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 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 STAY PENDING APPEAL

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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: February 9, 2022

/s/ R. Trent McCotter
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

PUBLIC LAWS AND U.S. CODE

REGULATORY MATERIALS AND EXECUTIVE ORDERS

MISCELLANEOUS

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should deny the government's request to stay the District Court's injunction of the President's unilateral and unprecedented requirement that millions of federal employees be vaccinated or terminated ("Mandate").

First, the government cannot demonstrate that it will suffer irreparable harm absent a stay—a fatal flaw. The government leisurely delayed implementing the Mandate, and delayed again before seeking any relief from the injunction, which alone demonstrates a lack of irreparable harm. The government has boasted about the high percentage of federal employees who have been vaccinated and the minimal risk of disruption to operations even if unvaccinated employees were suspended or terminated. The District Court also held that the government could require masking, social distancing, and telework for unvaccinated employees. Given these findings, no calamity will unfold by keeping the injunction in place.

Second, the government cannot make the requisite "strong showing" on the merits—another fatal flaw. The President does not have unilateral power to mandate that all federal employees undergo an

unwanted medical procedure just to keep their jobs. This is not regulation of employees *qua* employees, rather it is a general health and safety measure issued without clear authority from Congress. The Mandate is therefore ultra vires, as the District Court concluded.

Nor can the government demonstrate the District Court abused its discretion in granting broad relief. This is the rare case where a clear, nationwide rule is needed to ensure full relief for all Plaintiffs, in particular Feds for Medical Freedom, a membership group with over 6,000 members. The government's poor record of compliance with its own promises not to proceed with employee discipline is further confirmation of the need for a clear, broad injunction.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND.

On September 9, 2021, President Biden issued Executive Order 14043, which states that "it is necessary to require COVID-19 vaccination for all Federal employees, subject to such exceptions as required by law." 86 Fed. Reg. 50,989. On September 13, 2021, the Safer Federal Workforce Task Force ("Task Force") issued a guidance document, recommending a deadline of November 22, 2021, for all federal employees to be fully

vaccinated. Task Force, *COVID-19 Workplace Safety: Agency Model Safety Principles* 2 (Sept. 13, 2021), ECF No. 3-2.[1]

In a subsequent "FAQ," the Task Force stated that "[e]mployees who are on maximum telework or working remotely are not excused from this requirement," nor are employees with natural antibodies. Task Force, *FAQ*, ECF No. 3-3. Employees who fail to comply "are in violation of a lawful order" and are subject to discipline, "up to and including termination or removal." *Id.*

Defendant agencies acknowledge they have adopted policies requiring vaccines pursuant to EO14043. ECF Nos. 21-1–21-17.

II. DISTRICT COURT PROCEEDINGS.

Lead Plaintiff Feds for Medical Freedom has over 6,000 registered members, including many federal employees with no pending Mandate exemption requests and who have already been subjected to or threatened with imminent discipline. *See, e.g.*, ECF Nos. 3-15–3-18, 3-20, 3-26–3-29, 3-37–3-38. Plaintiff Local 918 is also a membership group representing certain DHS employees. *See* ECF No. 1, ¶ 11.

[1] All "ECF" cites are to the District Court's docket.

Plaintiffs filed suit on December 21, 2021, and moved for a preliminary injunction the next day. On January 21, 2021, the District Court issued a 20-page order enjoining enforcement and implementation of EO14043. ECF No. 36 ("Order").

The government filed its appeal the same day but then waited a week before asking the District Court to stay its injunction, ECF No. 40, and another week before asking this Court for a stay ("Gov.Mot."), while insisting this case involves "an emergency sufficient to justify disruption of the normal appellate process." L.R.27.3.

LEGAL STANDARD

This Court considers "four factors in deciding whether to grant a stay pending appeal: '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether 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). "To succeed on the merits, the government must show that the district court abused its discretion by entering a preliminary injunction." *Id.* at 747. "A stay 'is not a matter

of right, even if irreparable injury might otherwise result to the appellant.'" *Id.*

ARGUMENT

I. THE GOVERNMENT CANNOT DEMONSTRATE IRREPARABLE HARM ABSENT A STAY.

The government's motion should be denied at the outset because it cannot show irreparable injury absent a stay.

First, although the government immediately filed a notice of appeal (indicating it had taken the unusual step of receiving pre-authorization from the Solicitor General), it then conspicuously delayed more than a week before seeking a stay from the District Court and then waited another week to seek relief in this Court.

By comparison, when a district court enjoined the federal Centers for Medicare and Medicaid Services vaccine mandate, the government sought stays from both the district court and this Court within *two days*, *see Louisiana v. Becerra*, No. 3:21-cv-03970 (W.D. La.), *appealed*, No. 21-30734 (5th Cir.), and did so within *three days* when the federal contractor vaccine mandate was enjoined nationwide, *see Georgia v. Biden*, No. 1:21-cv-00163 (S.D. Ga.), *appealed*, No. 21-14269 (11th Cir.). By contrast, the government's leisurely "chronology of events in this case belies

appellants' claim that resolution of the stay issue by this court is a matter of extreme urgency needing immediate resolution." *Chem. Weapons Working Grp. v. Dep't of Army*, 101 F.3d 1360, 1361 (10th Cir. 1996).

The government's claimed imminent harm is especially unconvincing given the lengthy delay in enforcing the Mandate since the President announced it on September 9, 2021. This delay included the winter holidays, Gov.Mot.4, 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 suggests the government's sense of urgency depends largely on public optics.

Second, the District Court found as a factual matter—reviewed only for clear error—that the "government has not shown that an injunction in this case will have any serious detrimental effect on its fight to stop COVID-19." Order18. This was based on statistics from the government itself, showing that "an overwhelming majority of the federal workforce

is already vaccinated," *id.*, a fact the White House itself has publicized, citing 98% compliance, *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/; Eric Katz, *Some Agencies Report 100% Vaccine Mandate Compliance As Others Begin Suspensions*, GOV. EXEC. (Jan. 11, 2022), https://www.govexec.com/workforce/2022/01/some-agencies-report-100-vaccine-mandate-compliance-others-begin-suspensions/360630/.

The government has touted that it could fire or suspend non-compliant employees without suffering operational concerns, undercutting any claim that COVID absenteeism from those employees 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.

The government's argument is especially weak given the District Court's finding that unvaccinated employees can still use "masking, social distancing, or part- or full-time remote work." Order19. The

government never explains why it will suffer imminent, irreparable harm despite those available options.

Under similar circumstances, the Eleventh Circuit refused to stay the nationwide injunction against the parallel vaccine mandate for federal contractors: "[W]e deny the motion because the government has not established one of the most critical factors—that it will be irreparably injured absent a stay." Order, *Georgia v. President of U.S.*, No. 21-14269 (11th Cir. Dec. 17, 2021) (Wilson, Grant & Luck, JJ.). This case is even easier given the government's delay and the smaller number of individuals at issue.

The government argues that "allowing the continued service" of employees who refused to comply with the illegal Mandate "will damage good order and discipline." Gov.Addend.27. But the government can claim no vested interest in an illegal policy. *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2490 (2021).

The government also complains about being unable to process exemption requests, Gov.Mot.16–17, but no irreparable harm results from the inability to exempt people from illegal requirements that are not even in effect. To the contrary, the government has used the exemption

process to coerce unvaccinated employees into accepting demotions. *See, e.g.*, Pls.Addend.6.

The government finally gripes that the District Court has "usurp[ed]" the President's power. Gov.Mot.2. But there is "a long history of judicial review of illegal executive action, tracing back to England." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015).

Without irreparable harm, the government's motion fails.

II. THE GOVERNMENT CANNOT MAKE A "STRONG SHOWING" THAT IT WILL PREVAIL ON THE MERITS.

The government also cannot make the required "strong showing" on the merits. *Texas*, 787 F.3d at 746.[2]

A. THE GOVERNMENT'S CSRA THEORY HAS BEEN UNIFORMLY REJECTED.

The government raises the same Civil Service Reform Act ("CSRA") theory that the District Court soundly rejected. Order5–6&n.3. For nearly 40 years, appellate courts—including this one—have uniformly

[2] The government boasts that other courts denied relief against EO14043, Gov.Mot.1n.1, but the government carefully elides that almost all of those cases had obvious flaws not present here (*e.g.*, plaintiffs sued the wrong defendants, sued over the wrong policies, or faced no imminent discipline). Order4 (noting Judge Brown himself had denied a PI against EO14043 in a different case).

held that pre-enforcement facial challenges to employment regulations (as in this case) can properly be filed in district court.

For example, after President Reagan issued an executive order requiring drug testing of certain employees, this Court authorized suits "against the individual agency plans implementing the [Executive] Order," with nary a word about CSRA preclusion. *NTEU v. Bush*, 891 F.2d 99, 102 (5th Cir. 1989). The Supreme Court considered the merits of such a suit—again without a word about CSRA preclusion—in *NTEU v. Von Raab*, 489 U.S. 656 (1989).

Similarly, in a case involving a "government-wide regulation promulgated by the Office of Personnel Management," this Court held that if a plaintiff "wishes to challenge the validity of this [federal employment] regulation, there are other means available," such as "challenging [the] regulations in district court." *AFGE v. FLRA*, 794 F.2d 1013, 1015–16 (5th Cir. 1986).

The D.C. Circuit has also long held in this context that there is "no legal basis" to argue that courts lack jurisdiction due to "the exclusive jurisdictional provisions of the Civil Service Reform Act." *NFFE v. Weinberger*, 818 F.2d 935, 939–40 (D.C. Cir. 1987). In fact, the D.C.

Circuit forewarned the government: "To discourage any future litigant who might have the effrontery to engage the District Court with this discredited theory of subject matter jurisdiction, we briefly review the law of this circuit for what we trust will be the last time," and the court held that constitutional and APA challenges had been properly brought. *Id.* at 940, 941 n.11.

The government's cases, by contrast, all involve challenges to *previous* discipline in *individualized* employment actions, not pre-enforcement challenges to entire regulations. *See Rollins v. Marsh*, 937 F.2d 134 (5th Cir. 1991) (two employees disciplined for publishing nude photos). The government is thus wrong to rely on *Elgin v. Treasury*, 567 U.S. 1 (2012), which likewise involved individualized "challenges [to] an adverse employment action," which the employees' suit sought "to reverse," *id.* at 5.

The government apparently believes *Elgin* silently overruled four decades of uniform precedent on facial pre-enforcement challenges, but as one court recently concluded in rejecting (yet again) the government's argument: "[T]he plaintiffs in *Elgin* were challenging a discrete employment decision rather than any [employment] rulemaking. As

such, *Elgin* is not relevant to the Court's present analysis." *FLEOA v. Cabaniss*, No. 1:19-cv-735, 2019 WL 5697168, at *6 (D.D.C. Nov. 4, 2019) (distinguishing the same cases the government peddles to this Court).

The government has apparently identified no appellate case that has *ever* applied CSRA preclusion to a facial pre-enforcement challenge—whereas cases allowing such claims are legion. The government cannot make a "strong showing" of success on an issue precluded by forty years of precedent.

B. THE DISTRICT COURT CORRECTLY HELD THAT THE MANDATE IS ULTRA VIRES.

The President lacks the power to unilaterally mandate medical procedures as a condition of federal employment. Order11–16.

The President Lacks Statutory Power to Issue the Mandate. The District Court correctly held that none of the statutory sources invoked by the government provide the President with the power to issue the Mandate. Order11–15. In its PI briefing below, the government barely even defended this point, spending only a single page on the matter, and thus many of its arguments to this Court are new and should be deemed forfeited. Gov.Opp.27, ECF No. 21.

The District Court correctly held that the first two invoked statutes—5 U.S.C. §§ 3301 and 3302—are narrowly focused, granting the President only certain limited powers not relevant here. Order11–13.

In passing, the government now claims that even though § 3301 expressly applies only to "the admission of individuals into the civil service," it actually applies to all *existing* employees, too—an argument so implausible that the government wisely omitted it in its opposition below, thus forfeiting the argument as well. Gov.Mot.14.

The government also tries to portray the District Court as confused because it cited *contractor* mandate decisions. Gov.Mot.14. The language in § 3301 ("promote the efficiency of [the civil] service") parallels the language in 40 U.S.C. § 101 ("an economical and efficient system for" procurement), which is the statute the government claims authorizes the contractor mandate. The District Court aptly cited cases rejecting the claim that vaccines can be mandated on this "efficiency" basis. Order12.

The government next argues that "[b]y *mandating* that the President address particular matters under [§] 3302, Congress did not impliedly *prohibit* him from addressing others," Gov.Mot.14, but this argument was not raised below and is forfeited. It is also meritless

because the President's authority to "prescribe rules" must be interpreted in context, and the District Court properly concluded after reviewing the entirety of § 3302 that "not even a generous reading of the text provides authority for a vaccine mandate." Order12; *see Adams v. Woods*, 6 U.S. (2 Cranch) 336, 341 (1805) ("[G]eneral expressions may be restrained by subsequent particular words, which shew that in the intention of the legislature, those general expressions are used in a particular sense[.]"). Both §§ 3301 and 3302 also appear in a subchapter of the U.S. Code entitled "Examination, Certification, and Appointment," further undermining any argument that vaccine mandates are within their scope.

The crux of the District Court's decision turned on whether requiring that all employees are vaccinated is "conduct" for purposes of the third invoked statute—5 U.S.C. § 7301—which states in its entirety: "The President may prescribe regulations for the conduct of employees in the executive branch." But being vaccinated is not "conduct" in its commonly understood sense. An irreversible measure results in a status, not conduct. That alone resolves the matter.

The District Court correctly held that *even assuming* the Mandate regulates conduct, EO14043 is still ultra vires because § 7301 is best read as authorizing regulation of *workplace* conduct, and "[a]ny broader reading would allow the President to prescribe, or proscribe, certain private behavior by civilian federal workers outside the context of their employment." Order13. The government claims there is no textual limitation to employment conduct, Gov.Mot12, but the government forfeited that argument by not raising it in its opposition below. Anyway, the government is wrong. Section 7301 expressly references conduct for those "in the executive branch," indicating a limitation to conduct in employees' executive branch capacity.

It further beggars belief that the simple word "conduct" authorizes widespread vaccine mandates, especially given that OSHA lacks such power despite an enabling statute authorizing the agency to ensure "every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. § 651; *NFIB v. Dep't of Labor*, 142 S. Ct. 661, 665–66 (2022). If a statute directly implicating employee health and safety doesn't authorize a vaccine mandate, then authority over employee "conduct" clearly doesn't, either.

Moreover, implementation of §§ 3301, 3302, and 7301 has historically been limited to regulating workplace conduct, even when the targeted activity might occur outside the workplace. *See, e.g.*, 62 Fed. Reg. 43,451 (Aug. 9, 1997) (regulating "exposure to tobacco smoke *in the Federal workplace*"); 77 Fed. Reg. 24,339 (Apr. 18, 2012) ("prevent[ing] domestic violence *within the workplace*").

The government's invocation of President Reagan's executive order prohibiting drug use is especially inapt given that (1) it did not involve a permanent, irreversible status like being vaccinated; (2) there is only brief mention about using drugs outside the workplace; (3) it narrowly applied only to those employees with "sensitive positions," not to every federal employee; and (4) most critically, drug use was *already* illegal, and the CSRA provided that employees could be immediately disciplined when there was "reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed," 5 U.S.C. § 7513(b)(1).

The additional executive orders cited by the government—which were not raised in its PI opposition—involved the regulation of workplace conduct, required employees to follow preexisting laws, involved

statutory authority in addition to § 7301, or otherwise pre-dated the CSRA. None involved acts with permanent and irreversible consequences, let alone medical procedures. It is telling that these fragments of easily distinguishable executive orders are the best precedents the government can muster.

The government pivots by claiming vaccine mandates do regulate workplace conduct, Gov.Mot.13, but as the District Court ruled, that theory is foreclosed by the Supreme Court's recent OSHA decision, which held that broad employee vaccine mandates are "public health measure[s]" "untethered, in any causal sense, from the workplace," and thus are not "*workplace* safety standards," *NFIB*, 142 S. Ct. at 665, 666 (refusing to let OSHA "regulate the hazards of daily life" as occupational hazards "simply because most Americans have jobs and face those same risks while on the clock"). When a general employment requirement has permanent and irreversible consequences outside the workplace, it can no longer be considered the regulation of "workplace conduct." Rather, it is a general health and safety measure.

Even if § 7301 were ambiguous about the President's power to mandate medical procedures, several clear-statement doctrines confirm

that regulating "conduct" does *not* include the power to issue a generally applicable vaccine mandate. To begin, the Supreme Court has already recognized that the major-questions doctrine applies to widespread federal vaccine mandates and would require a clear statement for such a dramatic policy. *See NFIB*, 142 S. Ct. at 665.

This Court has also made clear that "to mandate that a person receive a vaccine or undergo testing falls squarely within the States' police power," which implicates the federalism clear-statement canon. *BST Holdings, LLC v. OSHA*, 17 F.4th 604, 617 (5th Cir. 2021). This canon applies despite employees' federal nexus. By imposing a generally applicable vaccine mandate on federal employees, which carries permanent and irreversible non-workplace consequences, the government is not regulating federal employees *qua* employees but rather is imposing a general public-health measure. As the Sixth Circuit held in the context of the contractor mandate, it "certainly" implicates the federalism clear-statement canon "when the federal government seeks to usurp [the States'] roles by doing something that *it* has no traditional prerogative to do—deploy [regulations] to mandate an

irreversible medical procedure." *Kentucky v. Biden*, ___ F.4th ___, 2022 WL 43178, at *16 (6th Cir. Jan. 5, 2022).

A third clear-statement doctrine states that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power," Congress must provide "a clear indication that [it] intended that result." *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001). This Court has held that widespread vaccine mandates are (at the very least) at the outer limits of Congress's power. *BST*, 17 F.4th at 617.

Consistent with these clear-statement rules, when Congress authorizes mandatory vaccinations, it has done so expressly, including in areas where the President could claim inherent Article II power. *See* 8 U.S.C. § 1182(a)(1)(A)(ii) (mandating vaccines in immigration context). But Congress did not do so here.

The President Lacks Inherent Article II Power to Issue the Mandate. The District Court also correctly held that the President lacks inherent Article II authority to issue the Mandate. Order15–16; *cf. BST*, 17 F.4th at 618 ("Nor can the Article II executive breathe new power into OSHA's [statutory] authority.").

Conspicuously missing from the government's brief is any example of any President in the Nation's history who invoked inherent Article II authority to impose medical procedures of any type on civilian employees—let alone *every* employee. Chief Judge Sutton, joined by seven of his colleagues, provided an exhaustive historical review demonstrating that no branch of the federal government has ever asserted such power. *See In re MCP No. 165*, 20 F.4th 264, 289 (6th Cir. 2021) (Sutton, C.J., joined by Kethledge, Thapar, Bush, Larsen, Nalbandian, Readler & Murphy, JJ., dissenting). "The dearth of analogous historical examples is strong evidence that [the provision] does not contain such a power," especially given that "the threat of absenteeism is hardly unique to COVID-19." *Kentucky*, ___ F.4th ___, 2022 WL 43178, at *15.

The government argues that refusal by line-level employees to confirm their vaccinated status interferes with the President's "executive power," but the District Court made short work of that theory. Order15–16. Vaccination status in no way interferes with the President's ability to direct how the law should be executed. The government's generic citation to *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), is inapplicable because

Plaintiffs are line-level employees, not "Officers of the United States" who exercise significant authority and are personally accountable to the President. The distinction between officers and employees dates back at least to the Supreme Court's seminal decision in *Myers v. United States*, 272 U.S. 52 (1926), which held that while the President had constitutional power to "remov[e] executive officers of the United States whom he has appointed by and with the advice and consent of the Senate," *id.* at 106, by contrast "the merit system rests with Congress," *id.* at 174. Indeed, the government's theory would render the CSRA itself unconstitutional (ironic given the government's reliance on alleged CSRA preclusion).

More, the government has never disputed that its interpretation would authorize the President to order every federal employee to undergo irreversible surgeries (*e.g.*, LASIK eye surgery), forced ingestion of medications (*e.g.*, Adderall), or almost anything else conceivably tied to absenteeism or performance, without any "logical stopping point," amounting to "a *de facto* police power [of] the President." *Kentucky*, ___ F.4th ___, 2022 WL 43178, at *15; Order16.

C. THE MANDATE VIOLATES THE APA.

The APA provides an alternative basis for denying the government's motion. Federal administrative agencies "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). This review "has serious bite." *Wages & White Lion Invs., L.L.C. v. FDA*, 16 F.4th 1130, 1136 (5th Cir. 2021).

The individual agency vaccine mandates (implementing and expanding on EO14043) provide almost no reasoning, only diktats. *See* ECF No. 3-5. The District Court held that it "need not reach th[e] question" of whether these agency implementations are arbitrary and capricious, although it noted that "additional vaccination requirements by agencies apart from" EO14043 would likely be subject to APA review. Order17. There has been far more than "ministerial" implementation of EO14043, which told agencies to "implement" their own "programs," ECF No. 3-1, and Defendant Agencies have chosen to follow Task Force requirements setting deadlines and disciplinary procedures. Pls.Reply20n.9, ECF No. 23. That renders Defendant Agencies'

implementations of the Mandate subject to APA review, which they fail due to a lack of reasoned decisionmaking. *See id.*; *Texas v. Becerra*, No. 2:21-CV-229, ___ F. Supp. 3d ___, 2021 WL 5964687, at *13 (N.D. Tex. Dec. 16, 2021) (invalidating similar vaccine mandate on APA grounds).

D. THE GOVERNMENT CANNOT SHOW THE DISTRICT COURT ABUSED ITS DISCRETION IN FINDING THAT PLAINTIFFS FACE IMMINENT, IRREPARABLE HARM.

The government barely disputes that Plaintiffs demonstrated imminent, irreparable harm—a finding reviewed only for abuse of discretion. Order9–10. This Court has held, and the District Court rightly concluded, that the unusual nature of putting employees to the choice of "their job(s) and their jab(s)" is irreparable. Order10 (citing *BST*, 17 F.4th at 618); *see* Pls.Br.26, ECF No. 3 ("Anyone forced to get vaccinated pursuant to an invalid regulation will never be made whole with cash damages." (citing *BST*, 17 F.4th at 618)). This case is even easier because, unlike the private employees in *BST*, federal employees have no option to be tested in lieu of vaccination.

The District Court followed this Court's decision in *Burgess v. FDIC*, 871 F.3d 297 (5th Cir. 2017), which found irreparable harm when the federal government seeks to bar someone "from significant

employment opportunities in their chosen profession," *id.* at 304; Order10. Following this Court's precedent is not an abuse of discretion, especially given Plaintiffs' unrebutted expert affidavit submitted below, explaining that Plaintiffs face irreparable reputational harm because the President has labeled unvaccinated individuals as lawbreakers and selfish "kill[ers]." Pls.Addend.3–4.

The government also ignores the irreparable injuries of Plaintiffs like Joshua Roberts, who—if he loses his DHS job—will be unlikely to qualify to adopt two foster children he and his wife have raised since the children were only a few weeks old. Pls.Addend.7.

E. THE GOVERNMENT CANNOT SHOW THE DISTRICT COURT ABUSED ITS DISCRETION IN FINDING THAT BROAD RELIEF IS APPROPRIATE.

The government cannot show the District Court abused its discretion by granting nationwide relief. *Texas v. United States*, 809 F.3d 134, 187 (5th Cir. 2015). The District Court noted that it "always will be terribly reluctant to go nationwide on injunctive relief," ECF No. 31 at 29, but it was ultimately persuaded by the "unique facts" of this case, Order20.

First, the Task Force has announced that "consistency across government in enforcement of this government-wide policy is desired." ECF No. 3-3 at 15. There is no abuse of discretion in holding the government to its own desired standard.

Second, lead Plaintiff Feds for Medical Freedom has over 6,000 registered members "spread across every state and in nearly every federal agency." Order20. The government refers to these public servants as "so-called 'members,'" Gov.Mot.19, but the government never objected to their *bona fide* membership status in the PI briefing and has thus forfeited any challenge. Anyway, Feds for Medical Freedom has standard indicia of membership like leaders who are also members, and nearly 1,000 members made significant financial contributions to fund this litigation. Pls.Addend.1.

Given the vast size of the membership body and its constantly changing characteristics—with employees moving between states or agencies, and having exemption requests denied or facing discipline on a rolling basis—there was no narrower scope of relief that could be determined *ex ante* that would also guarantee full relief to *all* members.

See Califano v. Yamasaki, 442 U.S. 682, 702 (1979) (injunction must be as broad as "necessary to provide complete relief to the plaintiffs").

By finding that tailored relief is not "practical in this case," Order20, the District Court indicated there are so many affected individuals that, without a nationwide injunction, Defendants would undoubtedly impose harm on many people nonetheless entitled to relief.

Before this Court, the government insists it could "easily" track members of Feds for Medical Freedom, Gov.Mot.19, but the government has a poor record. During the pendency of this litigation, the government *repeatedly* issued discipline to members of Feds for Medical Freedom despite their pending exemption requests, directly contrary to the government's own guidance. *See* Pls.Reply5, ECF No. 23. A different Plaintiff was issued a notice of termination, which his agency withdrew after this suit was filed—but the agency later insisted the withdrawal was invalid and the employee would be fired, only to change its mind *again* when undersigned counsel intervened. ECF No. 21-18.

Moreover, the government's suggestion that employees identify themselves would make them prime targets for retaliation, thereby chilling them from exercising their rights. The President has publicly

excoriated anyone resisting vaccination, attempted to foment public resentment against them, and vowed to "get them out of the way." Pls.Addend.4.

Similar concerns about ensuring full relief motivated the Southern District of Georgia to issue a nationwide injunction against the contractor mandate, which the Eleventh Circuit refused to narrow on appeal. *Georgia v. Biden*, No. 1:21-CV-163, ___ F. Supp. 3d ___, 2021 WL 5779939, at *12 (S.D. Ga. Dec. 7, 2021), *motion to stay denied*, Order, *Georgia*, No. 21-14269 (11th Cir. Dec. 17, 2021).

Third, broad relief complies with *Louisiana v. Becerra*, 20 F.4th 260 (5th Cir. 2021). The most salient other case challenging the Mandate (*Rodden*) is likewise pending before Judge Brown, *see* Order4, and thus does not present concerns that different courts will "inconsistently rul[e]." 20 F.4th at 263. And *Becerra* endorsed broad injunctions where the "circumstances" of the case call for it, such as when there is "a concern that 'a geographically-limited injunction would be ineffective.'" *Id.* That concern is present here and is magnified by the many agencies and employees involved.

Fourth, the government's request to resume "processing" exemption requests is especially insidious. Gov.Mot.21. The government claims that employees subject to that process "would not be injured." *Id.* But consider George O'Sullivan, a Purple Heart recipient and 100% service-disabled veteran, who was pressured into accepting the religious "accommodation" of a demotion with a $60,000 pay cut. Pls.Addend.6.

The government itself should prefer the District Court's clear injunction rather than one that will subject executive officials to the constant risk of contempt.[3]

III. THE PUBLIC INTEREST AND BALANCE OF HARMS FAVOR PLAINTIFFS.

The public interest is "served by maintaining our constitutional structure and maintaining the liberty of individuals to make intensely personal decisions according to their own convictions." *BST*, 17 F.4th at 618. The District Court also correctly held—again, reviewable only for clear error—that the public will not be served "by terminating

[3] The government also says that one Plaintiff—out of 6,000 members—is named in another case challenging EO14043, Gov.Mot.21, but that argument is forfeited because it was not raised in the government's PI opposition. Anyway, there is no preclusion because no judgment has issued in the other case. *See FDIC v. Nelson*, 19 F.3d 15 (5th Cir. 1994) (memorandum).

unvaccinated workers who provide vital services to the nation." Order18. As discussed above, the government will suffer no harm from the injunction, whereas Plaintiffs would be subject to constant threat of and actual suspensions and terminations, irreparable reputational harms, pressure to be vaccinated unwillingly, and bad-faith accommodation "offers."

CONCLUSION

The Court should deny the government's motion.

February 9, 2022

Respectfully submitted,

/s/ R. Trent McCotter
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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 5,173 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.

February 9, 2022

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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.

February 9, 2022

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

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ADDENDUM

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TABLE OF CONTENTS

AFFIDAVIT OF MARCUS THORNTON

1. My name is Marcus Thornton. I am over the age of 18 and am competent to make this declaration. The facts set forth in this declaration are based on my personal knowledge.

2. I am the President of Feds 4 Med Freedom ("F4MF"), a non-profit registered in Nevada.

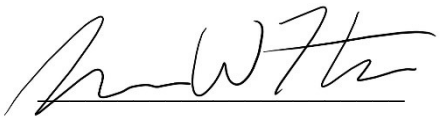
3. F4MF has over 6000 members, located in all 50 states and at embassies, consulates, and military bases around the world. They work for nearly every federal agency in existence, and for dozens of different federal contractors. Some members are prohibited by law or regulation from suing under their own names due to the sensitive positions they hold.

4. Documentation confirms that over 1500 of those members have contributed financially to F4MF, including over 925 who have contributed financially specifically to the lawsuit filed in the Southern District of Texas (averaging over $300 per person).

5. All leadership roles in F4MF are filled by members of F4MF.

6. I declare under penalty of perjury that the foregoing is true and correct.

Executed on: February 09, 2022



AFFIDAVIT OF SPENCER CHRETIEN

1. My name is Spencer Chretien. I am over the age of 18 and am competent to make this declaration. The facts set forth in this declaration are based on my personal knowledge and are submitted solely in my own capacity.

2. I have extensive professional experience in the staffing of federal agencies, having served as a Special Assistant to the President and Associate Director of Presidential Personnel from 2020 to 2021 during the COVID pandemic, and having identified qualified candidates for positions at all levels across the federal government.

3. In January 2021, President Biden established the Safer Federal Workforce Task Force ("Task Force"). This Task Force is "led by the White House COVID-19 Response Team, the General Services Administration (GSA), and the Office of Personnel Management (OPM)."[1] The Task Force was created to "give the heads of federal agencies ongoing guidance to keep their employees safe and their agencies operating during the COVID-19 pandemic."[2]

4. In September 2021, President Biden issued an executive order requiring each federal agency to adopt and implement, "to the extent consistent with applicable law, a program to require COVID-19 vaccination for all of its Federal employees, with exceptions only as required by law."[3] The President directed the Task Force to issue guidance "on agency implementation of this requirement for all agencies covered by this order."[4]

5. Shortly thereafter, the Task Force issued a guidance document recommending a deadline of November 22, 2021, for all federal employees to be fully vaccinated, meaning 14 days after the last required shot.[5] Federal employees who fail to comply with the requirement to be fully vaccinated by November 22, 2021, "are in violation of a lawful

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[1] Safer Federal Workforce, Overview, https://www.saferfederalworkforce.gov/overview/.
[2] *Id.*
[3] Executive Order on Requiring Coronavirus Disease 2019 Vaccination for Federal Employees (Sept. 9, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/09/executive-order-on-requiring-coronavirus-disease-2019-vaccination-for-federal-employees/.
[4] *Id.*
[5] Safer Federal Workforce Task Force, *COVID-19 Workplace Safety: Agency Model Safety Principles* (Sept. 13, 2021), https://www.saferfederalworkforce.gov/downloads/updates%20to%20model%20safety%20principles%209.13.21.pdf.

order" and are subject to discipline, "up to and including termination or removal."[6]

6. Also in September 2021, President Biden issued an executive order requiring the Task Force to issue guidance for federal contractors and then for the OMB Director to determine whether that guidance would improve economy and efficiency in government contracting.[7]

7. Shortly thereafter, the Task Force issued guidance requiring that nearly all federal contractors and subcontractors be vaccinated, via an extraordinarily broad definition of "covered contractors."[8] The OMB Director soon concluded summarily that this guidance would improve government contracting,[9] and the FAR Council issued a directive that agencies must include in new contracts, requiring the contractor to follow the Task Force guidance as it changes over time.[10]

8. As a result of these combined actions, nearly all employees of federal agencies and federal contractors must be vaccinated, unless they are entitled to a religious or medical accommodation under some other federal law.

9. The President has sought to target and label federal employees who do not choose to receive the COVID-19 vaccine as pariahs who cannot and should not be employed by the federal government, nor hired anywhere else. They will be deemed lawbreakers ("violat[ors] of a lawful order"), and the President himself has called them "kill[ers]."[11]

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[6] Safer Federal Workforce Task Force, *FAQ*, https://www.saferfederalworkforce.gov/faq/vaccinations/.
[7] Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors (Sept. 9, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/09/executive-order-on-ensuring-adequate-covid-safety-protocols-for-federal-contractors/.
[8] Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors (Sept. 24, 2021), https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf.
[9] 86 Fed. Reg. 53,691–92 (Sept. 28, 2021).
[10] *Memorandum from FAR Council to Chief Acquisition Officers et al. re: Issuance of Agency Deviations to Implement Executive Order 14042* (Sept. 30, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/09/FAR-Council-Guidance-on-Agency-Issuance-of-Deviations-to-Implement-EO-14042.pdf.
[11] Transcript: CNN Presidential Town Hall with President Joe Biden, CNN (Oct. 21, 2021), https://transcripts.cnn.com/show/se/date/2021-10-21/segment/01.

10. He has also condemned unvaccinated people for hindering economic growth, costing other people jobs, and putting unnecessary strain on the healthcare system.[12]

11. In particular, during his speech announcing the various mandates, he expressed his "anger at those who haven't gotten vaccinated," whom he accused of "overcrowd[ing] our hospitals, … overrunning the emergency rooms and intensive care units, leaving no room for someone with a heart attack, or pancreitis [sic], or cancer."[13] He said those who oppose vaccinations "ha[ve] cost us all," they "stand in the way of protecting the large majority of Americans who have done their part and want to get back to life as normal," and they are "undermining you and … lifesaving actions"—as a result, he would "use my power as President to get them out of the way."[14] He said the unvaccinated were so dangerous that he would have "to protect vaccinated workers from unvaccinated co-workers."[15]

12. The President's characterizations of these employees as selfish killers who have destroyed the country and economy has caused significant reputational harm equivalent to pernicious targeting and blackballing. Disciplining or terminating a worker's employment on the stated basis that he or she is intentionally a health hazard—a "kill[er]"—to fellow employees makes him or her a pariah. The impact extends far beyond simply denying someone a particular job or wages; it will follow them throughout their career, imposing reputational harms that cannot be undone with simple backpay or even reinstatement. The President's targeting of these workers makes this entirely unlike routine federal employment actions where an individual faces discipline or termination for any number of reasons. In those cases, the President of the United States has not publicly and repeatedly called out the employees as selfish "kill[ers]."

13. Anyone who is disciplined or terminated under these conditions would be hard pressed to regain their unblemished reputation or find employment in their chosen fields.

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[12] Robert Towey, *Biden says unvaccinated Americans are 'costing all of us' as he presses Covid vaccine mandates*, CNBC (Sept. 24, 2021), https://www.cnbc.com/2021/09/24/biden-says-unvaccinated-americans-are-costing-all-of-us-as-he-presses-covid-vaccine-mandates.html.
[13] Joseph Biden, *Remarks by President Biden on Fighting the Covid-19 Pandemic* (Sept. 9, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/.
[14] *Id.*
[15] *Id.*

14. And, moreover, barring unvaccinated workers from almost any type of civil service or contracting position deprives them not just of one job, but of nearly every possible employment opportunity in their chosen profession. The government has sought to cover the waterfront to make it impossible for unvaccinated workers who are terminated to find any other job within their chosen field.

15. A true and correct copy of my curriculum vitae, detailing my educational and professional experience, is attached to this declaration.

16. I declare under penalty of perjury that the foregoing is true and correct.

Executed on: December 21, 2021

AFFIDAVIT OF GEORGE O'SULLIVAN

1. My name is George O'Sullivan. I am over the age of 18 and am competent to make this declaration. The facts set forth in this declaration are based on my personal knowledge.

2. I am a member of Feds for Medical Freedom.

3. I am a civilian employee with the federal government. I work for the Central Intelligence Agency. I am also a 100% disabled veteran and Purple Heart recipient.

4. I was a Special Agent for the Director's Protective Staff. In 2021, I submitted a request for a religious exemption from the CIA's vaccine mandate. In December 2021, the Religious Accommodation Committee (RAC) said my religious beliefs were strongly held and sincere.

5. But the RAC's only offered accommodations were for me to use my leave time, enter LWOP status, or accept a "reassignment" to a position one grade lower (from GS-14 to GS-13) where I am almost guaranteed not to be promoted and will take a $60,000 pay cut because overtime is not offered.

6. RAC followed up with a letter indicating that if I declined this offer, I would "be considered non-compliant with Executive Order 140343 [*sic*] and will be contacted about next steps in the disciplinary process."

7. I felt that I had no choice but to accept the demotion and pay cut because I have to provide for my family.

8. I declare under penalty of perjury that the foregoing is true and correct.

Executed on: February 1, 2022

George G O'Sullivan

AFFIDAVIT OF JOSHUA ROBERTS

1. My name is Joshua Roberts. I am over the age of 18 and am competent to make this declaration. The facts set forth in this declaration are based on my personal knowledge.

2. I reside in Hidalgo County, Texas. I am a member of Feds for Medical Freedom.

3. I am a civilian employee with the federal government. I work for the Department of Homeland Security.

4. My agency has issued a vaccine mandate requiring me to be fully vaccinated by November 22, 2021, or else be subjected to increasing discipline, up to termination. I have not been vaccinated and do not plan to get vaccinated.

5. I have not sought any exemption from my agency's vaccine mandate, nor do I plan to do so.

6. I am currently an Air Interdiction Agent for Customs and Border Protection. I provide air support as a pilot in command of the AS350, and UH-60 helicopters. We provide this support for all the federal and local governments within our area of responsibility. Primarily we are charged with interdicting illegal border crossers and contraband entering the United States. Because of our unique capabilities, we also provide such things as search and rescue, aerial observation (for fire support for example), communication relay, and etc.

7. I am the primary provider in my household. My wife is currently not working so that we are able to serve as foster parents for two infants we've had since they were a few weeks old. We hope to be able to adopt them, but we worry that if I lose my job, we will not qualify to adopt them.

8. I retired last year from the Alaska Air National Guard. I retired at the rank of Major and served primarily as a Personnel Recovery Pilot.

9. I declare under penalty of perjury that the foregoing is true and correct.

Executed on: December 10, 2021

AFFIDAVIT OF THOMAS DAVID GREEN

1. My name is Thomas David Green. I am over the age of 18 and am competent to make this declaration. The facts set forth in this declaration are based on my personal knowledge.

2. I reside in Pima County, Arizona. I am a member of Feds for Medical Freedom.

3. I am a civilian employee with the federal government. I work for the Department of Homeland Security.

4. My agency has issued a vaccine mandate requiring me to be fully vaccinated by November 22, 2021, or else be subjected to increasing discipline, up to termination.

5. I have not been vaccinated and do not plan to get vaccinated, but I supported my mother and grandmother getting vaccinated.

6. I previously served as a Sergeant in the U.S. Marine Corps and as a Sergeant in the U.S. Army during Operation Iraqi Freedom III. I have had an exemplary career with no discipline.

7. I am a single father and sole financial provider of four minor children.

8. I declare under penalty of perjury that the foregoing is true and correct.

"I can only pray my signature that was penned to paper, and all that it signifies, will contain the integrity and strength of our founding fathers."-

Executed on: December 10th, 2021

Thomas D. Green

AFFIDAVIT OF BRIAN FOUCHE

1. My name is Brian Fouche. I am over the age of 18 and am competent to make this declaration. The facts set forth in this declaration are based on my personal knowledge.

2. I am a member of Feds for Medical Freedom.

3. I am a civilian employee with the federal government. I work for the U.S. Department of Commerce, with the Census Bureau.

4. On January 19, 2022, I received the attached notice of a 14-day unpaid suspension, which will begin January 30, 2022. The letter says that my decision not to reveal my vaccination status is "misconduct [that] is very serious and will not be tolerated," and it "impairs [my supervisor's] confidence in [my] ability to perform [my] position," despite my 16 years of service with satisfactory performance ratings and a lack of discipline.

5. I declare under penalty of perjury that the foregoing is true and correct.

Executed on: January 20, 2022

UNITED STATES DEPARTMENT OF COMMERCE
U.S. Census Bureau
National Processing Center
Jeffersonville, IN 47132-0001

January 19, 2022

Brian Fouche
Survey Statistician
Logistics and Command Center
National Processing Center

Dear Mr. Fouche:

This is to inform you of my decision regarding the November 23, 2021, letter proposing a fourteen (14) calendar day suspension from your position as a Survey Statistician, GS-1530-12, with the U.S. Census Bureau (Census Bureau), Department of Commerce, for your *Failure to Comply with Executive Order 14043 Requiring Coronavirus Disease 19 Vaccination for Federal Employees*.

You were afforded the opportunity to reply orally, in writing, or both, to the specific reasons for proposing your suspension, and to submit affidavits or other documentary evidence in support of your reply. On November 23, 2021, you provided a response, in which you stated, "Yes, I have refused to provide my vaccination status. My vaccination status has nothing to do with my work or my co-workers. Vaccination is a personal health decision and it is no ones business to know if I am or am not vaccinated. Additionally, I am 100% teleworking as the office I work at in Suitland, MD is closed for renovations until at least the end of 2022. This has nothing to do with my work. I have worked at Census for over 16 years with no issues and have been a stand up employee. I will not tolerate this treatment which is akin to bullying and discrimination and urge you to stand up as well. All I can do to stand up is not go along with this nonsense by declining to provide my vaccination status. Stop trying to divide people, this is ridiculous."

I have given full and careful consideration to the charge and specification for your proposed suspension as well as your response. On September 9, 2021, President Joseph R. Biden Jr. signed Executive Order (EO) 14043. Requiring Coronavirus Disease 2019 Vaccination for Federal employees. The EO specifically directed that all Federal employees must be fully vaccinated against COVID-19 no later than November 22, 2021, subject only to such exceptions as required by law. On September 14, 2021, Department of Commerce (DOC) Deputy Secretary Don Graves sent an email communication to all DOC employees informing them that failure to comply with EO 14043 would result in an adverse action, up to and including dismissal from Federal service. In this directive, and frequently since that date, the Census Bureau has issued follow-up information and reminders providing detailed instructions on how to provide proof of vaccination, providing guidance and educational resources regarding the available vaccines and providing detailed information regarding the procedures for requesting a reasonable accommodation for medical or religious reasons.

On November 10, 2021, you were issued a letter of counseling and education again reminding you of the vaccination requirement and instructing you to take steps to comply with the mandate immediately upon receipt of the letter. Also, on January 18, 2022, I verified you still have not attested to or uploaded proof you have either been fully vaccinated or had begun the vaccination process. Based on my thorough review, I find that the charge and specification listed in the proposed suspension are fully supported by a preponderance of the evidence and warrant disciplinary action to promote the efficiency of the Federal service.

Determination of Penalty:

Having sustained the Reason contained in your proposed suspension, I must determine the appropriate penalty. In doing so, I have carefully considered relevant factors such as your years of service, performance level, and lack of disciplinary history and find that disciplinary action is appropriate considering all the relevant circumstances.

Your misconduct is very serious and will not be tolerated. Your misconduct in failing to comply with EO 14043 Requiring Coronavirus Disease 2019 Vaccination for Federal Employees concerns me and impairs my confidence in your ability to perform your position. I considered your more than 16 years of Federal service. You have received at least satisfactory performance ratings over recent years. While I considered your past work record, length of service and lack of prior disciplinary history as mitigating factors, I find that they do not warrant mitigation of the proposed fourteen (14) day suspension given the other relevant factors. I also find you were on notice of expectation to become fully vaccinated and provided multiple opportunities to timely submit documentation of your compliance. You must be held accountable for your failure to comply with EO 14043. I find that the 14-day suspension is appropriate considering all the relevant circumstances.

Accordingly, you will be suspended without pay for fourteen (14) calendar days effective January 30, 2022 through February 12, 2022. You will return to duty on your next scheduled workday.

If before or during your suspension period, you provide appropriate documentation showing you have received the single dose Janssen (i.e., Johnson & Johnson) vaccine or have received both doses in the two dose Pfizer or Moderna vaccines to become fully vaccinated your suspension will end immediately. If you provide appropriate documentation showing you received the first dose in the two dose Pfizer or Moderna vaccine, you will be returned to a paid status and the remainder of the suspension will be held in abeyance for five (5) weeks to allow for you to receive your second dose. Thereafter, if you fail to provide appropriate documentation that you received the second dose, you will serve the remainder of the suspension.

You are hereby warned that any further misconduct, including continued failure to comply with the requirement to be fully vaccinated, will not be tolerated and may result in more severe discipline, up to and including your removal from the Federal service. I am taking this action pursuant to Title 5, Code of Federal Regulations, Part 752, to promote the efficiency of the Service.

Employee Rights Information:

You have the right to grieve this action under the administrative grievance procedure. If you elect to file a grievance under the administrative grievance procedure, you must file a written grievance within fifteen (15) calendar days of the effective date shown above in accordance with Departmental Administrative Order (DAO) 202-771.

You should send this grievance to:

U.S. Census Bureau
ATTN: Md Mahabub R. Rahim
Chief, Human Resources Branch (HRB)
National Processing Center
1201 East Tenth Street, Building 64 G
Jeffersonville, IN 47132

For additional information regarding the grievance procedure and process, please contact the Employee and Labor Relations Section (ELRS), Human Resources Branch (HRB), on (812) 218-3321.

If you believe this action was based on discrimination on the basis of race, color, religion, sex, (including gender identity, sexual orientation, and pregnancy), national origin, age (at least 40 years of age), disability, genetic information, or retaliation, you may raise such allegation through either the administrative grievance procedure identified above or through filing an Equal Employment Opportunity (EEO) complaint under the EEO complaint process, as set forth in Title 29, Code of Federal Regulations, Part 1614, but you may not do both. Selection of the negotiated grievance procedure in no manner prejudices the right of an aggrieved employee to appeal the final grievance decision on the matter of discrimination to the Equal Employment Opportunity Commission. To initiate an EEO complaint, you must bring the matter to the attention of an EEO counselor within forty-five (45) calendar days of the date of this action. For information concerning the filing of an EEO complaint, you should contact the EEO Office on (301) 763-2853 or toll free (800) 872-6096.

You are sworn for life to not disclose any information contained in the schedules, lists, or statements obtained or prepared by the Census Bureau to any person or persons either during or after employment. If your representative is not a sworn Census Bureau employee, please remember that Title 13 of the United States Code, Section 9, prohibits the disclosure of any identifying information about a respondent, including names, addresses, and other survey data to that representative. Title 13 information cannot be disclosed to anyone who is not a Census Bureau employee, or who does not have special sworn status, including any representative, the MSPB and the EEOC. You can provide documentation to the MSPB, EEOC, and/or your representative, but you must delete any identifying information such as names and addresses from the document. Moreover, violators of this provision are subject to criminal prosecution under Section 214 of Title 13. Under federal law, the penalty for unlawful disclosure is a fine of not more than $250, 000 or imprisonment for not more than five (5) years, or both. Be mindful of similar requirements for Title 26, and Personally Identifiable Information (PII).

The Employee Assistance Program (EAP) is an available confidential service to assist Census Bureau employees in resolving personal or work-related problems. If you would like to speak with the EAP Counselor, you may schedule an appointment by calling the EAP office, on (812) 218-2030 or toll free (800) 211-6015.

If you have any questions about the contents of this decision notice, or your rights in connection with it, you may contact Annette Kendle, Chief, ELRS, HRB, via e-mail at [redacted]

Sincerely,

Timothy P. Olson
Associate Director for Field Operations
U.S. Census Bureau

Enclosure: Designation of Representative

MEMORANDUM FOR Timothy P. Olson
Associate Director for Field Operations
U.S. Census Bureau

From: Brian Fouche
Survey Statistician
Logistics and Command Center
National Processing Center

Subject: Designation of Representative

I hereby designate _____
(Name/Division/Location or Address)

as my representative in connection with my _____

regarding _____

_____.

_____ _____
Employee Signature Date

_____ _____
Representative Signature Date