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

BRIEF AMICI CURIAE OF JAMES RODDEN, ISAAC MCLAUGHLIN, GABRIEL ESCOTO, MICHELLE RUTH MORTON, WADDIE BURT JONES, RYAN CHARLES BIGGERS, CAROLE LEANN MEZZACAPO, EDWARD BRYAN SURGEON, SUSAN REYNOLDS, ROY KENNETH EGBERT, GEORGE GAMMON, DORIS FORSHEE, JOHN LUFF, APRIL HANSON, DAN PARENTE AND STEVE HANLEY IN SUPPORT OF APPELLEES

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SUPPLEMENTAL CERTIFICATE OF INTRESTED PARTIES

The undersigned counsel for *amici curiae* certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1, in addition to those listed in the Petitioners' Certificate of Interested Persons, have an interest in the outcome of the case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

***Amicus*:** James Rodden, Isaac Mclaughlin, Gabriel Escoto, Michelle Ruth Morton, Waddie Burt Jones, Ryan Charles Biggers, Carole Leann Mezzacapo, Edward Bryan Surgeon, Susan Reynolds, Roy Kenneth Egbert, George Gammon, Doris Forshee, John Luff, April Hanson, Dan Parente and Steve Hanley the putative Class Representatives in *Rodden v. Fauci*, Ca 3:21-cv-00317 (S.D. Tex.)(Galveston Div.)

***Counsel for Amici*:** New Civil Liberties Alliance is a non-partisan not-for-profit corporation exempt from income tax under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c) (3). It does not have a parent corporation, and no publicly held company has a 10% or greater ownership interest in it. John J. Vecchione, is a Senior Litigation Counsel of the New Civil Liberties Alliance.

/s/ John Vecchione
John J. Vecchione

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTEREST OF AMICI CURIAE

James Rodden, Isaac McLaughlin, Gabriel Escoto, Michelle Ruth Morton, Waddie Burt Jones, Ryan Charles Biggers, Carole Leann Mezzacapo, Edward Bryan Surgeon, Susan Reynolds, Roy Kenneth Egbert, George Gammon, Doris Forshee, John Luff, April Hanson, Dan Parente and Steve Hanley are the putative Class Representatives in *Rodden v. Fauci*, Ca 3:21-cv-00317 (S.D. Tex.)(Galveston Div.) "The *Rodden* Plaintiffs" are the named plaintiffs in a class action filed on November 5, 2021 in the district court below. All of them, and the class, are individuals who have had Covid-19 demonstrated through antibody testing and are federal employees subject to the instant vaccine mandate (the "Federal Employee Vaccine Mandate")[1].

Simultaneously with filing the Complaint, the *Rodden* Plaintiffs filed a motion for TRO and Preliminary Injunction to prevent implementation of the President's Executive Order and Federal Employee Vaccine Mandate. The Court below denied that motion for failure to find imminent harm at that date and a concern as to the proper defendant. *Rodden v. Fauci*, No. 3:21-CV-317, —— F.Supp.3d ——, 2021 WL 5545234 (S.D. Tex. Nov. 27, 2021). The case was cited by the district court in the injunction order appealed *sub judice*. *Feds for Medical Freedom v. Biden*, __ F.Supp.3d __, 2022 WL 188329 (S.D. Texas)(Galveston Div.) ("*FfMF v. Biden*).

[1] This is to distinguish it from the myriad of other federal vaccine mandates that have recently been halted by the courts.

Subsequently, on December 28, 2021, *Rodden* Plaintiffs filed a First Amended Complaint ("Rodden FAC") and named more class plaintiffs who had not filed for religious or medical exemptions and added defendants. It contained five counts, including violation of constitutional rights to refuse medical treatment under the Constitution (Count I); the imposition of unconstitutional conditions on the exercise of rights (Count II), and Equal Protection Claim (Count III), that the Federal Vaccine Mandate was contrary to law (Count IV) and an APA claim (Count V). FAC ECF 35, No. 3:21-cv-00317 (S.D. Tex.). The FAC laid out the unlawfulness of the Federal Employee Vaccine Mandate and sought a class for all similarly situated individuals within it.

The Class is defined as:

> (i) All non-uniformed service federal employees within the meaning of 5 U.S.C. § 2105 employed by the United States government (ii) on or after October 8, 2021 (the deadline for the earliest of those employees to become vaccinated against COVID-19), including employees newly hired, whether or not they work at federal buildings or other facilities, at home, or both (iii) who have naturally acquired immunity demonstrable by antibody testing and where (iv) such employees have withheld their consent to taking such a vaccine.

FAC, ¶ 187 ECF 33-2, ECF 35 (accepted for filing), No. 3:21-cv-00317 (S.D. Tex.).

The Defendants suspended operation of the Federal Employee Vaccine Mandate until after New Year's Day 2022 but it resumed thereafter. As the *Rodden*

Plaintiffs were threatened with serious career harm or forced vaccination, including with vaccines only approved for emergency use by the Food and Drug Administration ("FDA"). On January 14, 2022, they again moved for a TRO before the court below. The injunction *sub judice* was issued on January 21, 2022. *FfMF v. Biden* at * 1. The *Rodden* Plaintiffs were then informed by counsel for Defendants in that case that they agreed the injunction protected those plaintiffs and would follow that injunction for all of them until it was withdrawn or overturned. The *Rodden* Plaintiffs then withdrew their request for a TRO. *Rodden v. Fauci*, ECF 43 Plaintiffs Notice of Withdrawal of TRO No. 3:21-cv-00317 (S.D. Tex.).

The Rodden Plaintiffs have an even stronger case on the balance of harms analysis than even the Appellees, as they all acquired natural immunity to Covid-19 and so any claim by Appellants of greater reinfection or worse health effects to them by Covid-19 is counterfactual and flies in the face of science and the Appellants' own data. In addition, the current injunction protects the entire class, and its nationwide effect is reasonable given the requested class is nationwide. Their interest in the instant injunction is far stronger than virtually any group outside of the Appellees themselves.

INTRODUCTION AND SUMMARY OF THE ARGUMENT[2]

The *Rodden* Plaintiffs are all civilian employees with natural immunity to Covid-19 and are faced with an order by their employer, the Federal Government, which requires each to undergo a medical procedure that is unnecessary to them and of no use to any legitimate need of their employer. The President of the United States and the agencies he directs have no power to direct their personal medical decisions, and this is particularly so when the vaccines they require are non-sterilizing, that is do not prevent transmission of Covid-19 to other employees, were at the time of filing of the Complaint (and some still are), only authorized for emergency use, and, in any event, less efficacious than natural immunity in preventing reinfection with Covid-19.

To grant such a vast and uncabined power over the health decisions of federal employees to the agencies on such vague language implicates the non-delegation

[2] In accordance with 5th Cir. R. 29 this *amicus* brief avoids repetition of arguments made by Appellees except where needed to flesh out their own interests in maintaining the instant injunction. However, *Rodden* Plaintiffs agree with Appellees' arguments, particularly as to the inapplicability of the CSRA to strip district court jurisdiction, as neither Appellees nor *Rodden* Plaintiffs are challenging any individual employment decision or seeking employment related relief like backpay. Brief of Appellees at 15. In addition, the New Civil Liberties Alliance, counsel here, was counsel in *Cochran v. SEC*, 20 F.4th 194 (5th Cir. 2021) and agrees with Appellees' discussion of it and its import for this case. Brief of Appellees, at 23-30.

doctrine and major questions doctrine and the Court should not readily read such immense power into the law. Deference to administrative agencies is particularly unwarranted in the Covid-19 context as the assertions of the agencies have so often been contrary to facts and reason.

The instant stay protects the *Rodden* Plaintiffs, and all similarly situated, and it should remain in place nationwide as the putative class is nationwide and the balance of harms and the law do not differ from one area of the country to the next. The nationwide injunction will conserve judicial resources and protect the entire class equally as it is now doing.

I. *RODDEN* PLAINTIFFS HAVE NATURAL IMMUNITY AND THE NATURE OF THE VACCINES SUPPORT MAINTAINING THE INJUNCTION

A. NONE OF THE MANDATED VACCINES ARE "STERILIZING" AND DO NOT PREVENT TRANSMISSION TO OTHER FEDERAL WORKERS

A vaccine is "sterilizing" if it eradicates the virus from the system and prevents transmission.[3] The lack of efficacy of the vaccines against transmission of, for instance, the Omicron variant is evident. A trial in Israel demonstrated that "the level of antibodies needed to protect and not to g[e]t infected from Omicron is

[3] It is noteworthy that the vaccine for smallpox at issue in *Jacobson v. Massachusetts,* 197 U.S. 11 (1905) was sterilizing.

probably too high for the vaccine" to accomplish.[4] It should also be noted that the Federal Employee Vaccine Mandate inexplicably allows employees to comply with it by having been injected with inferior foreign vaccines unapproved by the F.D.A and not even allowed in the United States. Shockingly, compliance with the Vaccine Mandate can be achieved by receiving any vaccine "that has been listed for emergency use by the World Health Organization [WHO]," *id.* at Tab Vaccination Requirements for Federal Employees (New and Updated), *available at* https://www.saferfederalworkforce.gov/faq/vaccinations/ (last visited Oct. 29, 2021). The Vaccine Mandate can thus be satisfied by taking foreign vaccines that the FDA has *not approved in any fashion*, such as the Sinovac and Sinopharm Vaccines. These vaccines are demonstrably inferior to naturally acquired immunity in terms of preventing a coronavirus infection.[5]

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[4] "Israeli study shows 4th shot of COVID-19 vaccine less effective on Omicron," *Reuters* (Jan. 17, 2022), *available at* https://www.reuters.com/world/middle-east/israeli-study-shows-4th-shot-covid-19-vaccine-not-able-block-omicron-2022-01-17/ (last visited Jan. 25, 2022).

[5] It should be noted that even Emergency Use Authorized ("EUA") vaccines by statute can only be forced on military members by Presidential action not civilian employees. *See e.g. John Doe No. 1 v. Rumsfeld*, No. Civ. A. 03-707(EGS), 2005 WL 1124589, *1 (D.D.C. Apr. 6, 2005) (*Doe v. Rumsfeld)* (allowing use of anthrax vaccine pursuant to EUA "on a *voluntary* basis"). *See also* 21 U.S.C. § 360bbb-3(e)(1)(A)(ii).

Nor are the vaccines harmless to everyone. While they are efficacious and safe for the general population, they are not without side-effects. Kaiser Permanente concluded that "[t]he true incidence of myopericarditis is markedly higher than the incidence reported to US advisory committees." *See* Katie A. Sharff et al., "Risk of Myopercarditis following COVID-19 mRNA vaccination," *Medrxiv* (Dec. 27, 2021), *available at* bit.ly/3ncLwhN (last visited Jan. 11, 2022).

In a similar vein, just last month a study confirmed reports that the COVID-19 vaccines may cause temporary changes to women's menstrual cycles. *See* Alison Edelman, et al., "Association Between Menstrual Cycle Length and Coronavirus Disease 2019 Vaccination," Obstetrics and Gynecology (Jan. 5, 2022), available at https://journals.lww.com/greenjournal/Fulltext/9900/Association_Between_Menstrual_Cycle_Length_and.357.aspx (last visited Jan. 11, 2022).

A "one size fits all" vaccine mandate such as is at issue here does not take into account different risk-to-benefit calculations a healthy individual with natural immunity has compared to an immunocompromised individual.

B. STATEMENTS BY APPELLANTS REQUIRE MAINTAINING THE INJUNCTION

One of the remarkable features of cases involving federal vaccine mandates and the Courts is the frequent citation of the statements of the Defendants concerning the disease, the lawfulness of their actions and the "real" reason for the Government

action. Here too, the Court should also take into account what many of the Appellants have said in public that should have an impact on the balance of harms of maintaining the instant injunction and on the lawfulness of the current Federal Employee Vaccine Mandate. This very month Dr. Anthony Fauci said:

> There is no way we are going to eradicate this virus," said Fauci, according to the Times. "But I hope we are looking at a time when we have enough people vaccinated and enough people with protection from previous infection that the COVID restrictions will soon be a thing of the past.
>
> *See* Chloe Folmar, Fauci: US Exiting 'Full-Blown' Pandemic Phase Of Coronavirus Crisis, The Hill (Feb. 09, 2022) *Available at* https://thehill.com/policy/healthcare/593456-fauci-us-exiting-full-blown-pandemic-phase-of-coronavirus-crisis

Not only does this statement identify natural immunity as the scientific fact it was always recognized to be pre-Covid, but it also undermines any assertion by the Appellants that such drastic measures are necessitated by an emergency or the state of the virus within the workforce. Nor is this the first time Dr. Fauci has made such statements completely at odds with the Appellants' position here.

Statements by key Government decision-makers in the recent past expose the fact that these mandates are the product of a political calculus and have nothing to do with best public health practices. Indeed, the first named defendant in *Rodden* Plaintiffs action, Dr. Anthony Fauci, has stated on numerous occasions that mandates such as these are unwise, unnecessary or unlawful. During a talk at George

Washington University on August 18th, 2020, Dr. Fauci stated: "You don't want to mandate and try and force anyone to take a vaccine. We've never done that." Likewise, he has remarked that "You can mandate for certain groups of people like health workers, but for the general population you can't." *See* "COVID-19 vaccine won't be mandatory in US, says Fauci," (August 19, 2020), *available at* bit.ly/3x2sgHf (last visited November 17, 2021). Addressing the prospect of such mandates, he has deemed them "unenforceable and not appropriate." *Id*.

Similar statements by Appellants and their agents confirm for the Court that the vaccines do not prevent transmission and so the Federal Employee Vaccine Mandate can only be premised on the employer knowing how to take care of the employees' health better then they do. Even CDC Director Rochelle Walensky has stated that the vaccines do not stop transmission of the Delta and Omicron variants.[6] Likewise, the CDC's webpage does not claim that the vaccines reduce or stop

[6] Eric Sykes, "CDC Director: Covid vaccines can't prevent transmission anymore," *MSN* (Jan. 10, 2022), available at https://www.msn.com/en-us/health/medical/cdc-director-covid-vaccines-cant-prevent-transmission-anymore/ar-AASDndg (last visited Feb, 1, 2022); Tim Hains, "CDC Director: Vaccines No Longer Prevent You From Spreading COVID, RealClear Politics (Aug. 6, 2021), available at https://www.realclearpolitics.com/video/2021/08/06/cdc_director_vaccines_no_longer_prevent_you_from_spreading_covid.html (last visited Feb. 1, 2022).

transmission, particularly in light of the emergence of the Omicron variant.[7] The most highly vaccinated countries in the world (such as Israel and Denmark) and the most highly vaccinated states in the United States (such as Vermont) experienced case rates that dwarf any prior ones.[8] Pfizer's own CEO recently publicly acknowledged that two doses of Pfizer's mRNA vaccine provide "very little, if any protection" against infection and transmission of the Omicron variant.[9]

There is no evidence that those with naturally acquired immunity pose a heightened threat to anyone. The CDC's rules for entry into the United States from abroad via air travel in fact recognizes such immunity. It states:

> If you recently recovered from COVID-19, you may instead travel with documentation of recovery from COVID-19 (i.e., your positive COVID-19 viral test result on a sample taken no more than 90 days before the flight's departure from a foreign country and a letter from a licensed healthcare provider or a public health official stating that you were cleared to travel). https://www.cdc.gov/coronavirus/2019-ncov/travelers/testing-international-air-travelers.html (last visited November 16, 2021).

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[7] "Omicron Variant: What You Need to Know," Centers for Disease Control and Prevention (Dec. 20, 2021), available at https://www.cdc.gov/coronavirus/2019-ncov/variants/omicron-variant.html (last visited Jan. 25, 2022).

[8] Appellees have already noted the CDC's admissions on the superiority of natural immunity to vaccine-induced immunity. Brief of Appellee at 52 n. 14.

[9] Ashley Sadler, "Pfizer CEO backtracks on jab effectiveness," (Jan. 12, 2022), *available at* https://www.lifesitenews.com/news/pfizer-ceo-claimed-covid-jabs-were-100-effective-now-says-2-shots-offer-very-limited-protection-if-any/ (last visited Feb. 1, 2022).

Put otherwise, those who have acquired immunity the hard way, as *amici* have, may board an airplane where they remain in close quarters with hundreds of other people on flights from places like Hong Kong, India, Australia, all of which can exceed 17 hours. They are not usually in close proximity to their co-workers that long in a day.

II. THE DEFERENCE TOO OFTEN GIVEN EXECUTIVE AGENCIES HAS BEEN EVEN MORE UNWARRANTED WHERE VACCINE MANDATES ARE CONCERNED

Covid-19 has plagued this country for two years now. Unfortunately, so have false statements by the Government on what it is doing concerning the virus and why. Courts have been misled and cited the conflicting statements of the main actors in response. The Appellees cited *Dep't of Com. v. New York*, 139 S.Ct. 2551, 2573-76 (2019), for the proposition that giving a false explanation of what the agency is doing is necessarily arbitrary and capricious. Brief of Appellees at 54. But this does not capture the degree of mendacity that Courts have discerned in the Federal Government's efforts to avoid the bedrock Constitutional proposition that our Constitution is one that grants specific, enumerated powers and not a general grant of all power to the Federal Government. *NFIB v. Sebelius*, 567 U.S. 519, 534-35 (2012) (noting it is "acknowledged by all" that federal powers are enumerated and

specific grants of power by the Constitution, not general powers as the States have) (internal citations omitted).

But during the Covid-19 pandemic the Executive has again and again sought the famous "work-around" of this bedrock principle which is "acknowledged by all." This was put in stark relief in the recently concluded saga of the Centers for Disease Control nationwide eviction moratorium. The Supreme Court eventually, after two trips up and down the federal judiciary, allowed the lower court's injunction to prevail. *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2487-88 (2021) (describing the progress of the case up and down the judiciary). That case stands for the proposition that agencies cannot do what Congress has not explicitly authorized them to do, but there is a deeper lesson to be drawn from that case. The stated reason by the agency for the incredible assertion of novel powers was acknowledged by both the *per curiam* and the dissent in that case to be the "strong interest" by the government in stopping the spread of the Delta variant of Covid-19. *Cf. Ass'n of Realtors v. HHS* at 2490 (*per curiam*) *with Id.* at 2493 (dissent deferring to CDC's prediction of massive spread of Delta upon the ending of the moratorium).

However, there was no massive spread of the virus with the end of the CDC eviction moratorium. There have been many articles and public discussions of how the predicted eviction crisis did not materialize upon its end. *See* Rachel Siegel and

Jonathan O'Connell, *The Feared Eviction 'Tsunami' Has Not Yet Happened. Experts Are Conflicted On Why,* (Sep. 28, 2021) *Available at* https://www.washingtonpost.com/business/2021/09/28/eviction-cliff-moratorium-rental-assistance/. But there has been virtually no discussion of the other dog that did not bark. *See Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 592 n. 8 (1980) (citing Arthur Conan Doyle, The Silver Blaze, in The Complete Sherlock Holmes (1938)). There was no rise in transmission of Delta or Covid-19 in general attributable to the end of the moratorium. Where is the discussion of the massive unlawful disruption of the housing market all based on a theory that from all public sources was hooey? Not only was there no eviction crisis, but there was also no increase in Covid-19 spread attributable to it. Where are the articles on the difference in spread among states that maintained eviction moratoriums and those that did not? They do not exist or do not redound to the benefit of the administrative state. Yet for nearly a year CDC came before the courts and argued its expertise had to be deferred to, long-established rights trampled, or people would die.

Another incident "no less curious" "than the dog that did nothing in the nighttime" is the fate of the OSHA Employer mandate. *See Harrison v. PPG Industries, Inc., supra,* at 596 (Rehnquist, J., dissenting). Barely a month ago the Supreme Court enjoined the Department of Labor, Occupational Safety and Health

Administration ("OSHA") from requiring all employers with more than one hundred employees to have them vaccinated on pain of termination. *NFIB v. Dep't of Labor*, 142 S.Ct. 661 (2022). Once again, an agency claimed vast powers over eighty-four million American workers to regulate "workplace safety." Once again, the agencies came before the Court with a plea for deference, and once again the Court enjoined a vaccine mandate. And a month later the parade of horribles has not ensued, and Dr. Fauci is saying that in very little time natural immunity and vaccination will end any mandates.

Finally, the federal contractor vaccine mandate has been stayed nationwide. *Kentucky v. Biden*, 23 F4th 585, 611 (6th Cir.,2022) (noting nationwide stay and that the Eleventh Circuit declined to vacate it). Once again, an agency, pursuant to the President's pique at the unvaccinated, attempted to determine the medical choices of nearly twenty percent of the labor force. *Id.* at 589-591 (President's patience "wearing thin" prompted federal contractor mandate over one-fifth of the national workforce). The President, in effect, asked who would rid him of the "meddlesome unvaccinated" and the bureaucrats stepped up. *See United States v. Gatto*, 986 F.3d 104, 141 n. 3 (2d Cir. 2021) (Lynch, J., *concurring in part and dissenting in part*) (discussing the responsibility of Henry II for the murder of Archbishop Thomas Becket).

This case affects the rights of the more than two million members of the civilian federal workforce to their own medical choices, bodily integrity and reputation. Congressional Research Service, Federal Workforce Statistics Sources: OPM and OMB, (June 24, 2021) at 1. https://sgp.fas.org/crs/misc/R43590.pdf (stating number of full-time federal employees).

The Court ought to not only examine in isolation the lack of authority for the Executive to make such an order but also examine it as part of a concerted, overarching attempt by the administrative agencies to evade powerful precedent on the limits of their power. The assertions of imminent doom that have been made in all of these cases have proven chimerical. The administrative state and the Executive have been willing to say anything to arrogate power to themselves that has not been given by statute or the Constitution. The lives and freedom of tens upon tens of millions of Americans have been disrupted in no small measure by these vast claims of novel power and false assertions of both power and imminent doom. The Federal Government has practically attempted to create a "social credit" system where one's job and livelihood are determined by whether one complies with the Government's view of vaccines. But no words in the Constitution nor the statute books create such a system. For that reason, each such attempt has been accompanied by twisting or eliding the meaning of words. Here it attempts to use the word "conduct" to mean

vaccinated or not vaccinated. That this is false is evident from a simple thought experiment. If someone sneaks up behind you and jabs you with a vaccination, you will be vaccinated but have engaged in no conduct at all. Just as natural-immunity is not "conduct," neither is vaccination. Allowing the agencies, as the CDC attempted with the eviction moratorium, to twist words to mean something they don't robs Americans of any ability to control those agencies and the Executive through self-government.

The Court should examine all the vaccine mandate cases, like this one, that rested on fanciful notions of what words mean and were stayed, enjoined or overturned with absolutely no discernible effect on Covid-19 spread. The balance of harms here is clear. Appellees, and *amici* now protected by the injunction, will be badly harmed in their person, dignity and reputation to what appears to be no gain to the Appellants. The Appellants here attempt the same legerdemain as essayed in previous vaccine mandate cases but also akin to what was attempted in *Cochran*. The administrative agencies and the Executive attempt to create *fait accompli* so that when the judiciary finally catches up to unlawful exertions of power, the troublesome have been removed or submitted, even though the Government did not have a Constitutional or even a statutory leg to stand on. This is the great danger to individual liberties created when a President runs out of patience, the agencies

channel his pique, and the Courts stand aside allowing the crushing weight of the bureaucracy to overburden the individual so that the merits have scant chance of reaching any appellate court. This is an overarching reason this Court should affirm the district court's injunction.

The only one of the recent major vaccination mandate cases in which the federal government prevailed at the Supreme Court was *Biden v. Missouri*, 142 S.Ct. 647 (2022). In that case it is noteworthy that no individuals asserted individual constitutional rights as only states were involved. *Id.* at 653 (health care workers overwhelmingly supported rule criticized by the complaining states). It is also important that, unlike here, the case was replete with the HHS Secretary previously promulgating similar rules under specific statutory language on the spending of funds appropriated by Congress for Medicare and Medicaid. *Id.* at 653.

A. Binding Precedent Supports the District Court's Injunction

There ought to be no dispute as to whether Appellees and *amici* suffer irreparable harm in the absence of the injunction. Their constitutional rights to remain free from unwanted medical treatment and their bodily autonomy are infringed every minute that the Federal Employee Vaccine Mandate remains in effect. "[W]hen 'the threatened harm is *more than de minimis*, it is not so much the *magnitude* but *the irreparability* that counts for purposes of a preliminary

injunction."' *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 279 (5th Cir. 2012) (quoting *Enter. Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472 (5th Cir. 1985)) (emphases added).

First, should they give in and get the vaccine due to financial pressure or other concerns that accompany loss of a job, such as reputational injury, Appellees will suffer irreparable harm. The Supreme Court recognized the permanent nature of vaccination in its order granting a stay of the OSHA vaccine mandate in *NFIB v. Dep't of Labor*, 142 S.Ct. 661, 665 (2022). Holding that a vaccine mandate is qualitatively different than other workplace regulations that OSHA has imposed, the Court explained that "[a] vaccination, after all, "cannot be undone at the end of the workday." *Id.* (quoting *In re: MCP No. 165*, 20 F.4th 264 (6th Cir. 2021) (Sutton, J., dissenting); *BST Holdings, LLC v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021) (granting preliminary injunction because being forced to choose between vaccination and employment entailed a loss of constitutional freedoms, *even though* masking and testing was offered as an alternative to vaccination); *Fraternal Order of Police Chicago Lodge No. 7, et. al v. City of Chicago*, Case No. 2021 CH 5276, at 3 (Circuit Court of Cook County, Ill.) (Nov. 1, 2021)(internal citations omitted), *available at* https://news.wttw.com/sites/default/files/article/file-attachments/FOP%20v.%20City%20of%20Chicago%2011.1.21%20Order.pdf

(last visited Nov. 3, 2021) (granting preliminary injunction because "[a]n award of back pay or reinstatement cannot undo a vaccine. Nothing can.").

The violation of constitutional limitations, standing alone, is sufficient to establish irreparable harm. *See Deerfield Med. Ctr. v. Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981); *and see U.S. Navy Seals 1-26 v. Biden,* 2022 WL 34443 *13 (N.D. Tex) (Fort Worth Div.)(Jan. 1, 2022) (First Amendment rights to refuse vaccine, irreparable harm, and injunction granted even in military setting).

There is no question that forced vaccination implicates Constitutional rights. The Supreme Court has recognized that the Ninth and Fourteenth Amendments protect an individual's right to privacy. A "forcible injection … into a nonconsenting person's body represents a substantial interference with that person's liberty[.]" *Washington v. Harper*, 494 U.S. 210, 229 (1990). The common law baseline is also a key touchstone out of which grew the relevant constitutional law. *See, e.g., Cruzan v. Dir., Mo. Dep't of Public Health*, 497 U.S. 261, 278 (1990) ("At common law, even the touching of one person by another without consent and without legal justification was a battery."). *See also* W. Keeton, D. Dobbs, R. Keeton, & D. Owen, PROSSER AND KEETON ON LAW OF TORTS § 9, pp. 39-42 (5th ed. 1984).; *Schloendorff v. Society of N.Y. Hosp.*, 211 N.Y. 125, 129-130, 105 N.E. 92, 93 (1914) (Cardozo, J.) ("Every human being of adult years and sound mind has

a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages.").

Subsequent Supreme Court decisions are explicit that the Constitution protects a person's right to "refus[e] unwanted medical care." *Cruzan*, 497 U.S. at 278; *King v. Rubenstein*, 825 F.3d 206, 222 (4th Cir. 2016) (recognizing same). This right is "so rooted in our history, tradition, and practice as to require special protection under the Fourteenth Amendment." *Washington v. Glucksberg,* 521 U.S. 702, 722 n.17 (1997). The Court has explained that the right to refuse medical care derives from the "well-established, traditional rights to bodily integrity and freedom from unwanted touching." *Vacco v. Quill*, 521 U.S. 793, 807 (1997).[10]

B. *Non-Delegation and Separation of Powers Concerns Preclude a Broad Reading of plenary Presidential Control of Employees' Health Decisions*

While the Appellees did argue that *Gundy v. United States*, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting), and the intersection of the major questions

[10] While undersigned counsel was writing this brief the Fifth Circuit issued a non-precedential opinion, over dissent, holding that forced vaccination on pain of unpaid leave by a private employer over employees' religious objections qualified as irreparable harm to support an injunction under Title VII. While it is non-precedential, counsel believes the Court would wish to be aware of it in determining the instant matter. *Sambrano, et al. v. United Airlines, Inc.*, No. 21-11159, (5th Cir., Feb. 17, 2022) (remanding to district court to reconsider denial of injunction).

doctrine and the non-delegation doctrine counsel the Court to narrowly interpret the statutory power given the Executive here, the precedent of this Court is even more compelling. This Court's holding in *BST Holdings, LLC*, *supra,* is explicit that "… concerns over separation of powers principles cast doubt over the Mandates assertion of virtually unlimited power to control individual conduct under the guise of a workplace regulation." *Id.* at 617. The Court went on to explain that the lack of Congressional clarity and the novel claims by OSHA counseled against a broad reading of the statute because of the Constitutional concerns. *Id.* It went on to say, "At the very least, even if the statutory language were susceptible to OSHA's broad reading—which it is not—these serious constitutional concerns would counsel this court's rejection of that reading." *Id.* at 618 (citations omitted). The same interpretive rigor applies here.

Finally, the Appellees have provided ample reason for why the nationwide scope of the injunction is appropriate and necessary. It is even more so for *amici curiae* here. *Rodden* Plaintiffs are representatives of a putative class. The current injunction protects that class, and precedent is clear that an injunction of this scope is warranted in these circumstances. *Texas v. United States*, 201 F.Supp.3d 810, 836 (N.D. Tex.)(nationwide injunction appropriate in class action)(citing *Califano v. Yamasaki*, 442 U.S. 682, 702, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979). The issuance

of the injunction stopped motion practice below and its removal would restart such motion practice and engender yet another review by this Court to little purpose in advancing the merits.

CONCLUSION

For all of the foregoing reasons, the District Court's preliminary injunction should be affirmed.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface requirements of Rule 32(a)(5) and the typestyle requirements of Rule 32(a)(6) because this brief was prepared in 14-point Times New Roman, a proportionally spaced typeface, using Microsoft Word. See Fed. R. App. P. 29(a)(4), (b)(4), 32(g)(1). This brief complies with the type-volume limitation of Rule 29(a)(5) because it contains 4935 words, excluding the parts exempted under Rule 32(f).

/s/ John J. Vecchione

CERTIFICATE OF SERVICE

I hereby certify that on February 18th, 2022, an electronic copy of the foregoing brief *amici curiae* was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF filing system and that service will be accomplished using the appellate CM/ECF system.

/s/ John J. Vecchione