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, INC.; 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.

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

MOTION 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, STEVE HANLEY, AND THE NEW CIVIL LIBERTIES ALLIANCE FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF APPELLEES

John J. Vecchione
Counsel of Record
Gregory Dolin
Margaret A. Little
Mark Chenoweth
NEW CIVIL LIBERTIES ALLIANCE
1225 19th St. NW, Suite 450
Washington, DC 20036
(202) 869-5210
john.vecchione@ncla.legal
Counsel for Amici Curiae

James Rodden, Isaac McLaughlin, Gabriel Escoto, Michelle Ruth Morton, Waddie Burt Jones, Ryan Biggers, Carole LeAnn Mezzacapo, Edward Surgeon, Susan Reynolds, Roy Kenneth Egbert II, George Gammon, Doris Forshee, John Luff, April Hanson, Dan Parente, Steven Hanley, and the New Civil Liberties Alliance ("proposed *amici*") move for leave to file a brief as *amicus curiae* in support of the plaintiffs-appellees and rehearing *en banc*. The parties consent to this motion. A copy of the proposed brief is attached.

A. Interest of the *Amici*.

The proposed amici are the named plaintiffs (and proposed class representatives) in *Rodden v. Fauci*, Ca 3:21-cv-00317 (S.D. Tex.) (Galveston Div.) filed on November 5, 2021 as a class-action suit. All of them (as are all members of the class that they seek to represent in that civil action) are federal employees who have had Covid-19 and have developed antibodies to that virus yet remain subject to the federal employee vaccine mandate, and following the panel's decision in the present case are unable to bring a pre-enforcement challenge to what they believe (and the District Court concluded to be) an unlawful Executive Order. The proposed *amici* have a stronger case on the balance of harms analysis than even the Appellees as the proposed *amici* are all naturally immune to Covid-19. Their interest in the District Court's injunction is far stronger than virtually any group outside of the Plaintiffs-Appellees themselves.

B. *Amici's* relevance to the case.

In light of *amici*'s health status, they bring a particular and unique perspective on how preclusion to pre-enforcement challenges to Executive Order 14043 affects health and constitutional liberties of federal workers. *Amici* offer reasons above and beyond those advanced by Plaintiffs-Appellees for affirming the nationwide injunction against the Federal Employee Vaccine Mandate. *Amici* offer their perspective in hopes that it will assist the Court with its determination as to the propriety of the executive action at issue and appropriateness of the District Court's injunction. Furthermore, because *Amici* are proposed representatives of the nationwide class of federal employees who have naturally acquired immunity to Covid-19, they bring forth specific arguments why a *nationwide* injunction is an appropriate remedy in this case

C. Conclusion & Prayer

The proposed *Amici* pray that the Court grant them leave to file its attached brief as friends of the court in support of the Plaintiffs-Appellees and affirmance of the decision below. They further pray for all other relief to which they may be entitled.

Respectfully submitted,

/s/ John J. Vecchione
John J. Vecchione
Gregory Dolin
Margaret A. Little
Mark Chenoweth
NEW CIVIL LIBERTIES ALLIANCE
1225 19th St. NW, Suite 450
Washington, DC 20036
(202) 869-5210
john.vecchione@ncla.legal
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on September 2nd, 2022, an electronic copy of the foregoing motion of *amici curiae* was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/EFC filing system and that service will be accomplished using the appellate CM/ECF system.

/s/ John J. Vecchione

CERTIFICATE OF COMPLIANCE

I certify that this motion 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. 27(d)(1), 29(a)(3), 32(g)(1). This motion complies with the type-volume limitation of Rule 27(d)(2)(A) because it contains 401 words, excluding the parts exempted under Rule 32(f) and 5th Cir. R. 32(b).

/s/ John J. Vecchione

No. 22-40043

In the United States Court of Appeals for the Fifth Circuit

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

v.

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

Defendants-Appellants.

On Appeal from the U.S. District Court
for the Southern District of Texas

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, STEVE HANLEY AND THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF APPELLEES

John J. Vecchione
Counsel of Record
Gregory Dolin
Margaret A. Little
Mark S. Chenoweth
NEW CIVIL LIBERTIES ALLIANCE
1225 19th St. NW, Suite 450
Washington, DC 20036
(202) 869-5210
john.vecchione@ncla.legal
Counsel for Amici Curiae

SUPPLEMENTAL CERTIFICATE OF INTERESTED 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.

***Amici*:** 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*, No. 3:21-cv-317 (S.D. Tex.) (Galveston Div.). NCLA is counsel to the class in the *Rodden v. Fauci* case.

***Counsel for Amici*:** New Civil Liberties Alliance is a nonpartisan, nonprofit 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

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INTEREST OF AMICI CURIAE

The proposed *amici* are the named plaintiffs (and proposed class representatives) ("The *Rodden* Plaintiffs") in *Rodden v. Fauci*, No. 3:21-cv-317 (S.D. Tex.) (Galveston Div.) filed on November 5, 2021 as a class-action suit. All are federal employees who have recovered from Covid-19 and have developed antibodies to that virus (demonstrated through antibody testing). They have thereby naturally acquired immunity to Covid-19.[1] All of them, and the class, are federal employees subject to the instant vaccine mandate ("Federal Employee Vaccine Mandate").[2]

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*, 571 F. Supp. 3d 686 (S.D. Tex. 2021). The case was cited by the district court in the injunction order

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[1] No one other than the *amici* and their counsel wrote this brief or parts of it. The cost of its preparation was paid for solely by *amici* and their counsel.

[2] CDC has released new guidance equating natural immunity and vaccine immunity for purposes of public health. *Summary of Guidance for Minimizing the Impact of COVID-19 on Individual Persons, Communities, and Health Care Systems – United States, August 2022*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 11, 2022).

appealed *sub judice*. *Feds for Med. Freedom v. Biden*, No. 21-cv-356, 2022 WL 188329 (S.D. Tex. Jan. 21, 2022).

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), an Equal Protection claim (Count III), that the Federal Vaccine Mandate was contrary to law (Count IV), and an Administrative Procedure Act claim (Count V). Rodden FAC, *Rodden v. Fauci*, 571 F. Supp. 3d 686 (S.D. Tex. 2021) (No. 3:21-cv-317), ECF No. 35. The Rodden 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.

Id. at 187.

The Defendants suspended operation of the Federal Employee Vaccine Mandate until after New Year's Day 2022 when it resumed. 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. *Feds for Med. Freedom*, 2022 WL 188329 at * 1. The *Rodden* Plaintiffs, as agreed to by Defendants' counsel, were protected by that injunction. So, the *Rodden* Plaintiffs withdrew their request for a TRO. Plaintiffs' Notice of Withdrawal of TRO, *Rodden v. Fauci*, 571 F. Supp. 3d 686 (S.D. Tex. 2021) (No. 3:21-cv-317), ECF No. 43. The *Rodden* Plaintiffs have an even stronger case on the balance-of-harms analysis than Appellees. Having acquired natural immunity to Covid-19 means 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, Appellants' own data, and now even CDC guidelines. *Guidance for Minimizing the Impact of COVID-19*, *supra* n.2. The current injunction protects the entire putative class, and its nationwide effect is reasonable given these are federal workers and the requested class is nationwide. The class's interest in the instant injunction is far stronger

than any group outside of the Appellees themselves, as they have a class claim and a constitutional claim and the nationwide injunction protects them. Many of the Government's arguments here are vitiated by the class.

The parties consent to the filing of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT[3]

The Civil Service Reform Act of 1978 ("CSRA") does not divest jurisdiction over claims asserted here, and the Constitution cannot tolerate such divestment. This Court should affirm the injunction against the Federal Employee Vaccine Mandate.

The President of the United States and the agencies he directs have no power to dictate personal medical decisions of federal employees. This is particularly so when the required vaccines are (1) non-sterilizing, that is do not prevent transmission of Covid-19 to other employees, (2) were at the time of filing of the Complaint, and some still are, only authorized for emergency use, and, (3) in any event, less efficacious than natural immunity in preventing reinfection with Covid-19.

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[3] New Civil Liberties Alliance, counsel here, is counsel in *Cochran v. SEC*, 20 F.4th 194 (5th Cir. 2021) (*en banc), cert. granted*, 142 S. Ct. 2707 (2022) (mem.) and agrees with Appellees' discussion of *Cochran*'s import for this case. Appellees' Brief at 26-30; 39-41. Though *amici* endorse Appellees' arguments, this brief avoids repetition of Appellees' arguments. Loc. R. 29.2.

The Government's position seeks to insulate unlawful government mandates against federal employees from judicial review and to permit only case-by-case adjudication of class-wide constitutional violations. This is inconsistent with the role of the courts in protecting personal liberty and cabining the Executive Branch's exercise of authority that Congress granted to it.

A refusal to review these executive employment decisions except in the context of individual disciplinary proceedings invites the executive to behave in an arbitrary and oppressive fashion in hopes that most employees will buckle when faced with a threat to their livelihood and career. Additionally, successful individual challenges to the unlawful exercise of power merely protect a few federal employees from widespread illegal action, rather than placing appropriate limits on the Executive. Such an approach would emasculate the Judiciary and abdicate its role in policing the boundary between the Executive and Legislative branches and protecting individuals from the exercise of unlawful administrative power.

Imputing vast and uncabined power over the health decisions of federal employees to their agency employers implicates the nondelegation and major questions doctrines, so the Court should not readily read immense power into vague language. Deference to administrative agencies is particularly unwarranted

in the Covid-19 context, as agency assertions have so often contradicted facts and reason.

The *Rodden* Plaintiffs are also a putative class which this injunction protects. All the Government's arguments against a nationwide injunction involving a non-class and complaints that Appellees did not raise constitutional issues are vitiated by the *Rodden* Plaintiffs' FAC. *See* Appellants' Brief at 25, 44, 49. The instant stay protects the *Rodden* Plaintiffs, and all similarly situated, and it should remain in place nationwide. The putative class is nationwide, and the balance of harms does not differ from one area of the country to the next. The nationwide injunction will conserve judicial resources and protect the entire class equally from this unlawful mandate.

I. THE CSRA DOES NOT BAR PRE-ENFORCEMENT CHALLENGES IN FEDERAL COURT

"The CSRA established 'the comprehensive and exclusive procedures for settling work-related controversies between federal civil-service employees and the federal government.'" *Feds for Med. Freedom v. Biden*, 30 F.4th 503, 506 (5th Cir. 2022) (quoting *Rollins v. Marsh*, 937 F.2d 134, 139 (5th Cir. 1991)). But the CSRA is not so broad as to cover every dispute about governmental power over individuals who happen to be federal employees. Neither the structure of the Act, nor judicial decisions interpreting it require that approach.

A. *Adopting Government's Arguments Would Screen Considerable Constitutional Violations from Judicial Review*

Under the CSRA only "employee[s] against whom a[] [major disciplinary] action is taken" may petition the Merit Systems Protection Board ("MSPB") for review. 5 U.S.C. § 7513(d). In contrast, an employee against whom a "minor" disciplinary action is taken, *i.e.*, suspension of less than 14 days, does not enjoy such a right, even though the record of discipline remains in his personnel file. *See id.* § 7503. Yet, "a short suspension (generally, 14 days or less)" is exactly the sanction that the guidance implementing the Federal Employee Vaccine Mandate applies to individuals who refuse to comply with the requirement. *Safer Federal Workforce Task Force, Vaccinations, Enforcement of Vaccination Requirements for Employees*, U.S. GEN. SERVS. ADMIN. https://go.usa.gov/xe5aC (last visited Sept. 2, 2022).

Yet, according to the Government, the affected individuals must not only endure an unlawful order, but also unlawful "minor" discipline, all without recourse to the federal judiciary, or for that matter any review whatsoever. But "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear" because a "'serious constitutional question' … would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster v. Doe*, 486 U.S. 592, 603 (1988) (quoting *Bowen*

v. Mich. Acad. of Family Physicians, 476 U.S. 667, 681 n.12 (1986)). Nothing in the CSRA's text or structure suggests Congress meant to preclude constitutional challenges to suspensions lasting less than 14 days. Because only "major" discipline triggers the right to seek review from the MSPB, and thereafter in the U.S. Court of Appeals for the Federal Circuit, a holding that no pre-enforcement challenges to employment policies are cognizable in district courts would permit an agency to impose short suspensions *seriatim* and entirely evade judicial review. Even if an agency instead imposed progressive discipline, and the Federal Circuit set aside the eventually imposed "major" discipline, it is not obvious that court would have the power to reach back and vacate the previous "minor" suspensions, which would otherwise remain in the employee's permanent record. Meaningful judicial review provides a bulwark against disciplinary gamesmanship causing irremediable reputational damage to thousands of federal employees.

Second, the CSRA-prescribed review mechanisms kick into gear only after one of the major disciplinary actions "*is* taken." 5 U.S.C. § 7513(d) (emphasis added). Thus, an employee facing an unlawful order does not have an opportunity to challenge the order before the MSPB or in the Federal Circuit unless and until he (a) violates the order and (b) major discipline *is* imposed for such violation. In this sense, the system is similar to the one established by the Securities Exchange

Act of 1934, 15 U.S.C. § 78y, which this Court discussed extensively in *Cochran, supra* at n.2. In *Cochran*, the *en banc* Court explained that "jurisdiction 'becomes exclusive' in the court of appeals only after (1) the SEC issues a final order, (2) an aggrieved party files a petition, and (3) the SEC submits its administrative record." 20 F.4th at 201. If a final order has not been entered, district courts retain jurisdiction over disputes between citizens and the agency. *See id*. at 199. ("Congress gave federal district courts jurisdiction over *all* civil actions arising under the Constitution. Not some or most—but all. … Moreover, … when a federal court has jurisdiction, it also has a virtually unflagging obligation to exercise that authority.") (emphasis in original; cleaned up).

The same logic governs this dispute. *If* major discipline is imposed on a federal employee, *then* the dispute must first proceed through the MSPB with review (if any) in the Federal Circuit. However, absent such a final disciplinary order, MSPB does not possess jurisdiction to do anything. According to the Government, neither does any federal court. This Court, sitting *en banc*, was "loath to reach such a result" in the context of the Exchange Act. *Id* at 201. It should likewise refuse to do so in the CSRA context.

The panel majority elided this distinction by pointing out that even prior to being disciplined, "[e]mployees … are entitled to notice, an opportunity to

respond, legal representation, and written reasons supporting the employing agency's" proposed discipline. *Feds for Med. Freedom*, 30 F.4th at 507 (citing 5 U.S.C. § 7513(b)). However, a "proposed" action is not a policy that delineates the consequences for misconduct. Rather, a "proposed" action is a specific charge of violating the rules and a specific penalty the agency deems commensurate with the allegation. It is akin to an indictment triggering various procedural rights. In contrast, Executive Order 14043 and the Task Force guidance are more similar to a criminal statute that generally sets out penalties for noncompliance. The present challenge is analogous to a facial challenge to a criminal statute, not to a particular indictment. The fact that procedural safeguards become available once a charge is brought does not shield an unconstitutional statute or regulation from direct, pre-enforcement, judicially cognizable facial attack.

B. Government's Approach Traduces this Court's Precedents

The CSRA's designated process becomes exclusive only *after* a disciplinary case against a federal employee is brought. In *Elgin v. Department of Treasury*, the Supreme Court observed that "the CSRA prescribes in great detail the protections and remedies applicable to *adverse personnel actions* against federal employees." 567 U.S. 1, 11 (2012) (emphasis added; cleaned up). Petitioners in *Elgin* lost because they did "not dispute that they are employees who suffered adverse actions covered by the [relevant] provisions of the CSRA." *Id.* at 12.

Plaintiffs-Appellees and *amici*, on the other hand, do dispute that they have suffered adverse personnel actions. Instead, they allege that "the Mandate threatens to substantially burden the[ir] liberty interests" by putting them to an unlawful Hobson's choice "between their job(s) and their jab(s)." *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021). Because neither Plaintiffs-Appellees nor *amici* have suffered an "adverse personnel action," there is nothing for MSPB to adjudicate, and therefore, *Elgin*'s logic is inapplicable to the present case.

The Supreme Court's decision in *United States v. Fausto*, 484 U.S. 439 (1988), explained that § 2302 of the CSRA "establishes the principles of the merit system of employment, and forbids an agency to engage in certain 'prohibited personnel practices,' including unlawful discrimination, coercion of political activity, nepotism, and reprisal against so-called whistleblowers." *Id*. at 446 (citations omitted).[4] It is not a "catch-all" provision, however, consigning all disputes between federal employees and agency employers to the MSPB process.

[4] The Court also recognized that the CSRA governs "personnel actions based on unacceptable job performance," and "adverse action taken against employees … based on misconduct." *Fausto*, 484 U.S. at 445-46. It is undisputed that neither Plaintiffs-Appellees nor *amici* have yet had "personnel actions" taken against them for "unacceptable job performance" or "misconduct." Thus, the only way CSRA could preclude their claims is if the Federal Employee Vaccine Mandate fits into the "principles of the merit system of employment" category as defined by § 2302.

Rather, § 2302 applies to and prohibits only specific types of conduct, *e.g.*, racial discrimination (5 U.S.C. § 2302(b)(1)), coercion of political participation (§ 2302(b)(3)), granting of preferences not authorized by law (§ 2302(b)(6)), nepotism (§ 2302(b)(7)), retaliation for whistle-blowing (§ 2302(b)(8)), etc.[5] That the CSRA would cover such actions makes perfect sense. Invariably, claims under § 2302 are fact-laden (*e.g.*, was a particular action taken for an illegal discriminatory or retaliatory reason, or was it taken for an entirely appropriate, neutral legal reason), and current law commits the resolution of such factual questions to agency adjudication. *See Elgin*, 567 U.S. at 19. By contrast, the challenge here involves the legality of the whole policy, not the factual basis for an adverse action taken against a specific employee. There are no individual circumstances for an agency to adjudicate, nor upon which to bring MSPB's expertise to bear.

To be sure, challenges to adverse agency actions that have already been taken against particular federal employees must satisfy the administrative process.

[5] Furthermore, the structure of § 2302 strongly suggests that it applies when an illegal action is targeted at an individual federal employee who then suffers adverse consequences. Not only is the section written in singular (*e.g.*, "any employee," "any individual," "any person"), but also such a reading would be consistent with those sections of the CSRA that discuss punitive actions for misconduct or inadequate job performance, all of which are also directed at individual employees.

But the cases do not hold that facial challenges to unlawful government employment policies cannot be heard by a federal court except as an appeal from an individualized MSPB decision.

As the *en banc Cochran* court recognized, *Elgin* "did not break new ground," and there remains "a strong presumption favoring judicial review of administrative action that the Government may rebut only by carrying the heavy burden of showing that the statute's language or structure forecloses judicial review." *Cochran*, 20 F.4th at 200 (cleaned up). As in *Cochran*, the Executive here also failed to rebut the strong presumption of jurisdiction because the CSRA's wording analyzed above does not strip federal courts of jurisdiction over constitutional questions.

II. A REFUSAL TO ENTERTAIN APPELLEES' CLAIMS ABDICATES THE FUNDAMENTAL ROLE OF COURTS

The Supreme Court has "long recognized" that the federal judiciary is a "guardian of individual liberty and separation of powers … ." *Stern v. Marshall*, 564 U.S. 462, 495 (2011). The Government's theory, however, would permit the Executive to continue encroaching on individual liberty and the Legislature's domain, all in violation of its duty to keep those powers separate.

Under the Government's reasoning, even absent Congressional authorization, the Executive could, without fear of judicial intervention, require

federal employees to, for example, contribute a percentage of their income to charity, obtain a U.S. passport, buy a particular brand of automobile, or wear glasses rather than contact lenses. The Federal Circuit might eventually find such orders unlawful, but only as applied to an employee disciplined under § 7513, after the MSPB sustains the discipline. Absent employees' immediate recourse to courts to challenge such unlawful policies, a cynical Executive could promulgate such policies in hopes of "buying time." It could thereby illegitimately secure compliance from those who may lack knowledge of their rights or fortitude to withstand threatened disciplinary actions and the MSPB process. Early judicial intervention must be available to ensure Executive policies neither infringe federal employees' rights nor overstep the authority granted the Executive by Congress.

III. *RODDEN* PLAINTIFFS HAVE NATURAL IMMUNITY AND THE NATURE OF THE VACCINES SUPPORTS MAINTAINING THE INJUNCTION

A. The Mandated Vaccines Are Not "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.[6] The lack of efficacy of the vaccines against transmission of, for instance, the Omicron variant is evident. A study in Israel demonstrated that "the level of antibodies needed to protect and not to g[e]t infected from

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[6] By contrast, notably, the vaccine for smallpox at issue in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) was sterilizing.

Omicron is probably too high for the vaccine" to accomplish.[7] Additionally, and inexplicably, the Federal Employee Vaccine Mandate permits employees to comply with it by receiving inferior foreign vaccines unapproved by the FDA and therefore *illegal* for use or distribution within the United States. *See* 21 U.S.C. § 355(a). 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]." *Safer Federal Workforce Task Force*, *supra* at Tab Vaccination Requirements for Federal Employees (New and Updated). 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.[8] Even CDC now recognizes natural immunity is better and more protective than vaccines. *Guidance for Minimizing the Impact*

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[7] *Israeli Study Shows 4th Shot of COVID-19 Vaccine Less Effective on Omicron*, REUTERS (Jan. 17, 2022), https://reut.rs/3AV3jkB (last visited Sept. 2, 2022).

[8] It should be noted that even Emergency Use Authorized ("EUA") vaccines by statute can only be forced on military members, not civilian employees, and only by Presidential order. *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) (allowing use of anthrax vaccine pursuant to EUA "on a *voluntary* basis"); *see also* 21 U.S.C. § 360bbb-3(e)(1)(A)(ii).

of COVID-19, *supra* n.2 . This recognition (however belated) leaves no basis, let alone a "rational basis," for naturally immune employees to be force-vaccinated.

Nor are the vaccines harmless to everyone. While they are efficacious and safe for the general population, they are not without side-effects. For example, one of the risks posed by the Covid-19 vaccines is myopericarditis. And though it is not a very common complication, a Kaiser Permanente study concluded that "[t]he true incidence of myopericarditis [in individuals receiving a Covid vaccine] is markedly higher than the incidence reported to US advisory committees." Katie A. Sharff, *et al.*, *Risk of Myopericarditis Following COVID-19 mRNA Vaccination*, MEDRXIV (Dec. 27, 2021), bit.ly/3ncLwhN (last visited Sept. 2, 2022).

In a similar vein, a recent study confirmed 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 (COVID-19) Vaccination*, OBSTETRICS & GYNECOLOGY (Jan. 5, 2022), https://bit.ly/3pTAyyx (last visited Sept. 2, 2022).

The policy here utterly ignores the differences in risk-to-benefit calculations for a healthy individual without natural immunity versus a healthy individual with natural immunity versus an immunocompromised individual.

B. Statements by Appellants Require Maintaining the Injunction

One remarkable feature of cases involving federal vaccine mandates is the frequent citation of the statements of the Defendants concerning the disease, and both the lawfulness and the "real" reason for the Government action. What the government actors say in public often diametrically opposes what they say in court papers. Here too, what Appellants have said in public should have an impact on this Court's evaluation of the lawfulness of the Federal Employee Vaccine Mandate as well as the balance-of-harms analysis.

Dr. Anthony Fauci said: "There is no way we are going to eradicate this virus. 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." Chloe Folmar, *Fauci: US Exiting 'Full-Blown' Pandemic Phase of Coronavirus Crisis*, HILL (Feb. 09, 2022), https://bit.ly/3womFfi (emphasis added). 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 forced vaccinations are necessary to protect the federal workforce.

Nor is this the first time Dr. Fauci and other key Government decision-makers have made such statements completely at odds with the Appellants' position here. These statements expose the fact that these mandates are the product

of a political calculus and have little to do with best public health practices. Indeed, Dr. Fauci has stated on numerous occasions that mandates such as these are unwise, unnecessary, and 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, "You can mandate for certain groups of people like health workers, but for the general population you can't." *COVID-19 Vaccine Won't Be Mandatory in US, Says Fauci*, MED. XPRESS (August 19, 2020), bit.ly/3x2sgHf (last visited Aug. 17, 2022). Addressing the prospect of such mandates, he has deemed them "unenforceable and not appropriate." *Id.*

Similar statements by Appellants and their agents confirm that the vaccines do not prevent transmission. CDC Director Dr. Rochelle Walensky has stated that the vaccines do not stop transmission of the Delta and Omicron variants.[9] Likewise, CDC's webpage does not claim the vaccines reduce or stop transmission, particularly in light of the emergence of the Omicron variant.[10] With

[9] Eric Sykes, *CDC Director: Covid vaccines can't prevent transmission anymore*, MSN (Jan. 10, 2022), https://bit.ly/3cyqOH6 (last visited Sept. 2, 2022); Tim Hains, *CDC Director: Vaccines No Longer Prevent You From Spreading COVID*, REALCLEAR POLITICS (Aug. 6, 2021), https://bit.ly/3Rmj0Xo (last visited Sept. 2, 2022).

[10] *Variants of the Virus*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 20, 2021), https://bit.ly/3Av6wWM (last visited Sept. 2, 2022).

the Omicron wave, even 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 dwarfed any prior ones. 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.[11] Consequently, the Federal Employee Vaccine Mandate can only be and is premised on the deeply offensive notion that the federal government, in its capacity as an employer, knows how to take care of its employees' health better than the employees and their physicians do.

IV. THERE IS NO EVIDENCE THAT THOSE WITH NATURALLY ACQUIRED IMMUNITY POSE A HEIGHTENED THREAT TO ANYONE

Covid-19 has plagued this country for over 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, including by citations to conflicting statements of the main actors managing the country's response. It is well established that giving a false explanation of what the agency is doing creates barriers to judicial review and cannot be countenanced. *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2573-76 (2019). But this does not capture the full scope of

[11] Ashley Sadler, *Pfizer CEO Backtracks on Jab Effectiveness*, LIFE SITE (Jan. 12, 2022), https://bit.ly/3AzmHCo (last visited Sept. 2, 2022).

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—rather than limitless—powers to the Federal Government. *See NFIB v. Sebelius*, 567 U.S. 519, 534-35 (2012) (noting that unlike the states which possess broad and general police powers, "[t]he Federal Government is acknowledged by all to be one of enumerated powers.") (internal quotations 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 saga of the Centers for Disease Control's nationwide eviction moratorium. *See Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485 (2021). Though that case is often cited for the proposition that agencies cannot do what Congress has not explicitly authorized them to do, there is a deeper lesson to be drawn from it. Both the majority and dissent acknowledged the "strong interest" by the government in stopping the spread of the Delta variant of Covid-19. *Id.* at 2490 (per curiam); *Id.* at 2493 (Breyer, J., dissenting) (deferring to CDC's prediction of massive spread of Delta upon the ending of the moratorium). Yet contrary to the apocalyptic predictions, there was no massive spread of the virus after the Court's order abrogated the eviction

moratorium. *See* Rachel Siegel & Jonathan O'Connell, *The Feared Eviction 'Tsunami' Has Not Yet Happened. Experts Are Conflicted On Why,* WASH. POST (Sept. 28, 2021), https://wapo.st/3cpqaeJ.

Another incident "no less curious" "than the dog that did not bark," *see Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 n. 8 (1980) (citing Arthur Conan Doyle, The Silver Blaze, in The Complete Sherlock Holmes (1938)), is the fate of the Occupational Safety and Health Administration ("OSHA") Employer Mandate. After the Supreme Court enjoined the Department of Labor and 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), none of the Administration's baleful predictions about massive infection rates, illness, and death came to pass.

Similarly, the Federal Contractor Vaccine Mandate has been stayed nationwide. *Kentucky v. Biden*, 23 F.4th 585, 611 (6th Cir. 2022) (noting nationwide stay and that the Eleventh Circuit declined to vacate it). Once again, none of the dire predictions have come to pass. Given this track record, the Administration's doom-laden predictions should be taken with a granary of salt.

Strikingly, the Administration itself has come to recognize the uselessness of its mandate. In its latest guidance, the CDC Safer Federal Workforce Task Force

has advised all federal agencies to no longer "require documentation of vaccination status from employees, and ask about the vaccination status of onsite contractor employees and visitors." Safer Federal Workforce Task Force, *Initial Implementation Guidance for Federal Agencies on Updates to Federal Agency COVID-19 Workplace Safety Protocols* 2 (Aug. 17, 2022), https://bit.ly/3QORQc5. As the document explains, "safety protocols *will not vary* based on vaccination status or otherwise depend on vaccination information." *Id.* at 3. In light of this admission, and the fact that even if it were to prevail here, the Administration will—for now—no longer be "requiring, requesting, or collecting vaccination status information," *id.*, it is altogether baffling as to why it is continuing to appeal the injunction in the first place.

The balance of harms here is clear. Should the judgment below be reversed, Appellees, and *amici* protected by the injunction, will suffer an irreparable injury to their person, dignity and reputation, and all without discernible benefit to the Appellants. After all, Appellants themselves no longer care to "requir[e], request[], or [even] collect[] vaccination status information." *Id.*

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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. Jared C. Nagel & Carol Wilson, Cong. Rsch. Serv., R43590, *Federal Workforce Statistics Sources: OPM and OMB* 1 (June 28, 2022) (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 the limits of their power. In doing so, this Court should note that (as described above) *all* vaccine mandate cases rested on exaggerated claims of harm, none of which came to pass once the mandates were stayed, enjoined or overturned.

Furthermore, not only have the Administration's predictive powers proven paltry, but the vaccine mandate cases (among others) made clear that the administrative state and the Executive are willing to say anything to arrogate power to themselves unlawfully. The lives and freedom of tens upon tens of millions of Americans have been disrupted in no small measure by these vast and unsupported claims of novel power coupled with false assertions of imminent doom.[12]

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[12] 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). No individuals asserted individual constitutional rights there 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

The Appellants here attempt the same legerdemain[13] as essayed in previous vaccine mandate cases. The administrative agencies and the Executive attempt to, absent any Constitutional or statutory authority, to have the "troublesome" removed or forced to submit. By the time the judiciary finally catches up to unlawful exertions of administrative power, the Government's goals are a *fait accompli* with little opportunity to restore the *status quo*. Individual liberties suffer 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. Now that the dire consequences rationale has been exposed—and thoroughly debunked—it is also a compelling reason that this Court should affirm the district court's injunction.

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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.

[13] For example, in the present case the Government is arguing that the word "conduct" means vaccination status. But vaccination *status* is entirely independent of one's *conduct*. For example, if someone is vaccinated in error (say due to a chart mix-up in the hospital), that person's *status* will change despite the fact he engaged in no conduct at all. The Court should not allow the agencies to play the role of Humpty-Dumpty for whom words mean "just what [he] choose[s] them to mean—neither more nor less." *Lopez v. Gonzales*, 549 U.S. 47, 55 (2006) (quoting L. Carroll, Alice in Wonderland and Through the Looking Glass 198 (Messner 1982)).

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).

Absent a continued injunction, Appellees and the *amici* face a Hobson's choice—they can either give in and get the vaccine or lose their jobs and suffer financial and reputational consequences that usually accompany involuntary termination. It is beyond peradventure that receiving an unwanted vaccine constitutes irreparable harm. "A vaccination, after all, 'cannot be undone at the end of the workday.'" *NFIB*, 142 S. Ct. at 665, (quoting *In re: MCP No. 165*, 20 F.4th 264 (6th Cir. 2021) (Sutton, J., dissenting)); *see also BST Holdings*, 17 F.4th at 618 (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 Chi. Lodge No. 7 v. City of Chicago, No. 2021 CH 5276, at 3 (Ill. Cir. Ct. Nov. 1, 2021), https://bit.ly/3KmMNgr (last visited Sept. 2, 2022) (granting preliminary injunction because "[a]n award of back pay or reinstatement cannot undo a vaccine. Nothing can.") (internal citations omitted).

Furthermore, forced vaccinations implicate our most cherished Constitutional rights. *See Washington v. Harper*, 494 U.S. 210, 229 (1990) (A "forcible injection … into a nonconsenting person's body represents a substantial interference with that person's liberty."); *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."); *Schloendorff v. Soc'y of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 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; *see also 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). Requiring one to surrender a right that goes back centuries and predates the Constitution itself is the very definition of an "irreparable injury."

Nor is it a sufficient answer to say that Appellees and the *amici* can avoid the vaccination by quitting or being terminated from their jobs. While the Supreme Court has held that damage to reputation and financial burdens associated with termination of employment is insufficient to establish irreparable harm, *see Sampson v. Murray*, 415 U.S. 61, 91 (1974), Government's transgression of constitutional limitations placed on it, is itself sufficient to establish irreparable harm. *See Deerfield Med. Ctr. v. Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981); *see also U.S. Navy Seals 1-26 v. Biden*, 578 F. Supp. 3d 822, 837-40 (N.D. Tex. 2022) (First Amendment rights to refuse vaccine, irreparable harm, and injunction granted even in military setting). And because the Government has no authority to direct employees' medical decision-making, permitting it to extra-constitutionally insert itself into this area qualifies as irreparable harm.

B. Nondelegation and Separation of Powers Concerns Preclude a Broad Reading of Plenary Presidential Control of Employees' Health Decisions

The intersection of the nondelegation and major questions doctrines counsel the Court to narrowly interpret the statutory power given the Executive here. *See* Appellees' Brief at 56 (citing *Gundy v. United States*, 139 S. Ct. 2116, 2134-37 (2019) (Gorsuch, J., dissenting)). On this point, precedents of this Court are compelling. *BST Holdings* is explicit that "concerns over separation of powers principles cast doubt over the Mandate's assertion of virtually unlimited power to control individual conduct under the guise of a workplace regulation." 17 F.4th at 617. As this Court explained, the lack of Congressional clarity and the novelty of claims by OSHA counseled against a broad reading of the statute because of the Constitutional concerns. *Id.* at 618 ("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."). If the Court applies the same interpretive rigor to this case—as it should—it will cast a jaundiced eye on Appellants' claimed authority to regulate medical choices by federal employees.

Finally, the Appellees have provided ample reason why the nationwide scope of the injunction is appropriate and necessary. It is even more so for *amici curiae* here. The *Rodden* Plaintiffs represent a putative class. The current

injunction protects that class, and precedent is clear that an injunction of this scope is warranted in such circumstances. *See Texas v. United States*, 201 F. Supp. 3d 810, 836 (N.D. Tex. 2016)(nationwide injunction appropriate in class action) (citing *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)).

CONCLUSION

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

/s/ John J. Vecchione

John J. Vecchione
Gregory Dolin
Margaret A. Little
Mark S. Chenoweth
NEW CIVIL LIBERTIES ALLIANCE
1225 19th St. NW, Suite 450
Washington, DC 20036
(202) 869-5210
John.Vecchione@ncla.legal
September 2, 2022

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 6,449 words, excluding the parts exempted under Rule 32(f).

/s/ John J. Vecchione

CERTIFICATE OF SERVICE

I hereby certify that on September 2nd, 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