No. 22-40043

In the
United States Court of Appeals
for the Fifth Circuit

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

PLAINTIFFS-APPELLEES,

v.

JOSEPH R. BIDEN, JR., IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; THE UNITED STATES OF AMERICA; PETE BUTTIGIEG, IN HIS OFFICIAL CAPACITY AS SECRETARY OF TRANSPORTATION; DEPARTMENT OF TRANSPORTATION; JANET YELLEN, IN HER OFFICIAL AS SECRETARY OF TREASURY; ET AL,

DEFENDANTS-APPELLANTS.

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

BRIEF FOR *AMICUS CURIAE* AMERICA FIRST LEGAL FOUNDATION IN SUPPORT OF THE APPELLEES AND IN OPPOSITION TO MOTION FOR A STAY

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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 CURIAE[1]

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

AFL believes that the federal civilian employee COVID-19 vaccine mandate violates the separation of powers and constitutionally protected personal liberties. AFL also represents two federal civilian employees—an engineer with the Department of Defense engineer 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 denying the Appellant's motion to stay the lower court's injunction.

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

INTRODUCTION AND SUMMARY OF ARGUMENT

The federal employee vaccine mandate affects 2.1 million civilian employees, their families, and their dependents. *See* Julie Jennings & Jared C. Nagel, *Federal Workforce Statistics Sources: OPM and OMB*, Cong. Research Serv., at 1 (June 24, 2021). Congress did not explicitly delegate the president the authority to decree that vaccination is a condition of federal employment, and there is nothing in Article II, or its penumbra, providing 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. *Feds for Med. Freedom v. Biden*, No. 3:21-CV-356, 2022 WL 188329, at *5-6 (S.D. Tex. Jan. 21, 2022). Because the mandate places an immediate and irreversible imprint on all federal employees nationwide, the nationwide injunction should not be disturbed. *See BST Holdings, L.L.C. v. Occupational Safety & Health Admin., United States Dep't of Lab.,* 17 F.4th 604, 618 (5th Cir. 2021).

ARGUMENT

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

"The challenges posed by a global pandemic do not allow a federal agency 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).

Courts "expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *Id.* The core question before the court is simple: do any of the statutes cited as the basis of Executive Order 14,043 grant the President—or any of his subordinates—authority to compel federal employees to take a vaccine? The answer is no.

Executive Order 14,043 cites three statutes as its source of authority: 5 U.S.C. §§ 3301, 3302, and 7301.[2] None of these statutes, alone

[2] These statutes should be construed in accord with the ordinary public meaning of their terms at the time of enactment, *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1738 (2020), their words must be read in their context and with a view to their place in the overall statutory

or combined, give the Appellants the authority they seek to exercise here.

> Section 3301's title is "Civil Service; generally," and provides:
>
> The President may—(1) *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; (2) ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought; and (3) appoint and prescribe the duties of individuals to make inquiries for the purpose of this section.

5 U.S.C. § 3301 (emphasis added). Section 3301 cannot be the authority that the Appellants need, as it is a generic hiring authority pertaining to "the admission of individuals into the civil service," and "the fitness of applicants." Here, the Appellees are not seeking employment with the federal government, they already are employees.[3]

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scheme, *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 666 (2007), and their relevant provisions must be harmonized and given full effect, *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 132 (2000).

[3] The Appellants cite *AFGE v. Hoffman* as standing for the principle that section 3301 "delegate[s] broad authority to the President" over federal employees, analogizing it to the President's authority to regulate employee conduct under 5 U.S.C. § 7301. ECF No. __ at 14 (quoting *AFGE v. Hoffman*, 543 F.2d 930, 938 (D.C. Cir. 1976). In doing so, the Appellants ignore the D.C. Circuit's actual point of emphasis. The D.C. Circuit noted that "under 5 U.S.C. § 3301 *Congress has delegated*" broad authority to the President. *Hoffman*, 543 F.2d at 938. To side with the Appellants, then, this Court must make the intuitive leap that the Su-

Section 3302's title is "Competitive service; rules," and provides:

> The President may *prescribe rules governing the competitive service*. The rules shall provide, as nearly as conditions of good administration warrant, for—(1) necessary exceptions of positions from the competitive service; and (2) necessary exceptions from the provisions of sections 2951, 3304(a), 3321, 7202, and 7203 of this title. Each officer and individual employed in an agency to which the rules apply shall aid in carrying out the rules.

5 U.S.C. § 3302 (emphasis added).

This also cannot be the authority that the Appellants need, as it is a generic organizational statute. The Civil Service Reform Act divides civil service employees into three main categories: (1) "Senior Executive Service" employees, (2) "competitive service" employees, and (3) "excepted service" employees. *Elgin v. Dep't of Treasury*, 567 U.S. 1, 5 n.1 (2012). "Most 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).

Under section 3302, "[t]he President may prescribe rules governing the competitive service." The President may also designate certain positions into the excepted service, as opposed to the competitive ser-

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preme Court rejected in *NFIB*. This Court must find that the "broad authority" delegated by Congress in section 3301 includes silent, unprecedented authority for the Appellants' sweeping vaccine mandate.

vice. *See*, *e.g.*, *Patterson v. Dep't of Interior*, 424 F.3d 1151, 1155 n.4, 1159 (Fed. Cir. 2005). Moreover, as the lower court correctly indicated, "When the cross-referenced provisions are checked, it becomes evident that the 'rules' the President may prescribe under § 3302 are quite limited." *Feds for Medical Freedom*, 2022 WL 188329 at *5.

Section 7301's title is "Presidential Regulations," and 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 Appellants to require federal employees to take a vaccine. As discussed below, 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 ever 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 defi-

nition, 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 Appellants to compel federal employees to take a vaccine because vaccination status has nothing to do with behavior and deportment. A conduct-based regulation either requires, allows, or proscribes a type of ongoing behavior for covered employees.

Executive orders issued by Republican and Democratic presidents exemplify the actual scope of section 7301. 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 conduct, much less with off-the-job medical choices. And under both orders, every covered employee was subject to the same behavioral allowance or prohibition.

In contrast, President Biden has commanded federal employees to have "fully vaccinated" status. And as a status-based regulation, the

President's order neither requires, allows, nor proscribes 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 require that all federal employees be "non-smokers" away from the workplace. Yet that is the authority the Government now claims.

The vaccine mandate is a status-based regulation falling outside the authority of section 7301, which only concerns the "conduct" of federal employees. "A vaccination, after all, cannot be undone at the end of the workday." *NFIB*, 142 S. Ct. at 665.

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.* OPM estimates that 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 President's mandate is also a matter of serious political controversy.

The significance of the President's vaccine mandate is also manifest by its "intru[sion] into an area that is the particular domain of state law," since "[o]ur Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States." *Alabama Assoc. of Realtors*, 141 S. Ct. at 2489, *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring) (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905)).

Because the mandate is a rule of vast economic and political significance, there should be clear statutory authority. But, as discussed, these sections do not contain that clear authority. Moreover, there is no "longstanding practice" of using these provisions for such purposes. *Missouri*, 142 S. Ct. at 662. Rather, as the lower court correctly decided, they are more akin to the lack of authority the Court found in the *NFIB* case.

Consider that, historically, executive orders citing sections 3301, 3302, and 7301 have been used to justify routine federal personnel matters only. *See,* "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); and "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,* "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. The lack of historical precedent, coupled with the breadth of authority that the Appellants have claimed, is a telling indication that the federal employee mandate extends beyond their lawful reach. *NFIB*, 142 S. Ct. at 666.

These are the types of routine, general updates that Congress has delegated the authority to make to the Executive Branch by enactment of these statutes. 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.

The Appellants also lack Article II authority to impose the mandate. 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*, 2022 WL 188329, at *6. If Article II gives the President all the power he needs here, then the Civil Service Reform Act, and the independent civil service, are effective nullities.

III. The Court Should Deny the Motion to Stay the Injunction.

This Court's rationale in granting the *BST Holdings* injunction 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 Appellants' 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) (Burger, C.J.).

If this Court stays the injunction, then the government will surely 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 Appellants have 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 deny the Appellants' motion to stay the injunction.

CONCLUSION

Granting the stay that the Appellants seek would embolden and further facilitate their unlawful conduct, leaving little to no remedy for federal employees harmed in the process. This Court should deny their request for a stay.

Respectfully submitted,

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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.

s/ Gene P. Hamilton
GENE P. HAMILTON

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d) and 5th Cir. R. 25.2.5, I hereby certify that on February 8, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

s/ Gene P. Hamilton
GENE P. HAMILTON