No. 23-60

# In the Supreme Court of the United States

JOSEPH R. BIDEN, JR., PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS

*v.*

FEDS FOR MEDICAL FREEDOM, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONERS

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**REPLY BRIEF FOR THE PETITIONERS**

The Fifth Circuit wrongly upheld a nationwide preliminary injunction forbidding the government from enforcing Executive Order No. 14,043 (EO 14,043), 86 Fed. Reg. 50,989 (Sept. 14, 2021), which required civilian federal employees to be vaccinated against COVID-19. The government's appeal of that preliminary injunction became moot when the President revoked EO 14,043 several weeks after the Fifth Circuit entered judgment. Consistent with this Court's ordinary practice, the Court should thus grant the petition for a writ of certiorari, vacate the judgment below, and remand with instructions to direct the district court to vacate its preliminary injunction as moot pursuant to *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).

Respondents identify no sound basis to depart from the Court's ordinary *Munsingwear* practice. They

principally assert (*e.g.*, Br. in Opp. 1-2) that the government deliberately mooted this appeal in response to the Fifth Circuit's adverse decision. That is wrong. The President revoked EO 14,043 because of the changed circumstances of the COVID-19 pandemic, as part of a larger winddown of many different pandemic-related measures. And the President should not have been required to retain—even "on paper" (Br. in Opp. 25)—a vaccination requirement he had determined was no longer warranted merely to preserve the government's ability to seek this Court's review of an important but largely unrelated jurisdictional question under the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111.

**A. This Preliminary-Injunction Appeal Is Moot**

1. To be fit for adjudication by an Article III court, "an 'actual controversy' must exist not only 'at the time the complaint is filed,' but through 'all stages' of the litigation." *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 90-91 (2013) (citation omitted). No such controversy exists here. This is an appeal of a preliminary injunction forbidding the government from enforcing EO 14,043, and it became moot when the President revoked that order. Pet. 13-14.

Respondents suggest (Br. in Opp. 25) that the government could have sought certiorari in the five-week interval after the Fifth Circuit's judgment but before the President revoked EO 14,043. That misperceives the Article III problem. A live controversy must be "extant at all stages of review," *Already*, 568 U.S. at 91 (citation omitted), including in this Court. Filing a certiorari petition would not have kept the appeal from becoming moot. Even if this Court had already granted review (or had entered a stay, see Br. in Opp. 26),

mootness still would have prevented the Court from resolving the case on the merits.

Respondents also identify (Br. in Opp. 11) several online announcements listing compliance with EO 14,043 as a condition of eligibility for federal employment even after the order was revoked. Those announcements are inconsistent with the President's order revoking EO 14,043 and directing that all agency policies premised on EO 14,043, including hiring policies, "no longer may be enforced and shall be rescinded consistent with applicable law." Exec. Order No. 14,099 (EO 14,099), § 2, 88 Fed. Reg. 30,891, 30,891 (May 15, 2023). But those bureaucratic mistakes in extirpating references to EO 14,043 from agency documents do not establish any live controversy between the parties. Respondents do not identify any instance in which an agency has actually sought to enforce EO 14,043 after the order was revoked, much less sought to do so against any of the plaintiffs.[1]

2. Respondents invoke the exceptions to mootness for cases involving collateral legal consequences or voluntary cessation. Neither exception applies here.

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[1] Respondents state (Br. in Opp. 11 n.7) that counsel "inquired of DOJ about such postings in early April 2023." It appears that the inquiry was not properly disseminated within the Department of Justice or the federal government more broadly, in part because of a personnel change. We regret the inadvertent error and have taken steps to bring the matter to the attention of the responsible agencies. The Office of Personnel Management (OPM) has also issued a reminder to all Executive agencies concerning their obligation to ensure compliance with the President's order revoking EO 14,043. See Memorandum from Veronica E. Hinton, Assoc. Dir., OPM, *Reminder Regarding Revocation of COVID-19 Vaccination Requirements for Employees and New Hires – Executive Order 14099* (Sept. 1, 2023), perma.cc/2GJ5-R2TV.

a. In some circumstances, a federal court may adjudicate an appeal that would otherwise be moot because a party faces "collateral legal consequences." *Lane* v. *Williams*, 455 U.S. 624, 632 (1982) (citation omitted). Respondents point to nothing like that here. They do not, for example, identify any "discipline" or "warning letters" received by any plaintiff before EO 14,043 was enjoined. Br. in Opp. 11. The district-court filings that respondents cite (*id.* at 12 n.8) do not contain any factual showing on those issues or any argument about collateral legal consequences. And even if respondents had made such a showing, this appeal would still be moot because only the preliminary injunction was at issue here—not any retrospective relief. Cf. *U.S. Navy SEALs 1-26* v. *Biden*, 72 F.4th 666, 672 (5th Cir. 2023) ("There is no need to enjoin policies that no longer exist.").

b. Respondents' reliance (Br. in Opp. 12-14, 20-24) on voluntary cessation is likewise misplaced. The President revoked EO 14,043 after determining that the pandemic had evolved such that "we no longer need a Government-wide vaccination requirement for Federal employees." EO 14,099, § 1, 88 Fed. Reg. at 30,891. The President's revocation of EO 14,043 because of changed circumstances is not akin to a governmental official voluntarily ceasing to enforce a challenged policy in order to evade review. Pet. 14-15. To the contrary, the circumstances here are much more analogous to those of *Munsingwear* itself, where the Court accepted that the government's suit to enforce wartime price controls had become moot when the government rescinded the price controls. See *Munsingwear*, 340 U.S. at 37-38; cf. *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 25 n.3 (1994) (explaining that the "regulations sought to

be enforced * * * were annulled by Executive Order"). Respondents ignore that similarity.

Even if the revocation of EO 14,043 is viewed as akin to voluntarily ceasing to enforce it, this appeal is still moot because the same policy cannot be reasonably expected to recur. Pet. 16. Respondents observe (Br. in Opp. 13) that the eviction moratorium that this Court addressed in *Alabama Ass'n of Realtors* v. *HHS*, 141 S. Ct. 2485 (2021) (per curiam), had been allowed to expire before being reimposed in modified form. But those developments occurred in July and August 2021, during the "surge in cases brought forth by the highly transmissible Delta variant." 86 Fed. Reg. 43,244, 43,244 (Aug. 6, 2021). When the President revoked EO 14,043 in May 2023, he explained that the Nation is "no longer" in such an "acute phase" of the pandemic. EO 14,099, § 1, 88 Fed. Reg. at 30,891.

The revocation of EO 14,043 also bears no resemblance to the settlement at issue in *U.S. Bancorp* (see Br. in Opp. 20-21). When a private litigant chooses to settle a dispute while an appeal is pending, it can be fairly said to have "voluntarily forfeited" review. *U.S. Bancorp*, 513 U.S. at 25. The same cannot be said when the President revokes a prior policy for reasons independent of litigation, in the good-faith exercise of his constitutional and statutory powers. Cf. *Alvarez* v. *Smith*, 558 U.S. 87, 94-97 (2009) (distinguishing *U.S. Bancorp* and vacating pursuant to *Munsingwear* where the State had caused a forfeiture dispute to become moot by returning the seized property).

Respondents repeatedly invite the Court to impute bad faith to the President, insisting that he revoked EO 14,043 not for the public-health reasons that he gave at the time but rather to moot this case and "erase [a]

circuit court loss from the books." Br. in Opp. 2; see *id.* at 10, 12, 23, 28-33. This Court does not ordinarily "probe the sincerity" of the President's "stated justifications" for an executive order. *Trump* v. *Hawaii*, 138 S. Ct. 2392, 2418 (2018). And even on its own terms, the theory that the government was engaged in strategic behavior makes little sense. If that had been the government's motivation, it would have made far more sense to revoke EO 14,043 at some point during the many months when this appeal was pending before the en banc Fifth Circuit rather than waiting until after that court issued an adverse decision.

Respondents' allegations of gamesmanship are also refuted by the timing and context of the President's revocation of EO 14,043, which occurred as part of a broader winding down of pandemic-era policies. Respondents are thus wrong to assert (Br. in Opp. 31) that the requirement for federal employees to be vaccinated was "among the last COVID-19 related policies left on the books." In May 2023, the President also revoked a vaccination policy regarding federal contractors, see EO 14,099, § 1, 88 Fed. Reg. at 30,891; the Title 42 public-health emergency was allowed to expire, see HHS, *Fact Sheet: End of the COVID-19 Public Health Emergency* (May 9, 2023), perma.cc/JN4E-7MMF; and the Administration took steps to lift multiple other masking, testing, and vaccination requirements or policies—including one regarding federally funded healthcare facilities that this Court had already upheld, see 88 Fed. Reg. 36,485, 36,510 (June 5, 2023); *Biden* v. *Missouri*, 142 S. Ct. 647, 650 (2022) (per curiam).

This Court has already concluded that the end of the Title 42 policy rendered a challenge to that policy moot. See *Arizona* v. *Mayorkas*, 143 S. Ct. 1312, 1312 (2023)

(discussed at Pet. 15). Respondents are mistaken in asserting (Br. in Opp. 13 n.9) that "Congress itself ordered the end" of that policy. The Executive Branch made a decision not to renew the underlying public-health emergency in light of changed conditions, and this Court granted *Munsingwear* vacatur based on its conclusion that the non-renewal rendered the suit—and thus a motion to intervene in the suit—"moot." *Arizona*, 143 S. Ct. at 1312; see Gov't Letter at 1-2, *Arizona*, *supra* (May 12, 2023) (No. 22-592). The lower courts have likewise determined that preliminary-injunction appeals regarding other COVID-19 policies rescinded around the same time are moot. Pet. 15-16. This appeal is moot as well.

**B. Further Review Would Have Been Warranted Had This Appeal Not Become Moot**

1. Respondents identify no persuasive reason to doubt that the judgment below would have warranted further review. Pet. 16-25. The Fifth Circuit wrongly decided an important question of CSRA preclusion, in conflict with the D.C. Circuit's decision in *Payne* v. *Biden*, 62 F.4th 598 (2023), petition for cert. pending, No. 22-1225 (filed June 16, 2023).[2] Respondents do not deny the square conflict of authority but suggest (Br. in Opp. 14) that "further percolation" would have been necessary. But the Fifth Circuit already decided the CSRA question en banc, and it pretermitted any further percolation—at least in the context of EO 14,043—by

[2] The government filed a response brief in *Payne* on September 5, 2023, agreeing with the plaintiff that it would be appropriate to vacate the D.C. Circuit's judgment in *Payne* under *Munsingwear* for the same reasons that vacatur is warranted here. See Gov't Br. at 9-11, *Payne*, *supra* (No. 22-1225).

upholding a nationwide preliminary injunction that rendered litigation in other jurisdictions academic.

The Fifth Circuit's decision also contradicts this Court's CSRA precedent. As the petition explains (at 20-22), the Fifth Circuit's logic suggests that the plaintiffs in *Elgin* v. *Department of the Treasury*, 567 U.S. 1 (2012), could have circumvented the CSRA limitations that this Court applied in that case merely by suing in district court *before* suffering any specific adverse personnel actions. Respondents observe (Br. in Opp. 16) that the employees in *Elgin* had in fact suffered adverse personnel actions, but that is beside the point. If those same employees could have circumvented the CSRA's jurisdictional limitations by reframing their challenge as one to the statutory bar on employing individuals who fail to register for the Selective Service, then they could have "end run" the Court's holding in *Elgin*. Pet. App. 78a (Higginson, J., concurring in part and dissenting in part).

Respondents also misunderstand (Br. in Opp. 16) the government's brief in *Elgin*. The government acknowledged that the CSRA does not contain the "heightened showing" that this Court has required before concluding that Congress precluded *all* judicial review of a constitutional claim. Gov't Br. at 18, *Elgin*, *supra* (No. 11-45) (citation omitted). But neither *Elgin* nor this case implicates that principle because, as the Court confirmed in *Elgin* itself, the Federal Circuit is available as a judicial forum to hear constitutional challenges properly raised through the CSRA framework. Respondents' parade of horribles (Br. in Opp. 16-17) is similarly unavailing. Federal employees cannot circumvent the CSRA scheme based on speculation about

hypothetical policies for which they would prefer to obtain district-court review.

In short, for judicial review, federal employees "get * * * what [they] get" under the CSRA—no more, no less. *Fornaro* v. *James*, 416 F.3d 63, 67 (D.C. Cir. 2005). Respondents observe (Br. in Opp. 17) that *Fornaro* concerned the "Civil Service Retirement Act," 416 F.3d at 64. But that "other" CSRA incorporates essentially the same jurisdictional scheme as the Civil Service Reform Act, and the D.C. Circuit has cited cases addressing the two statutes interchangeably. See *id.* at 66-67; see also *Lacson* v. *DHS*, 726 F.3d 170, 174 n.4 (D.C. Cir. 2013). Respondents also err in relying (Br. in Opp. 17-18) on two D.C. Circuit decisions from the 1980s. In *Payne*, the D.C. Circuit explained that its "pre-1994 precedent" identifying certain judge-made exceptions to CSRA preclusion did not "survive [this] Court's subsequent decisions," including *Elgin*. *Payne*, 62 F.4th at 606.

2. The decision below also would have warranted further review because the Fifth Circuit wrongly upheld a nationwide preliminary injunction frustrating an important exercise of the President's constitutional and statutory authority to superintend the civilian federal workforce. Pet. 22-24. The Fifth Circuit addressed the merits of the preliminary injunction in a "perfunctory" two sentences, Pet. App. 96a (Higginson, J., concurring in part and dissenting in part), in which the en banc majority stated only that it "substantially agree[d]" with the district court's reasoning, *id.* at 40a.

For their part, respondents have virtually nothing to say in defense of the decision below on the merits. Their brief in this Court does not even cite the three statutes that the President invoked when he issued EO 14,043, let alone explain why those statutes do not confer the

authority to adopt the same sort of employee vaccination requirement that many other large employers chose to adopt during the height of the pandemic. Respondents observe (Br. in Opp. 18) that none of the three statutes refers specifically to "vaccines." This Court rejected a similar magic-words requirement in *Missouri*, *supra*, in holding that a rule requiring federally funded healthcare facilities to establish staff vaccination requirements "fit[] neatly within" the agency's statutory authority to adopt measures to promote the "'health and safety'" of patients receiving care at the facilities. 142 S. Ct. at 652 (citation omitted). The President here was likewise relying in part on his express authority to prescribe rules with respect to the "health" of candidates for federal service. 5 U.S.C. 3301(2).

3. Further review would have been particularly warranted given the nationwide scope of the preliminary injunction. Pet. 24-25. Contrary to respondents' suggestion (Br. in Opp. 19), the district court made no effort to try a more targeted remedy, and the court's decision to grant universal relief rested simply on its observation that "Feds for Medical Freedom[] has more than 6,000 members spread across every state," Pet. App. 156a—not on any finding of past non-compliance. The perceived convenience of universal relief is not a sound reason for dispensing with traditional Article III and equitable limitations on injunctions.

**C. The Equities Favor Vacatur**

Because the Fifth Circuit's decision would have warranted plenary review had the appeal not become moot, this Court should follow its "established practice" and vacate the judgment below. *Munsingwear*, 340 U.S. at 39. As the government has explained (Pet. 25-28), the equities favor vacatur here. It would not serve justice

or the public interest to force the Executive Branch to retain an obsolete employee vaccination requirement "on paper" (Br. in Opp. 25) merely in order to preserve a continuing basis for this Court to grant review.[3]

Vacatur is particularly appropriate because the legal consequences that the judgment below may spawn if left unreviewed have little to do with the equities that respondents claim to have. Respondents assert (Br. in Opp. 36) that the decision below will serve as a "warning to the future" about the importance of civil liberties during a national emergency. As just explained, however, the Fifth Circuit had almost nothing to say about the merits. The Fifth Circuit instead largely addressed more quotidian questions concerning CSRA preclusion. Leaving the unreviewed and unreviewable judgment below in place will guarantee that district courts within the Fifth Circuit are obligated to apply the flawed decision below as precedent in future CSRA disputes—a result that does not follow when mootness prevents a court of appeals from reviewing a non-precedential district court order, as in the circuit cases respondents invoke (Br. in Opp. 38).

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[3] Respondents err in asserting (Br. in Opp. 35) that the government's approach to this litigation bears any resemblance to the conduct of the petitioner in *EPIC* v. *Presidential Advisory Commission on Election Integrity*, 139 S. Ct. 791 (2019). There, the petitioner "abandoned its effort to obtain further relief" only "many months after" the mooting event. Gov't Br. in Opp. at 17, *EPIC*, *supra* (No. 18-267).

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the Court should grant the petition, vacate the judgment of the court of appeals, and remand with instructions to direct the district court to vacate its order granting a preliminary injunction as moot under *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).

Respectfully submitted.

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