, ROA.146. The Court must be "most deferential" where a "decision is based upon [an agency's] evaluation of complex scientific data within its technical expertise." *Sierra Club v. EPA*, 939 F.3d 649, 680 (5th Cir. 2019) (citation omitted). Plaintiffs' apparent disagreement with the President's assessment provides no basis for invalidating agency actions implementing that assessment. *See, e.g.*, *Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 451 (5th Cir. 2021).

III. Plaintiffs Failed To Satisfy The Equitable Requirements For Preliminary Injunctive Relief

A. Plaintiffs Have Not Established Any Irreparable Injury

Numerous courts have recognized that federal employees are not irreparably injured by the enforcement of Executive Order 14043. *See, e.g.*, *Church v. Biden*, No. 21-2815, 2021 WL 5179215, at *13-15 (D.D.C. Nov. 8, 2021); *Altschuld v. Raimondo*, No. 21-cv-2779, 2021 WL 6113563, at *3-5 (D.D.C. Nov. 8, 2021); *Smith*, 2021 WL 5195688, at *8-9. As the government's opening brief explained (at 38-42), it "is practically universal jurisprudence . . . that there is an adequate remedy for individual wrongful discharge after the fact." *Garcia v. United States*, 680 F.2d 29, 31 (5th Cir. 1982); *see also Sampson v. Murray*, 415 U.S. 61, 91-92 & n.68 (1974). Plaintiffs' standing

to challenge the Executive Order rests on the threat of adverse employment action, and it is well-established that such action does not inflict irreparable harm.

Plaintiffs mistakenly rely (Br. 56) on *Burgess v. FDIC*, 871 F.3d 297 (5th Cir. 2017). The plaintiff in *Burgess* alleged that he would be forced to "withdraw" from an entire industry, leaving him "unable to find" comparable employment. *Id.* at 304. Here, by contrast, plaintiffs could be reinstated to their positions if they were discharged but prevailed in the CSRA process, and they would remain free to seek positions with other employers in the interim. *Cf. Sampson*, 415 U.S. at 92 n.68 ("difficulties in immediately obtaining other employment" do not establish irreparable harm, "however severely they may affect a particular individual"); *Morgan v. Fletcher*, 518 F.2d 236, 240 (5th Cir. 1975) (no irreparable injury where the plaintiff would lose "45% of the family income").

Plaintiffs' reliance on *BST Holdings, LLC v. OSHA*, 17 F.4th 604 (5th Cir. 2021), is likewise misplaced. Plaintiffs say they face a choice between "their job(s) and their jab(s)," *e.g.*, Br. 55, but their claims are fundamentally different from those in *BST Holdings* because they do not allege that the vaccination requirement invades their individual rights. *See BST Holdings*, 17 F.4th at 618 (explaining that "the loss of constitutional freedoms" is irreparable injury). They also have no response to the government's observation (Gov't Br. 42) that *BST Holdings* is inapplicable because this case involves *federal employees*, who can be adequately compensated through the CSRA.

Plaintiffs also assert (Br. 56-57) that they will suffer irreparable "reputational harms" from the Executive Order. The Supreme Court has held that reputational damage resulting from adverse employment action "falls far short of the type of irreparable injury which is a necessary predicate to the issuance of a temporary injunction." *Sampson*, 415 U.S. at 91-92. Plaintiffs' asserted harm derives solely from the President's general statements concerning people who refuse to become vaccinated—statements that were not directed at these plaintiffs specifically, nor even at federal employees more broadly. *See* ROA.1184-85 ¶¶ 9-11; *compare Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047, 1056 (5th Cir. 1997) (irreparable injury where a particular employee was found "'inefficien[t] and incompeten[t],'" causing "'severe injury to her professional reputation'" (emphasis omitted)).

To the extent plaintiffs contend (Br. 58) that "employees with religious objections" face a "crisis of conscience," every agency has established a process to review requests for exceptions on the basis of sincerely held religious beliefs, and many plaintiffs had pending requests when the injunction was issued. Perhaps for that reason, plaintiffs have not asserted a claim that the Executive Order violates religious freedoms. In any event, there is no basis to speculate that plaintiffs' exception requests would be denied, and any asserted harm from such a scenario is therefore—at minimum—not "imminent." *Humana, Inc. v. Jacobson*, 804 F.2d 1390, 1394 (5th Cir. 1986).

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

Plaintiffs have no meaningful response to the government's identification (Gov't Br. 42-47) of many serious harms that the injunction inflicts on the government and the public. As Judge Higginson explained, "the public interest is not served by a single Article III district judge, lacking public health expertise and made unaccountable through life tenure, telling the President of the United States, in his capacity as CEO of the federal workforce, that he cannot take the same lifesaving workplace safety measures as . . . private sector CEOs." Stay Order 11 (Higginson, J., dissenting). Indeed, plaintiffs essentially concede that the injunction usurps the President's authority, undermines good order and discipline, and inflicts irreparable harm by halting the processing of exception requests; their only response is that they believe the Executive Order is invalid.

Plaintiffs echo the district court's view that the injunction "'will [not] have any serious detrimental effect on [the government's] fight to stop COVID-19.'" Br. 61 (quoting ROA.1768). But the Executive Order was issued to optimize the operations of the federal workforce, not as a general public health measure. *See* 86 Fed. Reg. at 50,989 (describing an objective "to promote the health and safety of the Federal workforce and the efficiency of the civil service").

Plaintiffs do not dispute that the COVID-19 pandemic has interfered with government operations in numerous ways. *See* Gov't Br. 44. They likewise do not

dispute that the injunction significantly complicates agencies' efforts to return more employees to in-person work and requires that agencies divert time and resources from their missions. *See* ROA.1806-10. Plaintiffs echo (Br. 62) the district court's view that the government could adopt alternative COVID-19 mitigation measures, but the President found, relying on public-health guidance, that those measures are not as effective as vaccination. 86 Fed. Reg. at 50,989; *see* ROA.1805.

Plaintiffs are wrong to criticize (Br. 62-63) the government's decision to defer certain steps within the disciplinary process until after the winter holidays. That deferral was intended to give agencies additional time to engage in education and counseling as part of a multi-step enforcement process; the government believed a limited extension of the counseling period was the best way to advance its goal of increasing workforce vaccination. Agencies must now move to the next disciplinary phase for employees who failed to comply with vaccination requirements (either because they refused to be vaccinated or because they lack an approved or pending exception request). In any event, any delay in implementing the Executive Order does not undermine the harms to the government—and the public—from enjoining it now. And plaintiffs' suggestion (Br. 63) that the government has approached this litigation in a "leisurely" manner is astounding. Although plaintiffs waited over three months after the Executive Order was issued to file suit, *see* ROA.65-140, the government promptly sought an emergency stay of the preliminary injunction both in district court (as required under Fed. R. App. P. 8) and this Court.

IV. At Minimum, The Preliminary Injunction Must Be Narrowly Tailored

As explained in the government's opening brief (at 47-51), the injunction must at minimum be narrowed so that it extends only as far as necessary to redress the injuries of the named plaintiffs and any of their bona fide members when the complaint was filed. Plaintiffs do not engage with the constitutional and equitable constraints on the district court's authority, and they cannot convincingly explain why a nationwide injunction halting all enforcement of Executive Order 14043 is necessary to redress their alleged injuries.

Plaintiffs note (Br. 65) that Task Force guidance advises that agency enforcement procedures should generally be "consisten[t] across government." ROA.810. That discussion of agencies' latitude to tailor enforcement to "operational needs" and individualized employee circumstances, ROA.810, provides no justification to enjoin the Executive Order as to millions of nonparties.

Plaintiffs do not dispute that the district court could have granted an injunction limited to FMF and its bona fide members. They suggest (Br. 65-66) that such relief might pose difficulties because FMF has many "members" who work for different agencies, and they confusingly declare that no narrower relief "could be determined *ex ante*." As noted in the government's opening brief, however, plaintiffs could provide a list of FMF members, subject to a protective order if needed, and agencies could take account of the injunction through the same processes they use to consider exception

requests. In any event, plaintiffs' practical concerns are no ground for ignoring Article III.

Plaintiffs make no effort to defend the district court's extension of relief to plaintiffs with unripe claims. ROA.1757. Nor can plaintiffs defend the district court's encroachment on the authority of the dozen courts that had previously declined to enjoin the Executive Order. Plaintiffs declare (Br. 67) that another suit pending before the court that issued the injunction "is most likely to reach a full analysis of the merits," but there is no basis for that assertion. Cases remain pending in numerous courts where there will be further opportunities to address the merits. There is no basis to privilege a single district court over coequal courts around the country.

CONCLUSION

The preliminary injunction should be vacated in full or, at a minimum, narrowed to extend only as far as necessary to redress the injuries of the named plaintiffs and any bona fide members of FMF when the complaint was filed. In the event the Court concludes that such relief is appropriate, it should immediately grant the government's emergency motion for stay, which remains pending, to provide relief prior to the issuance of the Court's opinion.

Respectfully submitted,

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FEBRUARY 2022

CERTIFICATE OF SERVICE

I hereby certify that on February 18, 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 appellate CM/ECF system.

/s/ Casen B. Ross
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,488 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

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