No. 22-1225

In the Supreme Court of the United States

JASON PAYNE, PETITIONER

v.

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

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
CHARLES W. SCARBOROUGH
DANIEL WINIK
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

In 2021, the President issued an executive order requiring employees of the Executive Branch to be vaccinated against COVID-19 as a condition of their employment, subject to religious and medical exemptions. In the decision below, the D.C. Circuit affirmed the dismissal of a challenge to that requirement under the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, which channels federal employees' challenges to adverse personnel actions to the Merit Systems Protection Board, subject to review by the Federal Circuit. Roughly six weeks after the D.C. Circuit issued its decision, the President revoked the executive order at issue in this case as part of a broader wind-down of COVID-19 emergency policies based on changed public-health conditions. The question presented is as follows:

Whether, pursuant to *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950), this Court should vacate the court of appeals' judgment as moot.

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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 62 F.4th 598. The opinion of the district court (Pet. App. 21-45) is reported at 602 F. Supp. 3d 147. The order of the district court (Pet. App. 46-47) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 2023. The petition for a writ of certiorari was filed on June 16, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A. Civil Service Background

1. The President is responsible for superintending the federal workforce. "Under our Constitution, the

'executive Power'—all of it—is 'vested in a President,' who must 'take Care that the Laws be faithfully executed.'" *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183, 2191 (2020) (quoting U.S. Const. Art. II, § 1, Cl. 1; *id.* § 3). The President's powers include "the general administrative control of those executing the laws." *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010) (citation omitted).

Consistent with the President's constitutional role as "Chief Executive," *Free Enter. Fund*, 561 U.S. at 493 (citation omitted), Congress has authorized him to "prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service" and to "ascertain the fitness of applicants," including specifically their "health." 5 U.S.C. 3301(1) and (2). Congress has also authorized the President to establish "rules governing the competitive service," 5 U.S.C. 3302, as well as exceptions to competitive hiring, *i.e.*, rules for the excepted service, 5 U.S.C. 3302(1).*

In addition to his authority over the admission of new employees into federal service, the President has long had express statutory authority to "prescribe regulations for the conduct of employees in the executive branch." 5 U.S.C. 7301; see Act of Mar. 3, 1871, ch. 114, § 9, 16 Stat. 514-515. Presidents have relied on that authority to establish a wide array of rules for federal

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* Federal civilian employees are classified into three main categories: the "Senior Executive Service," which is a relatively small cadre of high-level employees, 5 U.S.C. 3132(a)(2); the "competitive service," which consists of other "civil service positions in the executive branch" not exempted from competitive-hiring requirements, 5 U.S.C. 2102(a)(1); and the "excepted service," covering positions not in the first two categories, 5 U.S.C. 2103(a).

employees. In 1986, for example, President Reagan invoked Section 7301 to require drug-testing for sensitive positions in the civil service after he determined that any use of illegal drugs, "whether on duty or off duty, is contrary to the efficiency of the service." Exec. Order No. 12,564, § 1(b), 3 C.F.R. 224, 225 (1986 comp.). Presidents have also issued several executive orders, including most recently in 1989, establishing ethics rules for federal employees based in part on Section 7301 or its predecessors. See, *e.g.*, Exec. Order No. 12,674, 3 C.F.R. 215 (1989 comp.).

2. An employee in the competitive or excepted service generally may be removed for "such cause as will promote the efficiency of the service." 5 U.S.C. 7513(a); cf. 5 U.S.C. 7543(a) (Senior Executive Service). Under the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111, specified non-probationary employees in the competitive or excepted service have a "right to notice, representation by counsel, an opportunity to respond, and a written, reasoned decision from the agency" before any removal. *Elgin* v. *Department of the Treasury*, 567 U.S. 1, 6 (2012). If the agency proposes to remove a covered employee or take any of the other adverse personnel actions specified in 5 U.S.C. 7512, such as a suspension of more than 14 days, "the CSRA gives the employee the right to a hearing * * * before the Merit Systems Protection Board (MSPB)." *Elgin*, 567 U.S. at 6 (citing 5 U.S.C. 7513(d), 7701(a)(1)-(2)). The MSPB is an adjudicative agency with the authority to "order relief to prevailing employees, including reinstatement, backpay, and attorney's fees." *Ibid.* The Federal Circuit, in turn, has "exclusive jurisdiction" over appeals from the MSPB's decisions, 28 U.S.C.

1295(a)(9), except in certain cases involving discrimination claims, see 5 U.S.C. 7703(b).

The procedures established by the CSRA for review of covered personnel actions are comprehensive and exclusive. This Court has held that if Congress declined to extend the CSRA's "integrated scheme of administrative and judicial review" to a particular class of federal employees, *United States* v. *Fausto*, 484 U.S. 439, 445 (1988), those employees do not have a "statutory entitlement" to judicial review in any forum "for adverse action of the type governed by" the CSRA, *id.* at 448-449. And "[j]ust as the CSRA's 'elaborate' framework demonstrates Congress' intent to entirely foreclose judicial review to employees to whom the CSRA *denies* statutory review, it similarly indicates that extrastatutory review is not available to those employees to whom the CSRA *grants* administrative and judicial review." *Elgin*, 567 U.S. at 11 (citation omitted).

B. Executive Order No. 14,043

This case concerns an executive order issued by the President during the throes of the COVID-19 pandemic. On September 9, 2021, after the Food and Drug Administration approved the first COVID-19 vaccine, the President ordered each agency in the Executive Branch to "implement, to the extent consistent with applicable law, a program to require COVID-19 vaccination for all of its Federal employees." Exec. Order No. 14,043 (EO 14,043), § 2, 86 Fed. Reg. 50,989, 50,990 (Sept. 14, 2021). The order directed agencies to provide for exceptions "as required by law," *ibid.*, including on the basis of medical conditions or sincerely held religious beliefs.

The order rested on and invoked the President's constitutional and statutory authority to manage the civilian workforce, including 5 U.S.C. 3301, 3302, and

7301. The President explained that "[t]he health and safety of the Federal workforce, and the health and safety of members of the public with whom they interact, are foundational to the efficiency of the civil service." EO 14,043, § 1, 86 Fed. Reg. at 50,989. He also noted that, according to the Centers for Disease Control and Prevention (CDC), vaccination was the single "best way to slow the spread of COVID-19" and to prevent infection from the then-prevalent Delta variant. *Ibid.* Accordingly, the President determined that requiring "COVID-19 vaccination for all Federal employees" was necessary "to promote the health and safety of the Federal workforce and the efficiency of the civil service." *Ibid.*

At that time, thousands of Americans were dying from COVID-19 each week. See CDC, *COVID Data Tracker*, go.usa.gov/xeFyx. Millions of Americans were missing work "because they had COVID-19 or were caring for someone with COVID-19." The White House, *White House Report: Vaccination Requirements Are Helping Vaccinate More People, Protect Americans from COVID-19, and Strengthen the Economy* 4 (Oct. 7, 2021) (*Vaccination Report*). The federal government, like other employers, was forced to significantly alter its operations in response to the pandemic—reducing in-person work, limiting official travel, and taking other precautions to reduce the risk that employees would contract COVID-19, or transmit the disease to others, while carrying out their official duties and functions. See, *e.g.*, Pandemic Response Accountability Comm., *Top Challenges Facing Federal Agencies: COVID-19 Emergency Relief and Response Efforts* 8-9, 25, 45 (June 2020). Numerous private-sector businesses—including major employers like United Airlines, Tyson

Foods, AT&T, Bank of America, and CVS—likewise responded to the pandemic by requiring their employees to be vaccinated. See *Vaccination Report* 9, 12.

The President directed the Safer Federal Workforce Task Force to issue guidance to implement the vaccination requirement. EO 14,043, § 2, 86 Fed. Reg. at 50,990; see Exec. Order No. 13,991, § 4, 86 Fed. Reg. 7045, 7046 (Jan. 25, 2021) (earlier order establishing the Task Force). The Task Force issued guidance confirming the availability of medical and religious accommodations and providing a timeline for compliance. The guidance instructed agencies to use progressive discipline, under which employees who failed to comply would first receive counseling and education followed by sanctions of increasing severity, including reprimands, suspension, and termination. Pet. App. 6.

C. The Present Controversy

1. This suit is a challenge to EO 14,043 filed in the U.S. District Court for the District of Columbia in November 2021. Petitioner is a civilian employee of the Department of the Navy. Pet. App. 3. In his complaint, petitioner alleged that he "refuses vaccination" because he previously "recovered from COVID-19 and has natural immunity." Compl. ¶ 2. Among other claims, petitioner alleged that the President lacked constitutional or statutory authority to require federal employees to be vaccinated against COVID-19 as a condition of employment. Compl. ¶¶ 60-72.

2. The district court dismissed the complaint. Pet. App. 21-45, 46-47. The court determined that, in light of the CSRA, the court lacked "subject-matter jurisdiction over this workplace dispute involving a covered federal employee." *Id.* at 22. The court explained that, "[w]hile federal courts ordinarily have jurisdiction over

'all civil actions arising under the Constitution, laws, or treaties of the United States,' when 'a special statutory review scheme exists,' 'it is ordinarily supposed that Congress intended that procedure to be the exclusive means of obtaining judicial review in those cases to which it applies.'" *Id.* at 30 (citations omitted). The court further explained that, under *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200 (1994), a special statutory review scheme precludes district-court jurisdiction if Congress's intent to require a litigant to "proceed exclusively through a statutory scheme of administrative and judicial review * * * is 'fairly discernible in the statutory scheme'" and the litigant's claims are "'of the type Congress intended to be reviewed within the statutory structure.'" Pet. App. 30 (brackets and citation omitted). The district court found the first part of that inquiry to be controlled by this Court's decision in *Elgin*, *supra*, which already determined that the CSRA "provides the exclusive avenue to judicial review when a qualifying employee challenges an adverse employment action." Pet. App. 31 (quoting *Elgin*, 567 U.S. at 5). The district court further held that, under *Elgin*, petitioner's claims are "of the type Congress intended to be reviewed within" the CSRA framework. *Id.* at 32; see *id.* at 32-44.

3. The court of appeals unanimously affirmed. Pet. App. 1-18. Like the district court, the court of appeals employed the "two-part inquiry put forth in *Thunder Basin*." *Id.* at 8. With respect to the first part of that inquiry, the court of appeals agreed with the district court that *Elgin* is controlling: "*Elgin* instructs that given 'the painstaking detail with which the CSRA sets out the method for covered employees to obtain review of adverse employment actions, it is fairly discernible

that Congress intended to deny such employees an additional avenue of review in district court.'" *Id.* at 9-10 (quoting *Elgin*, 567 U.S. at 11-12). And with respect to the second part of the *Thunder Basin* inquiry, the court of appeals determined that petitioner's "constitutional challenge is the type of claim Congress planned to be assessed under the CSRA." *Id.* at 10. The court explained that the CSRA provides petitioner with an opportunity for "meaningful review" of his constitutional challenge, *id.* at 15; that his "claims are not wholly collateral" to the CSRA scheme because he ultimately seeks "to avoid [an] impending adverse employment action," *id.* at 17; and that "the MSPB's expertise" is "applicable to the various threshold questions attached to the claims and any preliminary issues particular to the employment context," *ibid.* The court described its holding as the only "permissible conclusion" under "well-established precedent," observing that "[t]he law is clear that where the CSRA provides judicial review, it does so exclusively." *Id.* at 18.

D. Subsequent Developments

The court of appeals entered judgment on March 21, 2023. Pet. App. 19-20. On April 10, 2023, the President signed into law a joint resolution enacted by Congress to terminate the national emergency concerning COVID-19. Act of Apr. 10, 2023, Pub. L. No. 118-3, 137 Stat. 6; see 88 Fed. Reg. 9385, 9385 (Feb. 14, 2023). In the following weeks, the government took a number of steps to wind down emergency measures that had been put into place to address the acute phase of the pandemic.

As particularly relevant here, the President revoked EO 14,043—the order at issue in this case—on May 9, 2023. See Exec. Order No. 14,099 (EO 14,099), § 2, 88

Fed. Reg. 30,891, 30,891 (May 15, 2023). In doing so, the President explained that he had issued EO 14,043 "when the highly contagious B.1.617.2 (Delta) variant was the predominant variant of the virus in the United States and had led to a rapid rise in cases and hospitalizations." *Id.* § 1, 88 Fed. Reg. at 30,891. He further explained that the government had "achiev[ed] a 98 percent" rate of compliance with EO 14,043 and that more than 270 million Americans had become vaccinated in "the largest adult vaccination program in the history of the United States." *Ibid.* The President also noted that, since he had issued EO 14,043 in September 2021, "COVID-19 deaths ha[d] declined by 93 percent, and new COVID-19 hospitalizations ha[d] declined by 86 percent." *Ibid.* Citing that progress, the President determined that "we no longer need a Government-wide vaccination requirement for Federal employees." *Ibid.*

The President accordingly revoked EO 14,043 and directed that "[a]gency policies adopted to implement [EO 14,043], to the extent such policies are premised on" that order, "no longer may be enforced and shall be rescinded consistent with applicable law." EO 14,099, § 2, 88 Fed. Reg. at 30,891. The revocation of EO 14,043 took effect on May 12, 2023. *Id.* § 3, 88 Fed. Reg. at 30,891.

ARGUMENT

The court of appeals correctly held that petitioner may not circumvent the CSRA's comprehensive and exclusive scheme of administrative and judicial review by preemptively suing in district court. But several weeks after the court of appeals entered judgment, the President revoked EO 14,043, which was the basis for the employee vaccination requirement that petitioner sought to challenge. Accordingly, this case is now moot.

The D.C. Circuit's decision in this case squarely conflicts with a decision by the Fifth Circuit holding that the CSRA does not preclude district-court jurisdiction over similar claims and affirming a nationwide preliminary injunction against enforcement of EO 14,043. See *Feds for Med. Freedom* v. *Biden*, 63 F.4th 366, 369 (5th Cir. 2023) (en banc), petition for cert. pending, No. 23-60 (filed July 21, 2023). The government has filed a petition for a writ of certiorari in that case, requesting that this Court vacate the Fifth Circuit's judgment pursuant to *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950). The government agrees with petitioner (Pet. 8-11) that vacatur pursuant to *Munsingwear* is likewise appropriate in this case.

Like *Feds for Medical Freedom*, this case satisfies each of the Court's traditional criteria for *Munsingwear* vacatur. First, the President's revocation of EO 14,043, based on changed public health conditions, caused this appeal to become moot on its way from the court of appeals to this Court. See Pet. at 13-16, *Biden* v. *Feds for Med. Freedom*, No. 23-60 (filed July 21, 2023) (*FMF* Pet.); see also *Smith* v. *President*, No. 21-3091, 2023 WL 5120321, at *1 (3d Cir. Aug. 10, 2023) (dismissing preliminary-injunction appeal as moot in light of revocation of EO 14,043). Second, whether the CSRA precludes district-court jurisdiction over challenges like this one is an important question of federal law on which the D.C. and Fifth Circuits had reached conflicting results. See *FMF* Pet. at 16-19. Accordingly, that question would have warranted this Court's review had this case not become moot. And third, equitable considerations support vacatur. See *id.* at 25-28.

Petitioner alternatively requests (Pet. 11-14) that the Court grant the petition, vacate the judgment

below, and remand for further consideration in light of *Axon Enterprise, Inc.* v. *FTC*, 598 U.S. 175 (2023). But there is no reason for such a remand because both parties agree that this case is moot: Even if the D.C. Circuit were to conclude that the district court had jurisdiction when the suit was filed, the federal courts could not grant petitioner any meaningful relief.

In any event, even if this case were not moot, petitioner fails to show any reasonable probability that the D.C. Circuit would reach a different conclusion in light of *Axon*. In *Axon*, this Court applied the *Thunder Basin* framework on which the court of appeals relied here (see pp. 7-8, *supra*), but in the context of constitutional challenges by regulated parties to the structure of the Federal Trade Commission (FTC) and to removal protections for administrative law judges at the FTC and the Securities and Exchange Commission. *Axon*, 598 U.S. at 182-183. The Court determined that those "structural constitutional claims" were not the type of claims that Congress intended to channel exclusively through the agencies' special review schemes, in part because the challengers were alleging that "'being subjected'" to the authority of the agencies' administrative law judges was itself the constitutional harm. *Id.* at 191 (citation omitted). Petitioner had no similar structural claim. Instead, like the plaintiff in *Elgin* v. *Department of the Treasury*, 567 U.S. 1 (2012), petitioner seeks to challenge the constitutionality of a condition of his federal employment. And *Axon* reaffirmed *Elgin*'s holding that district courts lack jurisdiction to consider such claims. See 598 U.S. at 187-189.

CONCLUSION

The Court should grant the petition for a writ of certiorari and vacate the judgment of the court of appeals pursuant to *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
CHARLES W. SCARBOROUGH
DANIEL WINIK
Attorneys

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