No. ________

In the Supreme Court of the United States

JASON PAYNE,

Petitioner,

v.

JOSEPH R. BIDEN, JR., OFFICE OF PERSONNEL MANAGEMENT, KIRAN AHUJA, GENERAL SERVICES ADMINISTRATION, ROBIN CARNAHAN, OFFICE OF MANAGEMENT AND BUDGET, SHALANDA YOUNG, SAFER FEDERAL WORKFORCE TASK FORCE, JEFFREY ZIENTS, UNITED STATES DEPARTMENT OF DEFENSE, LLOYD J. AUSTIN, III, UNITED STATES DEPARTMENT OF THE NAVY, AND CARLOS DEL TORO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner challenged the constitutionality of Executive Order No. 14,043, which mandated that all executive branch employees obtain the COVID-19 vaccination. In the decision below, the U.S. Court of Appeals for the D.C. Circuit misapplied *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), and held that the Civil Service Reform Act precluded jurisdiction over Petitioner's claim. Two days later, the en banc U.S. Court of Appeals for the Fifth Circuit correctly reached the opposite holding in a case involving analogous claims.

A few weeks later, this Court clarified how the *Thunder Basin* factors should apply when a party raises constitutional challenges, emphasizing that "agency adjudications are generally ill suited to address structural constitutional challenges—like those maintained here." *Axon Enter., Inc. v. Fed. Trade Comm'n*, 143 S. Ct. 890, 905 (2023) (cleaned up). The Court then granted certiorari in, vacated, and remanded a case involving similar issues for consideration in light of *Axon*. *Bohon v. FERC*, No. 22-256, 2023 WL 3046112, at *1 (U.S. Apr. 24, 2023).

Finally, effective May 12, 2023, the President revoked the challenged executive order mandating vaccination. Exec. Order No. 14,099, 88 Fed. Reg. 30,891, 30,891 (May 9, 2023).

The questions presented are:

1. Whether the judgment below should be vacated and the case remanded for dismissal as moot under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

2. Alternatively, whether the judgment below should be vacated and the case remanded for further consideration in light of *Axon*.

LIST OF ALL PROCEEDINGS

United States Court of Appeals for the D.C. Circuit, No. 22-5154, *Payne v. Biden et al.*, judgment entered March 21, 2023.

United States District Court for the District of Columbia, No. 21-3077 (JEB), *Payne v. Biden et al.*, judgment entered May 12, 2022.

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The D.C. Circuit's opinion affirming is reported at 62 F.4th 598 (D.C. Cir. 2023) and reprinted at App. 1–18.

STATEMENT OF JURISDICTION

Petitioner timely files this petition from the D.C. Circuit's March 21, 2023, decision. This Court has jurisdiction under 28 U.S.C. § 1254(a).

PERTINENT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

The relevant statutory provisions are set out at App. 48–118.

INTRODUCTION

This is a textbook case for granting certiorari and vacating the judgment below as moot. A few weeks after the D.C. Circuit affirmed the dismissal of Petitioner's challenge to an executive order mandating that all federal employees receive a COVID-19 vaccination, the President revoked that order. Because the courts can no longer provide relief against the revoked order, the challenge has become moot. And because the actions of the prevailing party below gave rise to mootness, the judgment below should be vacated under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

This course makes especially good sense because, a few days after the decision below but a few weeks before the order was revoked, the en banc Fifth Circuit reached the opposite result. Whereas the D.C. Circuit held that the Civil Service Reform Act ("CSRA") precluded jurisdiction over Petitioner's constitutional challenges to the vaccine mandate, the Fifth Circuit held that the courts retained jurisdiction over such challenges. The Fourth Circuit, meanwhile, has reached the same conclusion as the D.C. Circuit. This split of authority would ordinarily call out for the Court's review. Because these challenges are now moot, the split provides another reason to wipe the legal slate clean.

Given that the federal government has argued in other cases that the President's revocation mooted challenges to the employee and parallel contractor vaccine mandates, it will presumably agree with Petitioner. But even if this case were not moot, the Court should vacate the judgment and remand the case for further consideration in light of *Axon*

Enterprise, Inc. v. Federal Trade Comm'n, 143 S. Ct. 890 (2023).

In *Axon*, this Court clarified the factors that courts should apply when deciding whether a statutory scheme precludes Article III jurisdiction, especially with respect to constitutional claims. Those factors derive from *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). Because the decision below centered on the *Thunder Basin* factors and Petitioner alleged constitutional claims, it is reasonably probable that the D.C. Circuit would reconsider its opinion after *Axon*.

Thus, the Court should grant the petition for certiorari, vacate the judgment below, and remand with instructions to dismiss as moot or for further consideration in light of *Axon*.

STATEMENT OF THE CASE

A. Facts

In September 2021, President Biden issued Executive Order No. 14,043, mandating that all executive branch employees obtain the COVID-19 vaccination. Exec. Order No. 14,043, 86 Fed. Reg. 50,989, 50,990 (Sept. 9, 2021). This Order also directed the Safer Federal Workforce Task force to provide guidance about how the vaccine mandate should be implemented. *Id.* at 50,989–90; *see* Exec. Order No. 13,991, 86 Fed. Reg. 7,045, 7,046 (Jan. 20, 2021) (establishing the Safer Federal Workforce Task Force).

Petitioner Jason Payne is a federal civilian employee of the Department of the Navy. App. 122. He has contracted, and recovered from, COVID-19, and he has thereby acquired some natural immunity against the disease. App. 123. Mr. Payne does not believe he

needs, does not want, and does not intend to receive the COVID-19 vaccine. App. 121.

Mr. Payne did not complete the required Department of Defense form (DD-3175) to report whether he received a vaccine, though he informed his direct supervisors that he did not wish to receive one. App. 136. Notwithstanding the executive order and an Office of Personnel Management memorandum warning that "failure to comply will result in disciplinary action up to and including removal or termination," App. 134–35, 183, Mr. Payne's agency has neither taken nor proposed any personnel action against him. App. 11–12, 37–38.

B. Proceedings below

On November 22, 2021, Mr. Payne filed this pre-enforcement suit "challenging the mandate's constitutionality." App. 119. Specifically, Mr. Payne "claim[ed] the vaccine mandate violates the separation of powers and his Fifth Amendment right to privacy, and places an unconstitutional condition on his employment." App. 7. Mr. Payne moved for summary judgment, and the government moved to dismiss for lack of jurisdiction, "arguing that Congress divested district courts of subject matter jurisdiction over claims challenging an Executive Order, such as these, when it enacted the CSRA." *Id.*

The CSRA is a "system for reviewing personnel action taken against federal employees." *Elgin v. Dep't of Treasury*, 567 U.S. 1, 5 (2012). Two sections of the law are implicated by this case. First, Chapter 23 outlines the "merit system principles" agencies must uphold and makes a violation of those principles a "prohibited personnel practice." 5 U.S.C. §§ 2301(b), 2302(a). An employee alleging a personnel violation

may file a charge with the Office of Special Counsel, which can seek review in the Merit Systems Protection Board ("MSPB"). *Id.* § 1214. The other section, Chapter 75, "addresses major adverse actions against employees" and provides for review by the MSPB. App. 5. Under both chapters, review of an MSPB decision is available in the U.S. Court of Appeals for the Federal Circuit. App. 6.

The district court granted the government's motion to dismiss, holding that the CSRA attached to Mr. Payne's claims and precluded federal court review. App. 3, 44. The court said that it "[a]gree[d] with" the Fifth Circuit panel decision in *Feds for Medical Freedom v. Biden*, 30 F.4th 503 (5th Cir. 2022), that "the CSRA precludes challenges of this kind to the Executive Order." App. 27–28.

The D.C. Circuit affirmed. App. 3. To decide whether Congress established the CSRA "to be the exclusive means of obtaining judicial review in those cases to which it applies," the court applied the "two-part inquiry put forth in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994)." App. 8. First, the court asked "whether Congress's intent to replace district court jurisdiction with an alternative process of review is 'fairly discernible in the statutory scheme.'" *Id.* (quoting *Thunder Basin*, 510 U.S. at 207). Second, the court "analyze[d] whether the 'claims are of the type Congress intended to be reviewed within this statutory structure.'" App. 8–9 (quoting *Thunder Basin*, 510 U.S. at 212).

Answering "yes" to the first question, the D.C. Circuit relied on this Court's decision in *Elgin*, which held that "the CSRA provides the exclusive avenue to judicial review when a qualifying employee challenges

an adverse employment action by arguing that a federal statute is unconstitutional." App. 10 (quoting *Elgin*, 567 U.S. at 5).

On the second question, the D.C. Circuit applied the three *Thunder Basin* factors, explaining that "[a] claim generally falls outside of the special statutory scheme only when: (1) a finding of preclusion might foreclose all meaningful judicial review; (2) the claim is wholly collateral to the statutory review provisions; and (3) the claim is beyond the expertise of the agency." App. 10 (cleaned up); *see Thunder Basin*, 510 U.S. at 212–13. The D.C. Circuit held that the CSRA "covers pre-enforcement removal challenges like Mr. Payne's" and thus that he "may access meaningful review by following the [CSRA] procedures." App. 13, 15. Though the court recognized that "Mr. Payne certainly alleges that the vaccine mandate is unconstitutional," the court said that his claims were "not wholly collateral" because "one of [his] interests in this suit is to avoid the impending adverse employment action." App. 16–17. Finally, the court held that the agency's "expertise remains applicable to the various threshold questions attached to the claims and any preliminary issues particular to the employment context." App. 17. Thus, the D.C. Circuit held "that should Mr. Payne choose to continue challenging the vaccine mandate, he *must* do so through the CSRA's scheme" rather than in court. App. 18.

C. Later developments

Two days after the D.C. Circuit ruled against Mr. Payne, the en banc U.S. Court of Appeals for the Fifth Circuit reached the opposite result in a factually identical case, reversing the rationale of the previous

panel decision that the district court here aligned itself with. The en banc Fifth Circuit held that similarly-situated plaintiffs making the same arguments against the vaccine mandate "are not challenging CSRA-covered personnel actions," but rather challenging "under the Constitution, the APA, and the DJA" "the President's executive orders requiring federal employees to make irreversible medical decisions to take COVID-19 vaccines." *Feds for Med. Freedom v. Biden*, 63 F.4th 366, 375 (5th Cir. 2023). The court expressly departed from the D.C. Circuit's decision and instead relied on D.C. Circuit precedents that the decision below distinguished. *See id.* at 378–79, 388–89; App. 15.

A few weeks later, the President revoked the vaccine mandates for federal employees and contractors. Exec. Order No. 14,099, 88 Fed. Reg. 30,891, 30,891 (May 9, 2023). Citing declines in COVID deaths and hospitalizations, as well as "the latest guidance from our public health experts," the order said that "we no longer need a Government-wide vaccination requirement for Federal employees or federally specified safety protocols for Federal contractors." *Id.* Thus, "Executive Order 14042 and Executive Order 14043 are revoked," and "[a]gency policies adopted to implement Executive Order 14042 or Executive Order 14043, to the extent such policies are premised on those orders, no longer may be enforced and shall be rescinded consistent with applicable law." *Id.* The revocation took effect on May 12. *Id.*

REASONS FOR GRANTING THE WRIT

I. Because the challenge became moot on appeal, vacatur and remand is warranted.

For a federal court to exercise jurisdiction, "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) (quoting *Alvarez v. Smith*, 558 U.S. 87, 92 (2009)). A case generally presents no live controversy if "no court is now capable of granting the relief" sought by the plaintiff. *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 169 (2016).

Here, Petitioner sought an injunction and declaratory relief against "Executive Order 14,043 and the various Task Force and agency actions taken in response thereto." App. 145–46. But as explained, after the decision below, the President revoked that order and implementing agency actions. *See* Exec. Order No. 14,099, 88 Fed. Reg. 30,891, 30,891 (May 9, 2023). The revocation took effect on May 12, 2023. *Id.* Because there are no longer active orders against which relief can be granted, this challenge is moot.

Presumably, Respondents agree with this conclusion. In the Third Circuit, the federal government has filed a motion to dismiss as moot an appeal of an order denying a preliminary injunction against the employee vaccine mandate. *See* Motion to Dismiss Appeal as Moot, *Smith v. Biden*, No. 21-3091 (3d Cir. May 17, 2023) (hereinafter "*Biden* Motion"). And the government has successfully argued that challenges to Executive Order 14,042—the parallel order requiring vaccination of federal contractors—are moot because the President simultaneously revoked that order. *See* Letter from David L. Peters, *Hollis v.*

Biden, No. 21-60910, ECF No. 84 (5th Cir. May 15, 2023); Government's Unopposed Motion to Voluntarily Dismiss Appeal 3–5, *Missouri v. Biden*, No. 22-1104 (8th Cir. May 15, 2023). The Fifth and Eighth Circuits have agreed. *See Hollis v. Biden*, No. 21-60910, 2023 WL 3593251, at *1 (5th Cir. May 18, 2023); *Missouri v. Biden*, No. 22-1104, 2023 WL 3862561, at *1 (8th Cir. June 7, 2023). The same result obtains here. *Accord U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 n.3 (1994) ("The suit for injunctive relief in [*United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950)] became moot on appeal because the regulations sought to be enforced by the United States were annulled by Executive Order.").

The appropriate course, then, is to vacate the judgment below and remand for dismissal. "Vacatur is in order when mootness occurs through happenstance—circumstances not attributable to the parties—or, relevant here, the 'unilateral action of the party who prevailed in the lower court.'" *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 71–72 (1997) (quoting *U.S. Bancorp*, 513 U.S. at 23). This Court has authority to vacate the judgment of the court of appeals and "may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. § 2106.

The Court "normally" "vacate[s] the lower court judgment in a moot case because doing so 'clears the path for future relitigation of the issues between the parties,' preserving 'the rights of all parties,' while prejudicing none 'by a decision which . . . was only preliminary.'" *Alvarez*, 558 U.S. at 94 (quoting *Munsingwear*, 340 U.S. at 40). As the Court has explained, "vacatur must be decreed for those

judgments whose review is . . . prevented through happenstance—that is to say, where a controversy presented for review has become moot due to circumstances unattributable to any of the parties." *U.S. Bancorp*, 513 U.S. at 23 (cleaned up). Vacatur must also "be granted where mootness results from the unilateral action of the party who prevailed in the lower court." *Id.*

Under any understanding of the situation here, vacatur is required. Petitioner did not cause mootness. Respondent Biden—the prevailing party below—did, by revoking the challenged order. And no matter if "repeal of administrative regulations" can "fairly be attributed to the Executive Branch when it litigates in the name of the United States," *U.S. Bancorp*, 513 U.S. at 25 n.3, there is no reason to depart from the "established practice" of vacatur, *Arizonans for Off. Eng.*, 520 U.S. at 71 (quoting *Munsingwear*, 340 U.S. at 39); *see Camreta v. Greene*, 563 U.S. 692, 698 (2011) (referring to this "normal practice"). The federal government seems likely to agree. *See Biden* Motion, *supra*, at 5 ("Because the matter became moot while plaintiffs' appeal was pending, the government would not oppose vacatur").

Vacatur makes especially good sense here. First, while a reoccurrence of the exact order challenged may not be likely enough to trigger a mootness exception, similar orders are hardly unforeseeable, whether with regard to future coronavirus strains or other communicable diseases. Second, as explained below, this Court has since issued decisions that could warrant reconsideration of the decision below. Third, another court of appeals reached the opposite result in a substantively identical case, which would ordinarily prompt this Court to consider resolving the conflict

among the lower courts. *Feds for Med. Freedom*, 63 F.4th at 375; *but see Rydie v. Biden*, No. 21-2359, 2022 WL 1153249, at *8 (4th Cir. Apr. 19, 2022) (reaching same result as the D.C. Circuit). Leaving potentially erroneous precedent to ossify in the D.C. Circuit—where federal challenges are routinely filed—would disserve the judicial goal of preventing an "unreviewable decision 'from spawning any legal consequences.'" *Camreta*, 563 U.S. at 713 (quoting *Munsingwear*, 340 U.S. at 41).

In sum, "[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." *U.S. Bancorp*, 513 U.S. at 25. The Court should grant the petition, vacate the judgment, and remand for dismissal as moot under *Munsingwear*.

II. Alternatively, the Court should vacate and remand for consideration in light of *Axon*.

If this Court did not consider the challenge moot, it should vacate and remand for further consideration in light of *Axon Enterprise, Inc. v. Federal Trade Comm'n*, 143 S. Ct. 890 (2023). "Where intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order" is often appropriate. *Lawrence v. Chater*, 516 U.S. 163, 167 (1996).

That ordinary course would be appropriate here. As discussed, the decision below recognized that Petitioner's suit "challeng[ed] the mandate's constitutionality." App. 3. And it purported to apply

the *Thunder Basin* factors to decide whether Petitioner's "constitutional challenge is the type of claim Congress planned to be assessed under" a "special statutory scheme" like the CSRA. App. 10; *see* App. 9–17. This Court in *Axon* likewise considered whether two "special statutory review scheme[s]" "displace[d] district court jurisdiction over [plaintiffs'] far-reaching constitutional claims." 143 S. Ct. at 900.

Axon may materially affect the D.C. Circuit's consideration. On the first factor, access to meaningful judiciary review, the D.C. Circuit held that Petitioner "may access meaningful review by following the procedures described" in the CSRA. App. 15. But *Axon* held that when it comes to certain "structural constitutional claims"—including a "separation-of-powers claim"—the injury of being "subject[ed] to an illegitimate proceeding . . . cannot be undone," so "[j]udicial review . . . would come too late to be meaningful." 143 S. Ct. at 903–04.

On the second factor, the collateral nature of the claims, the D.C. Circuit held that even though Petitioner's "challenge pertains to the Constitution," his "claims are not wholly collateral because challenges to adverse employment actions are the type of claims that the [MSPB] regularly adjudicates." App. 17. *Axon*, however, held that the "separation-of-powers claims" there "d[id] not relate to the subject of the enforcement actions" or "address the sorts of procedural or evidentiary matters an agency often resolves on its way to a merits decision"—and therefore that the claims *were* collateral. 143 S. Ct. at 904.

On the third factor, agency expertise, the D.C. Circuit rejected Petitioner's argument that his

"constitutional challenges" were "unrelated to the CSRA's procedures" "because the MSPB's expertise remains applicable to the various threshold questions attached to the claims." App. 17. *Axon*, by contrast, emphasized that "'agency adjudications are generally ill suited to address structural constitutional challenges,'" especially those that "allege injury not from this or that ruling but from subjection to all agency authority." 143 S. Ct. at 905 (quoting *Carr v. Saul*, 141 S. Ct. 1352, 1360 (2021)).

For these reasons, it is at least reasonably probable that the D.C. Circuit would reach a different result if it were to reconsider this case in light of *Axon*. The "equities of the case" also support vacatur and remand. *Lawrence*, 516 U.S. at 168. "[A] GVR order conserves the scarce resources of this Court that might otherwise be expended on plenary consideration," *id.* at 167—an especially important consideration here, given the split among the courts of appeals. A GVR would also "alleviate[] the potential for unequal treatment" and "assist[] this Court by procuring the benefit of the lower court's insight before [it] rule[s] on the merits." *Id.* Last, "the intervening development" was not "part of an unfair or manipulative litigation strategy," and no unwarranted "delay" is threatened by a GVR. *Id.* at 168.

Further, this Court has already vacated and remanded a decision involving a more tenuous connection with *Axon*. In *Bohon v. Federal Energy Regulatory Commission*, the Court GVR'd in light of *Axon* even though, according to the Solicitor General, the court of appeals did not apply the *Thunder Basin* factors at all, and the petitioner's challenge was to a final agency decision. No. 22-256, __ S. Ct. __, 2023 WL 3046112, at *1 (U.S. Apr. 24, 2023); *see* Response of the

Federal Energy Regulatory Commission to Petitioners' Motion to Lift the Hold, Reverse and Remand 3–5, *Bohon* (U.S. Apr. 18, 2023). Vacating and remanding *this* case in light of *Axon* is even more warranted.

CONCLUSION

The Court should grant the petition for certiorari, vacate the judgment below, and remand with instructions to dismiss as moot or for further consideration in light of *Axon*.

Respectfully submitted,

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