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 U.S. District Court for the Southern District of Texas, No. 3:21-cv-356, Hon. Jeffrey V. Brown presiding

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PLAINTIFFS-APPELLEES' OPPOSITION TO EMERGENCY MOTION FOR A STAY OR FOR ISSUANCE OF THE MANDATE FORTHWITH

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CERTIFICATE OF INTERESTED PERSONS

Feds for Medical Freedom v. Biden

No. 22-40043

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Local Rule 28.2.1 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.

1. Highland Engineering, Inc., is a Plaintiff-Appellee. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.
2. Local 918, American Federation of Government Employees, is a Plaintiff-Appellee. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.
3. Feds for Medical Freedom, a/k/a Feds 4 Med Freedom, is a Plaintiff-Appellee. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.
4. Members of Feds for Medical Freedom are interested parties. Feds for Medical Freedom has over 6000 members. *See* L.R. 28.2.2 ("If a

large group of persons or firms can be specified by a generic description, individual listing is not necessary.").

The following are individual named Plaintiffs-Appellees:

5. John Armbrust
6. N. Anne Atkinson
7. Julia Badger
8. Michael Ball
9. Raymond A. Beebe, Jr.
10. Craigan Biggs
11. Laura Brunstetter
12. Mark Canales
13. Michele Caramenico
14. Andrew Chamberland
15. David Clark
16. Diane Countryman
17. Kevin Dantuma
18. Jose Delgado
19. Jordan DeManss
20. George Demetriou

21. Keri Divilbiss

22. Mercer Dunn IV

23. William Filkins

24. Jonathan Gragg

25. Bryon Green

26. Thomas David Green

27. Erika Hebert

28. Peter Hennemann

29. Neil Horn

30. Carey Hunter-Andrews

31. Tana Johnston

32. Tyler Klosterman

33. Deborah Lawson

34. Dan Lewis

35. Melissa Magill

36. Kendra Ann Marceau

37. Dalia Matos

38. Stephen May

39. Steven McComis

40. Christopher Miller

41. Joshua Moore

42. Brent Moores

43. Jesse Neugebauer

44. Joshua Nicely

45. Leslie Carl Petersen

46. Patti Rivera

47. Joshua Roberts

48. Ashley Rodman

49. M. LeeAnne Rucker-Reed

50. Trevor Rutledge

51. Nevada Ryan

52. James Charles Sams III

53. Michael Schaecher

54. Christina Schaff

55. Kurtis Simpson

56. Barrett Smith

57. Jaci ReNee Smith

58. Jarod Smith

59. Jana Spruce

60. John Tordai

61. Sandor Vigh

62. Christine Vrtaric

63. Pamela Weichel

64. David Wentz

65. Jason Wilkerson

66. Patrick Wright

67. Patrick Mendoza York

The following are individual named Defendants-Appellants:

68. Kiran Ahuja, in her official capacities as Director of the Office of Personnel Management and Co-Chair of Safer Federal Workforce Task Force

69. Lloyd J. Austin III, in his official capacity as Secretary of Defense

70. Joseph R. Biden, Jr., in his official capacity as President of the United States

71. Antony Blinken, in his official capacity as Secretary of State

72. Matthew C. Blum, in his official capacity as Federal Acquisition Regulatory Council member

73. William J. Burns, in his official capacity as Director of the Central Intelligence Agency

74. Pete Buttigieg, in his official capacity as Secretary of Transportation

75. Robin Carnahan, in her official capacities as Administrator of the General Services Administration and Co-Chair of Safer Federal Workforce Task Force

76. Leslie A. Field, in her official capacity as Federal Acquisition Regulatory Council member

77. Marcia Fudge, in her official capacity as Secretary of Housing and Urban Development

78. Merrick B. Garland, in his official capacity as Attorney General

79. Jennifer M. Granholm, in her official capacity as Secretary of Energy

80. Deb Haaland, in her official capacity as Secretary of Interior

81. Avril Haines, in her official capacity as Director of National Intelligence

82. Daniel Hokanson, in his official capacity as Chief of the National Guard Bureau

83. Karla S. Jackson, in her official capacity as Federal Acquisition Regulatory Council member

84. Kilolo Kijakazi, in her official capacity as Acting Commissioner of Social Security

85. Jeffrey A. Koses, in his official capacity as Federal Acquisition Regulatory Council member

86. Alejandro Mayorkas, in his official capacity as Secretary of Homeland Security

87. Denis McDonough, in his official capacity as Secretary of Veterans Affairs

88. Bill Nelson, in his official capacity as Administrator of the National Aeronautics and Space Administration

89. Samantha Power, in her official capacity as Administrator of the United States Agency for International Development

90. Gina M. Raimondo, in her official capacity as Secretary of Commerce

91. John M. Tenaglia, in his official capacity as Federal Acquisition Regulatory Council member

92. Tom Vilsack, in his official capacity as Secretary of Agriculture

93. Marty Walsh, in his official capacity as Secretary of Labor

94. Janet Yellen, in her official capacity as Secretary of Treasury

95. Shalanda D. Young, in her official capacity as Acting Director of the Office of Management and Budget

96. Jeffrey Zients, in his official capacity as co-chair of the Safer Federal Workforce Task Force

The following government entities are Defendant-Appellants:

97. Central Intelligence Agency

98. Department of Agriculture

99. Department of Commerce

100. Department of Defense

101. Department of Energy

102. Department of Homeland Security

103. Department of Housing and Urban Development

104. Department of Interior

105. Department of Justice

106. Department of Labor

107. Department of State

108. Department of Transportation

109. Department of Treasury

110. Department of Veterans Affairs

111. Federal Acquisition Regulatory Council

112. General Services Administration

113. National Aeronautics and Space Administration

114. National Guard Bureau

115. Office of Management and Budget

116. Office of Personnel Management

117. Office of the Director of National Intelligence

118. Safer Federal Workforce Task Force

119. Social Security Administration

120. The United States of America

121. United States Agency for International Development

The following are counsel in the case:

122. Boyden Gray & Associates PLLC: C. Boyden Gray, R. Trent McCotter, Jonathan Berry, Michael Buschbacher, and Jared M. Kelson are counsel for Plaintiffs-Appellees.

123. U.S. Department of Justice: Brian M. Boynton, Sarah Wendy Carroll, Marleigh D. Dover, Brit Featherston, James Gillingham,

Sarah E. Harrington, Casen Ross, Charles W. Scarborough, and Lowell V. Sturgill Jr. are counsel for Defendants-Appellants.

Dated: April 13, 2022

/s/ R. Trent McCotter
R. Trent McCotter
Counsel of Record

Plaintiffs-Appellees respectfully request that this Court deny the government's motion to stay the District Court's injunction pending issuance of the Court's mandate or to issue the mandate immediately. There is no justification to bypass normal appellate procedures before Plaintiffs-Appellees have the opportunity to seek, and the full Court has the opportunity to consider, rehearing en banc.

I. THE GOVERNMENT'S REQUEST TO STAY THE INJUNCTION IS A REHASH OF ITS ALREADY-DENIED EMERGENCY MOTION.

The government's request to stay the injunction pending issuance of the mandate is simply a repackaged version of the government's previously filed motion for an emergency stay—which the panel unanimously denied. *See* Order, *Feds for Medical Freedom*, No. 22-40043 (5th Cir. Apr. 7, 2022).[1] The government provides no persuasive reason

[1] The government's emergency motion to stay the injunction is procedurally improper. Because the government is asking the panel to reconsider its prior ruling, the government should have filed a petition for panel rehearing, not a new "motion" that asks the Court for the exact same relief that was just denied. *See, e.g.*, *Mancuso v. Herbert*, 166 F.3d 97, 99 (2d Cir. 1999) ("The Federal Rules of Appellate Procedure and this court's Local Rules make no mention of 'motions for reconsideration.' Therefore, we construe the government's motion for reconsideration as a petition for rehearing pursuant to Fed. R. App. P. 40.").

why the Court should suddenly change its view on this matter from just a few days ago.

Contrary to the government's argument, the panel's denial of the government's prior emergency motion as "moot" was not erroneous. By ordering that the motion be carried with the case, the motions panel gave the merits panel the opportunity to stay the injunction before a merits decision was issued. But now that the Court has issued its merits decision, the government's request for emergency relief is moot, and the government's recourse is to seek expedited issuance of the mandate (which fails for the reasons in Part II, below).

In any event, when considering a motion to stay an injunction, this Court looks at whether: (1) "the applicant will be irreparably injured absent a stay"; (2) "the applicant has made a strong showing that [it] is likely to succeed on the merits"; (3) "issuance of the stay will substantially injure the other parties interested in the proceeding"; and (4) "where the public interest lies." *Texas v. United States*, 787 F.3d 733, 746–47 (5th Cir. 2015). "A stay 'is not a matter of right, even if irreparable injury might otherwise result to the appellant.'" *Id.* The government cannot satisfy any of these elements. *See* Pls.Opp.to.Emer.Mot. (Feb. 9,

2022) (explaining at length why the government's prior emergency motion should fail).

First, the government cannot demonstrate any irreparable harm that would arise from leaving the injunction in place during the normal course of appellate proceedings. The government has delayed the effective date of the vaccine mandate repeatedly, for months at a time. This delay included the winter holidays, despite the government simultaneously warning of a "surge upon a surge" of cases. Noah Higgins-Dunn, *Dr. Fauci Warns the U.S. Will See a 'Surge Upon a Surge' of Covid Cases Following the Holidays*, CNBC (Dec. 1, 2020), https://www.cnbc.com/2020/12/01/dr-fauci-warns-the-us-will-see-a-surge-upon-a-surge-of-covid-cases-following-the-holidays.html.

This demonstrates that the government itself has concluded it faces no imminent, irreparable harm from delaying the vaccine mandate. The government cannot now suddenly claim for litigation purposes that there is actually an emergency worthy of taking this case outside the routine process of appeal, including the opportunity to seek rehearing.

The government has also expressly disclaimed any reliance on workplace spread of COVID-19 as a basis for the vaccine mandate. In its

merits reply brief, the government stated that the purpose of the vaccine mandate "is not to protect employees from workplace hazards." Gov't.Merits.Reply15.[2] Rather, the sole basis on which the government now relies is an alleged interest in "prevent[ing] the workplace disruption that occurs when federal employees become ill or are quarantined because of COVID-19." *Id.* But the government has publicly touted that it could fire or suspend non-compliant employees without suffering operational concerns, undercutting any claim that COVID-19 absenteeism would cause irreparable harm. Alex Gangitano & Morgan Chalfant, *Federal Agencies Prepare to Act Against Unvaccinated Employees*, THE HILL (Jan. 9, 2022), https://thehill.com/homenews/administration/588836-federal-agencies-prepare-to-act-against-unvaccinated-employees.

[2] This concession is in line with the CDC's statement that "what [vaccines] can't do anymore is prevent transmission" of COVID-19. Madeline Holcombe & Christina Maxouris, *Fully Vaccinated People Who Get COVID-19 Breakthrough Infection Can Transmit the Virus, CDC Chief Says*, CNN (Aug. 6, 2021), https://www.cnn.com/2021/08/05/health/us-coronavirus-thursday/index.html (quoting Dr. Rochelle Walensky, CDC Director); *COVID Cases in the U.S. to Worsen Says CDC Director*, CNN NEWSROOM (Aug. 6, 2021), https://transcripts.cnn.com/show/cnr/date/2021-08-06/segment/20 (statement of Dr. Rochelle Walensky, CDC Director).

The government has thus disclaimed the alleged harm underlying its only justification for the vaccine mandate, which alone should resolve the government's motion.

This is especially true given that the government has boasted about the high percentage of federal employees who have been vaccinated—earlier this year the White House itself publicized 98% compliance, and the number has likely increased since then. *See Press Briefing,* WHITE HOUSE (Jan. 21, 2022), https://www.whitehouse.gov/briefing-room/press-briefings/2022/01/21/press-briefing-by-press-secretary-jen-psaki-january-21-2022/.

Further, the District Court held that the government could require masking, social distancing, and telework for unvaccinated employees. ROA.1769. Given these findings, no calamity will unfold by keeping the injunction in place while Plaintiffs-Appellees seek, and the full Court has the opportunity to consider, rehearing en banc.

Second, although the government prevailed at the panel stage, that does not necessarily mean it made the requisite "strong showing" that it would be entitled to a stay of an injunction. *Texas*, 787 F.3d at 746–47. Judge Barksdale's dissent argues persuasively that courts have

jurisdiction to entertain pre-enforcement challenges to government-wide employment policies. Slip Op. at 17–18. And the majority opinion conflicts with numerous decisions of this Court and other circuits allowing for review of such challenges. *See, e.g.*, *NTEU v. Bush*, 891 F.2d 99, 102 (5th Cir. 1989); *NTEU v. Horner*, 854 F.2d 490, 497 (D.C. Cir. 1988); *NFFE v. Weinberger*, 818 F.2d 935, 939–40 (D.C. Cir. 1987); *AFGE v. FLRA*, 794 F.2d 1013, 1015–16 (5th Cir. 1986); *NTEU v. Devine*, 733 F.2d 114, 117 n.8 (D.C. Cir. 1984); *see also, e.g.*, *FLEOA v. Cabaniss*, No. 1:19-cv-735, 2019 WL 5697168, at *4–6 (D.D.C. Nov. 4, 2019). The panel majority also conflicts with this Court's recent en banc decision in *Cochran v. SEC*, 20 F.4th 194 (5th Cir. 2021) (en banc), which held that the government cannot satisfy the heavy burden of demonstrating implied preclusion of claims challenging ongoing constitutional violations that may be lost if not addressed now by a district court.

Given all this, the government cannot make the "strong showing" needed for a stay.[3]

[3] Moreover, the government cannot make a strong showing for the relief ordered. The opinion orders Plaintiffs' entire "case" to be dismissed, Slip Op. 14, but Plaintiffs still have pending in the District Court a completely separate set of claims about the federal *contractor* vaccine mandate, for which there is no plausible argument for CSRA preclusion.

Third, there are significant equitable concerns with granting the government's requested relief. If this Court stays the injunction but then en banc rehearing is granted, the panel's opinion would be vacated and the injunction would be reinstated. This would cause mass confusion and chaos as employees and agencies are whipsawed from not having to comply with the vaccine mandate, to suddenly having to comply with it, and then quickly back to not having to comply.

Given its history, the government would likely use any stay of the injunction to begin immediately suspending and terminating employees (including named Plaintiffs) who have declined to provide their vaccination status, as well as pressuring ones with pending exemption requests into accepting demotions, amplifying the unconstitutional coercion all these employees face to submit to vaccination. *See* ROA.1454; ROA.1464; ROA.1600; ROA.1625; ROA.1645; ROA.1817. If the panel's decision is ultimately reheard en banc, there would be tremendous logistical and equitable difficulties in undoing those actions. That can be avoided if the panel denies the government's motion and allows the rehearing process to play out in its normal course.

The Court should deny the government's request to reconsider the unanimous denial of the government's prior emergency motion to stay the injunction.

II. EXPEDITED ISSUANCE OF THE MANDATE IS UNWARRANTED.

The government's request to issue the mandate expeditiously should likewise be denied.

First, as noted above, the panel decision was not unanimous and conflicts with established precedent. Given this, there is a significant chance that the Court will grant rehearing en banc, and the panel should not short-circuit that process.

Indeed, this Court need only look to *Sambrano v. United Airlines, Inc.*, decided just a few months ago, where the Court likewise denied a request to expedite the Court's mandate. *See* Order, *Sambrano*, No. 21-11159 (5th Cir. Feb. 25, 2022). Like this case, *Sambrano* involved a vaccine mandate, expedited argument, reversal of the district court, and a dissent. The appellants in that case asked for prompt issuance of the mandate, which the panel unanimously denied. *Id.* If anything, *Sambrano* represented a far easier case for issuing the mandate early because the panel majority had held that the appellants were suffering

ongoing and irreparable harms. *See Sambrano v. United Airlines, Inc.*, No. 21-11159, 2022 WL 486610, at *6 (5th Cir. Feb. 17, 2022). Neither this Court nor the District Court has held that the government faces such harms here.

Second, even absent Judge Barksdale's dissent and the majority opinion's conflicts with prior precedent, expedited issuance of the mandate would still be unwarranted because the panel issued a published opinion. This Court's sister circuit—the Eleventh Circuit—has a local rule demonstrating that courts should be extremely reluctant to expedite the mandate in such cases: "In any appeal in which a published opinion has issued, the time for issuance of the mandate may be shortened only after all circuit judges in regular active service who are not recused or disqualified have been provided with reasonable notice and an opportunity to notify the clerk to withhold issuance of the mandate." 11th Cir. R. 41-2. Although that rule is of course not binding here, it demonstrates that even for the most run-of-the-mill published decisions, the mandate should not lightly be expedited. That logic is even stronger here, as there is not only a dissent from the panel opinion, but

also significant equities in favor of Plaintiffs and a significant chance that rehearing en banc will be granted.

CONCLUSION

The Court should deny the government's motion.

April 13, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who have consented to electronic service are being served today with a copy of this document via the Court's CM/ECF. All parties in this case are represented by counsel consenting to electronic service.

April 13, 2022

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fifth Circuit Rule 27.4 and Federal Rule of Appellate Procedure 27(d)(2) because it contains 1758 words, excluding the portions exempted by Rule 27(a)(2)(B). This brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure Rule 32(a)(5)–(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook and 14-point font.

April 13, 2022

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