

No.

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*

PETITION FOR A WRIT OF CERTIORARI

ELIZABETH B. PRELOGAR

Solicitor General

Counsel of Record

BRIAN M. BOYNTON

Principal Deputy Assistant

Attorney General

BRIAN H. FLETCHER

Deputy Solicitor General

MATTHEW GUARNIERI

Assistant to the Solicitor

General

CHARLES W. SCARBOROUGH

SARAH CARROLL

CASEN B. ROSS

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 en banc Fifth Circuit held that respondents could challenge that requirement in district court notwithstanding the provisions of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, channeling federal employees' challenges to adverse personnel actions to the Merit Systems Protection Board, subject to review by the Federal Circuit. The Fifth Circuit also affirmed a preliminary injunction forbidding the government from enforcing the vaccination requirement against any federal employee nationwide. Roughly six weeks after the Fifth 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 and remand with instructions to direct the district court to vacate its order granting a preliminary injunction as moot.

PARTIES TO THE PROCEEDING

Petitioners (defendants-appellants below) are Joseph R. Biden, Jr., in his official capacity as President of the United States; Antony Blinken, in his official capacity as Secretary of State; Janet Yellen, in her official capacity as Secretary of the Treasury; Lloyd J. Austin III, in his official capacity as Secretary of Defense; Merrick B. Garland, in his official capacity as Attorney General; Debra A. Haaland, in her official capacity as Secretary of the Interior; Tom Vilsack, in his official capacity as Secretary of Agriculture; Gina M. Raimondo, in her official capacity as Secretary of Commerce; Julie A. Su, in her official capacity as Acting Secretary of Labor; Marcia Fudge, in her official capacity as Secretary of Housing and Urban Development; Pete Buttigieg, in his official capacity as Secretary of Transportation; Jennifer M. Granholm, in her official capacity as Secretary of Energy; Denis McDonough, in his official capacity as Secretary of Veterans Affairs; Alejandro N. Mayorkas, in his official capacity as Secretary of Homeland Security; William J. Burns, in his official capacity as Director of the Central Intelligence Agency; Bill Nelson, in his official capacity as Administrator of the National Aeronautics and Space Administration; Kilolo Kijakazi, in her official capacity as Acting Commissioner of Social Security; Samantha Power, in her official capacity as Administrator of the United States Agency for International Development; Shalanda D. Young, in her official capacity as Director of the Office of Management and Budget; Avril Haines, in her official capacity as Director of National Intelligence; Daniel Hokanson, in his official capacity as Chief of the National Guard Bureau; Robin Carnahan, in her official capacities as Administrator of the General Services Administration and Co-Chair of the Safer Federal Workforce Task Force;

III

Kiran Ahuja, in her official capacities as Director of the Office of Personnel Management and Co-Chair of the Safer Federal Workforce Task Force; Lesley A. Field, in her official capacity as a member of the Federal Acquisition Regulatory Council; Matthew C. Blum, in his official capacity as a member of the Federal Acquisition Regulatory Council; Jeffrey A. Koses, in his official capacity as a member of the Federal Acquisition Regulatory Council; John M. Tenaglia, in his official capacity as a member of the Federal Acquisition Regulatory Council; Karla S. Jackson, in her official capacity as a member of the Federal Acquisition Regulatory Council; the United States of America; the United States Department of State; the United States Department of the Treasury; the United States Department of Defense; the United States Department of Justice; the United States Department of the Interior; the United States Department of Agriculture; the United States Department of Commerce; the United States Department of Labor; the United States Department of Housing and Urban Development; the United States Department of Transportation; the United States Department of Energy; the United States Department of Veterans Affairs; the United States Department of Homeland Security; the Central Intelligence Agency; the National Aeronautics and Space Administration; the Social Security Administration; the United States Agency for International Development; the General Services Administration; the Office of the Director of National Intelligence; the Office of Personnel Management; the Office of Management and Budget; the National Guard Bureau; the Safer Federal Workforce Task Force; and the

IV

Federal Acquisition Regulatory Council.* Jeffrey Zients was named as a defendant below in his official capacity as Co-Chair of the Safer Federal Workforce Task Force; during the pendency of the litigation, Zients vacated that office and was succeeded by Ashish Jha, who has also now vacated the position.

Respondents (plaintiffs-appellees below) are Feds for Medical Freedom; Local 918, American Federation of Government Employees; Highland Engineering, Inc.; Raymond A. Beebe, Jr.; John Armbrust; N. Anne Atkinson; Julia Badger; Michael Ball; Craigan Biggs; Laura Brunstetter; Mark Canales; Michele Caramenico; Andrew Chamberland; David Clark; Diane Countryman; Kevin Dantuma; Jose Delgado; Jordan DeManss; George Demetriou; Keri Divilbiss; Mercer Dunn IV; William Filkins; Jonathan Gragg; Bryon Green; Thomas David Green; Erika Herbert; Peter Hennemann; Neil Horn; Carey Hunter-Andrews; Tana Johnston; Tyler Klosterman; Deborah Lawson; Danie Lewis; Melissa Magill; Kendra Ann Marceau; Dalia Matos; Stephen May; Steven McComis; Christopher Miller; Joshua Moore; Brent Moores; Jesse Neugebauer; Joshua Nicely; Leslie Carl Petersen; Patti Rivera; Joshua Roberts; Ashley Rodman; M. LeeAnne Rucker-Reed; Trevor Rutledge; Nevada Ryan; James Charles Sams III; Michael Schaecher; Christina Schaff; Kurtis Simpson; Barrett Smith; Jace ReNee Smith; Jarod Smith; Jana Spruce; John Tordai; Sandor Vigh; Christina Vrtaric; Pamela Weichel; David Wentz; Jason Wilkerson; Patrick Wright; and Patrick Mendoza York.

* Acting Secretary Su is substituted for her predecessor in office, Marty Walsh, pursuant to Rule 35.3 of the Rules of this Court.

RELATED PROCEEDINGS

United States District Court (S.D. Tex.):

Feds for Medical Freedom v. Biden, No. 21-cv-356
(Jan. 21, 2022)

United States Court of Appeals (5th Cir.):

Feds for Medical Freedom v. Biden, No. 22-40043
(Mar. 23, 2023)

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement:	
A. Civil service background	2
B. Executive Order 14,043	5
C. The present controversy	7
D. Subsequent developments	10
Reasons for granting the petition	12
A. This appeal is moot	13
B. The decision below would have warranted review	16
C. Vacatur is appropriate under <i>Munsingwear</i>	25
Conclusion	29
Appendix A — Court of appeals en banc opinion (Mar. 23, 2023)	1a
Appendix B — Court of appeals panel opinion (Apr. 7, 2022)	103a
Appendix C — Court of appeals stay motion opinion (Feb. 9, 2022)	124a
Appendix D — District court order denying stay (Feb. 11, 2022)	138a
Appendix E — District court memorandum opinion and order (Jan. 21, 2022)	140a
Appendix F — Court of appeals order granting en banc rehearing (June 27, 2022)	158a
Appendix G — Statutory provisions:	
5 U.S.C. 3301	160a
5 U.S.C. 3302	160a
5 U.S.C. 7301	161a

VIII

TABLE OF AUTHORITIES

Cases:	Page
<i>Already, LLC v. Nike, Inc.</i> , 568 U.S. 85 (2013)	13, 14, 16
<i>Alvarez v. Smith</i> , 558 U.S. 87 (2009)	27
<i>American Fed’n of Gov’t Emps. Local 2018 v. Biden</i> , 598 F. Supp. 3d 241 (E.D. Pa. 2022).....	19
<i>American Fed’n of Gov’t Emps. Local 2586 v. Biden</i> , 616 F. Supp. 3d 1275 (W.D. Okla. 2022)	18
<i>Arizona v. Mayorkas</i> , 143 S. Ct. 1312 (2023)	15
<i>Arizonans for Official English v. Arizona</i> , 520 U.S. 43 (1997)	13
<i>Azar v. Garza</i> , 138 S. Ct. 1790 (2018)	26
<i>Brass v. Biden</i> , No. 21-cv-2778, 2022 WL 11732833 (D. Colo. Oct. 20, 2022)	18
<i>Camreta v. Greene</i> , 563 U.S. 692 (2011)	16
<i>City News & Novelty, Inc. v. City of Waukesha</i> , 531 U.S. 278 (2001).....	14
<i>DHS v. New York</i> , 140 S. Ct. 599 (2020)	25
<i>Donovan v. Vance</i> , 70 F.4th 1167 (9th Cir. 2023).....	15
<i>Elgin v. Department of the Treasury</i> , 567 U.S. 1 (2012)	4, 10, 18, 20-22
<i>Fornaro v. James</i> , 416 F.3d 63 (D.C. Cir. 2005).....	21
<i>Free Enter. Fund v. Public Co. Accounting Oversight Bd.</i> , 561 U.S. 477 (2010).....	2
<i>Health Freedom Def. Fund v. President of the United States</i> , No. 22-11287, 2023 WL 4115990 (11th Cir. June 22, 2023)	16
<i>Hollis v. Biden</i> , No. 21-60910, 2023 WL 3593251 (5th Cir. May 18, 2023)	16
<i>Livingston Educ. Serv. Agency v. Becerra</i> , No. 22-1257, 2023 WL 4249469 (6th Cir. June 29, 2023)	15

IX

Cases—Continued:	Page
<i>Mayorkas v. Innovation Law Lab</i> , 141 S. Ct. 2842 (2021)	12, 28
<i>Missouri v. Biden</i> , No. 22-1104, 2023 WL 3862561 (8th Cir. June 7, 2023)	16
<i>NFIB v. OSHA</i> , 142 S. Ct. 661 (2022)	23, 24
<i>Payne v. Biden</i> :	
602 F. Supp. 3d 147 (D.D.C. 2022), aff'd, 62 F.4th 598 (D.C. Cir. 2023), petition for cert. pending, No. 22-1225 (filed June 16, 2023).....	22
62 F.4th 598 (D.C. Cir. 2023), petition for cert. pending, No. 22-1225 (filed June 16, 2023).....	12, 17, 18
<i>Rydie v. Biden</i> , No. 21-2359, 2022 WL 1153249 (4th Cir. Apr. 19, 2022)	18
<i>Seila Law LLC v. CFPB</i> , 140 S. Ct. 2183 (2020)	2
<i>Trump v. Hawaii</i> , 138 S. Ct. 2392 (2018).....	25
<i>Trump v. International Refugee Assistance</i> , 138 S. Ct. 353 (2017)	28
<i>U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship</i> , 513 U.S. 18 (1994)	26, 27
<i>United States v. Fausto</i> , 484 U.S. 439 (1988)	4, 10, 20
<i>United States v. Microsoft Corp.</i> , 138 S. Ct. 1186 (2018)	27
<i>United States v. Munsingwear, Inc.</i> , 340 U.S. 36 (1950)	12, 15, 16, 26, 29
<i>United States v. Sanchez-Gomez</i> , 138 S. Ct. 1532 (2018)	13
<i>United States v. Texas</i> , 143 S. Ct. 1964 (2023)	25
<i>Yellen v. United States House of Representatives</i> , 142 S. Ct. 332 (2021)	28

Constitution, statutes, regulations, and rules:

U.S. Const.:

Art. II	9
§ 1, Cl. 1	2
§ 3	2
Art. III.....	13, 14, 25
§ 2, Cl. 1	13
Act of Mar. 3, 1871, ch. 114, § 9, 16 Stat. 514-515.....	3
Act of Apr. 10, 2023, Pub. L. No. 118-3, 137 Stat. 6	11
Civil Service Reform Act of 1978,	
Pub. L. No. 95-454, 92 Stat. 1111	3
5 U.S.C. 3132(a)(2).....	3
5 U.S.C. 7511-7515.....	18
5 U.S.C. 7512.....	4
5 U.S.C. 7513(a)	3
5 U.S.C. 7513(d).....	4
5 U.S.C. 7543(a)	3
5 U.S.C. 7701(a)(1)-(2).....	4
5 U.S.C. 7703(b).....	4
5 U.S.C. 2102(a)(1).....	3
5 U.S.C. 2103(a)	3
5 U.S.C. 3301	5, 22, 24, 160a
5 U.S.C. 3301(1)	2, 24, 160a
5 U.S.C. 3301(2)	2, 24, 160a
5 U.S.C. 3302.....	2, 5, 22, 160a
5 U.S.C. 3302(1)	3, 160a
5 U.S.C. 3328.....	21
5 U.S.C. 7301	3, 5, 22-24, 161a
28 U.S.C. 1295(a)(9).....	4
41 U.S.C. 3301	24
Exec. Order No. 12,564, § 1(b), 3 C.F.R. 225	
(1986 Comp.).....	3

XI

Statutes, regulations, and rules—Continued:	Page
Exec. Order No. 12,674, 3 C.F.R. 215 (1990 Comp.).....	3
Exec. Order No. 13,991, § 4, 86 Fed. Reg. 7045, 7046 (Jan. 25, 2021).....	6
Exec. Order No. 14,043, 86 Fed. Reg. 50,989 (Sept. 14, 2021):	
Pmbl., 86 Fed. Reg. 50,989	24
§ 1, 86 Fed. Reg. 50,989	5
§ 2, 86 Fed. Reg. 50,990	5, 6
Exec. Order No. 14,099, 88 Fed. Reg. 30,891 (May 15, 2023):	
§ 1, 88 Fed. Reg. 30,891	11, 15, 16
§ 2, 88 Fed. Reg. 30,891	11
§ 3, 88 Fed. Reg. 30,891	11
Fed. R. App. P. 41(b).....	8
Sup. Ct. R. 10(a).....	19
 Miscellaneous:	
CDC, <i>COVID Data Tracker</i> , go.usa.gov/xeFyx.....	5
88 Fed. Reg. 9385 (Feb. 14, 2023)	11
Pandemic Response Accountability Comm., <i>Top Challenges Facing Federal Agencies: COVID-19 Emergency Relief and Response Efforts</i> (June 2020)	6
Stephen M. Shapiro et al., <i>Supreme Court Practice</i> (11th ed. 2019)	17
The White House, <i>White House Report: Vaccination Requirements Are Helping Vaccinate More Peo- ple, Protect Americans from COVID-19, and Strengthen the Economy</i> (Oct. 7, 2021).....	6

In the Supreme Court of the United States

No.

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*

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of Joseph R. Biden, Jr., President of the United States, et al., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals (App., *infra*, 1a-102a) is reported at 63 F.4th 366. An earlier panel opinion (App., *infra*, 103a-123a) is reported at 30 F.4th 503. The court of appeals' order regarding a stay pending appeal (App., *infra*, 124a-137a) is unreported. The opinion of the district court (App., *infra*, 140a-157a) is reported at 581 F. Supp. 3d 826.

JURISDICTION

The judgment of the en banc court of appeals was entered on March 23, 2023. On June 9, 2023, Justice Alito

extended the time within which to file a petition for a writ of certiorari to and including July 21, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set forth in the appendix to this petition. App., *infra*, 160a-161a.

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).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 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 (1990 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

¹ 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).

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’s 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 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 set an initial deadline in November 2021 for non-exempt employees to be fully vaccinated, though that deadline was “later postponed * * * to early 2022.” App., *infra*, 105a. The guidance also instructed agencies to use progressive discipline, under which employees who failed to comply would first receive counseling and education

followed by sanctions of “escalating” severity, including reprimands, suspension, and termination. *Ibid.*

C. The Present Controversy

1. This suit is a challenge to EO 14,043 filed in the U.S. District Court for the Southern District of Texas in December 2021. The plaintiffs, respondents here, are a recently formed membership organization known as Feds for Medical Freedom, along with a local union chapter, a federal contractor, and dozens of individual federal employees. See Compl. ¶¶ 11-76.² Respondents alleged that several of the employee plaintiffs had declined to comply with the vaccination requirement and had been “disciplined with written reprimands and warnings” and, in one instance, notice that the plaintiff would be terminated in January 2022. Compl. ¶ 147. The gravamen of respondents’ challenge was that the requirement for federal employees to be vaccinated against COVID-19 as a condition of employment was “ultra vires.” Compl. ¶ 164.

2. On January 21, 2022, the district court entered a preliminary injunction forbidding the federal government from implementing or enforcing EO 14,043 against any federal employee nationwide. App., *infra*, 140a-157a. The court rejected the government’s argument that the CSRA precluded respondents from bringing a pre-enforcement challenge to the vaccination requirement in district court. *Id.* at 143a-145a. The court reasoned that the CSRA’s provisions for review by the

² The individual plaintiffs included some employees of federal contractors, and respondents also challenged a separate executive order regarding COVID-19 safety protocols for federal contractors. That order is not at issue here. See App., *infra*, 141a-142a (district court’s order declining to address the contractor executive order in light of developments in other litigation).

MSPB and the Federal Circuit apply to “actual discipline,” *id.* at 144a, and have no preclusive effect when employees preemptively challenge “government-wide policies” before suffering any such discipline, *id.* at 145a n.3. On the merits, the court concluded that respondents were likely to succeed in showing that the President’s authority to prescribe regulations for the conduct of federal employees permitted him to regulate only “*workplace* conduct,” and that the vaccination requirement exceeded that authority. *Id.* at 151a.

In the single paragraph of its opinion devoted to the scope of the injunction, the district court stated that Feds for Medical Freedom “has more than 6,000 members spread across every state * * * and is actively adding new members,” such that relief limited to the parties would be “unwieldy.” App., *infra*, 156a (citation omitted). The court declined to stay its injunction pending appeal. *Id.* at 138a-139a.

3. The government moved for a stay pending appeal in the Fifth Circuit. A divided motions panel declined to grant a stay, determining that the government’s motion should be carried with the case for disposition by a merits panel. App., *infra*, 124a-137a. A divided merits panel then vacated the preliminary injunction and remanded to the district court with instructions to dismiss the case for lack of jurisdiction based on the CSRA. *Id.* at 103a-123a. Respondents sought rehearing, which delayed issuance of the mandate and thus kept the preliminary injunction in effect. See Fed. R. App. P. 41(b). In June 2022, the court of appeals granted rehearing en banc. App., *infra*, 158a-159a.

The en banc court of appeals ultimately affirmed the preliminary injunction, with seven judges dissenting in whole or part. App., *infra*, 1a-102a. The majority held

that the CSRA did not preclude the district court from exercising jurisdiction over respondents' challenge. *Id.* at 3a-4a. The majority acknowledged that "the CSRA eliminates [28 U.S.C.] 1331 jurisdiction" when a federal employee seeks to challenge a "personnel action[] covered by the CSRA," such as a termination. *Id.* at 8a. In the majority's view, however, the CSRA did not preclude respondents from preemptively challenging the vaccination requirement in district court on the theory that the requirement was not itself a "CSRA-covered personnel action." *Id.* at 14a. The majority also stated that any future adverse personnel actions for refusing to comply with the vaccination requirement were merely "hypothetical" and were therefore irrelevant to the jurisdictional question. *Id.* at 19a.

The en banc majority addressed the CSRA issue at length. See App., *infra*, 3a-39a. With respect to the merits, however, the majority stated only that it "substantially agree[d]" with the district court's reasoning and that it was "unpersuaded" by the government's arguments on appeal. *Id.* at 40a. The majority also stated that the district court did not abuse its discretion in extending the injunction to every federal employee nationwide. *Id.* at 41a.

Judge Ho, joined by Judge Jones, concurred in the judgment but wrote separately to express the view that statutory limits on the President's authority to remove civilian employees violate Article II—an issue he found not squarely presented here. App., *infra*, 45a-52a.

Judge Haynes concurred in the judgment in part and dissented in part. App., *infra*, 53a-56a. She largely agreed with the majority but would have limited the scope of the injunction to the parties. See *id.* at 56a.

Judge Higginson, joined by Judge Southwick, concurred in part and dissented in part. App., *infra*, 57a-97a. In his view, the majority had failed to appreciate that the “whole point of this lawsuit is to challenge CSRA-covered personnel actions.” *Id.* at 75a. Judge Higginson also criticized the majority for creating a “loophole,” *id.* at 77a n.10, under which employees who wish to avoid the CSRA review scheme may instead sue in district court before suffering any adverse personnel action, stating that such an understanding of CSRA preclusion “would let plaintiffs end run” this Court’s precedent, *id.* at 78a (discussing *Elgin*, 567 U.S. at 7, and *Fausto*, 484 U.S. at 441). Although Judge Higginson would have recognized an exception permitting district-court jurisdiction over some of respondents’ constitutional claims, *id.* at 80a-81a, he would have held that those claims lack merit, *id.* at 88a-97a.

Judge Stewart, joined by Chief Judge Richman and Judges Dennis and Graves, dissented. App., *infra*, 98a-102a. For the reasons given by the merits panel, those judges would have held that the CSRA entirely “precludes district court review” of challenges to EO 14,043. *Id.* at 98a.³

D. Subsequent Developments

The en banc court of appeals entered judgment on March 23, 2023. App., *infra*, 1a. On April 10, 2023, the President signed into law a joint resolution enacted by Congress to terminate the national emergency

³ The district court had held the case in abeyance pending the government’s appeal. After the Fifth Circuit’s decision, respondents moved to reopen the litigation and for entry of summary judgment and a permanent injunction. See D. Ct. Doc. 49, at 1 (May 12, 2023). The district court has not yet acted on that motion.

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 “achieved 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.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit wrongly held that respondents may circumvent the comprehensive and exclusive scheme of administrative and judicial review established by the Civil Service Reform Act (CSRA) by preemptively suing in district court. The Fifth Circuit then compounded its jurisdictional error by upholding a nationwide preliminary injunction forbidding the government from implementing EO 14,043. The Fifth Circuit gave virtually no justification for that extraordinary relief, which frustrated an important policy adopted by the President pursuant to his express statutory authority to superintend the federal civilian workforce.

The decision below would have warranted review by this Court for multiple reasons, including that the Fifth Circuit's holding on CSRA preclusion squarely conflicts with a D.C. Circuit decision addressing the same question in another challenge to EO 14,043. See *Payne v. Biden*, 62 F.4th 598 (D.C. Cir. 2023), petition for cert. pending, No. 22-1225 (filed June 16, 2023). But before the government could obtain further review, the President revoked EO 14,043 in light of changed public health conditions and this appeal became moot. Consistent with this Court's ordinary practice under such circumstances, the Court should grant the petition for a writ of certiorari, vacate the judgment below, and remand with instructions to direct the district court to dismiss its order granting a preliminary injunction as moot. See *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); see also, e.g., *Mayorkas v. Innovation Law Lab*, 141 S. Ct. 2842, 2842 (2021).⁴

⁴ The plaintiff in *Payne* has filed a petition for a writ of certiorari seeking *Munsingwear* vacatur of the D.C. Circuit's decision in that case. See Pet. at i, 8-11, *Payne, supra* (No. 22-1225). The

A. This Appeal Is Moot

The nationwide preliminary injunction issued by the district court and the government’s appeal from that injunction became moot when the President revoked EO 14,043.

1. Under Article III, the jurisdiction of the federal courts is limited to the resolution of actual “Cases” or “Controversies.” U.S. Const. Art. III, § 2, Cl. 1. “To qualify as a case fit for federal-court adjudication, ‘an actual controversy must be extant at all stages of review.’” *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (citation omitted). “A case that becomes moot at any point during the proceedings is ‘no longer a “Case” or “Controversy” for purposes of Article III,’ and is outside the jurisdiction of the federal courts.” *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 (2018) (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013)).

A case or appeal becomes moot “when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” *Already*, 568 U.S. at 91 (citation omitted). “No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute ‘is no longer embedded in any actual controversy about the plaintiffs’ particular legal rights.’” *Ibid.* (citation omitted).

Under those principles, this preliminary-injunction appeal became moot when the President revoked EO 14,043 and eliminated the basis for any agency policies premised on EO 14,043, such as the Safer Federal

government agrees that *Munsingwear* vacatur is warranted there for the same reasons that it is warranted here and will convey that position in its response brief.

Workforce Task Force’s guidance. The issues presented in the government’s interlocutory appeal to the Fifth Circuit, including whether the district court lacked jurisdiction to preliminarily enjoin the implementation of EO 14,043 and whether the preliminary injunction was an abuse of discretion, are no longer the subject of any live controversy. EO 14,043 no longer exists to be enjoined. Affirming the preliminary injunction would do nothing to benefit respondents, and they therefore lack any legally cognizable interest in the outcome of these proceedings.

2. In the district court, respondents have contended that this case is not moot because “the President voluntarily ceased the offending conduct.” D. Ct. Doc. 49, at 14 (May 12, 2023). Respondents’ reliance on the voluntary-cessation exception to mootness is misplaced.

This Court has “recognized * * * that a defendant cannot automatically moot a case simply by ending its unlawful conduct once sued.” *Already*, 568 U.S. at 91. Otherwise, defendants would be able to “evade judicial review” in Article III courts “by temporarily altering questionable behavior,” only to resume the challenged conduct at a later time. *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001). “Given this concern,” the Court has explained that “‘a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.’” *Already*, 568 U.S. at 91 (citation omitted).

Those principles confirm that the voluntary-cessation exception does not apply here. The President revoked EO 14,043 because of the waning of the pandemic, not any effort to evade judicial review or gain litigation

advantage. The President explained that the country is “no longer in the acute phase” of the COVID-19 pandemic. EO 14,099, § 1, 88 Fed. Reg. at 30,891. He noted that hospitalization and mortality rates have fallen dramatically since EO 14,043 was issued, and that the vast majority of civilian federal employees either are already vaccinated or would be eligible for an exemption or extension under the terms of that order. *Ibid.* Accordingly, the President determined that “we no longer need a Government-wide vaccination requirement” to protect the civilian federal workforce. *Ibid.*

The equitable exception for voluntary cessation does not fit those circumstances. In *Munsingwear*, for example, this Court indicated that an analogous termination of a government policy in light of fundamentally changed circumstances—there, the lifting of wartime price controls after the end of the war—caused a pending dispute about the policy to become moot. See *Munsingwear*, 340 U.S. at 38-39. This Court also recently concluded that the end of the COVID-19 public-health emergency mooted a pending controversy about certain border-control measures imposed during the pandemic, notwithstanding the challengers’ argument that the voluntary-cessation doctrine applied. See *Arizona v. Mayorkas*, 143 S. Ct. 1312 (2023); Petitioners’ Ltr. at 1-3, *Arizona*, *supra* (May 16, 2023) (No. 22-592). And the courts of appeals have likewise found that the recent lifting of various federal COVID-19 emergency measures mooted disputes about those measures—including, in one instance, another challenge to EO 14,043. See *Donovan v. Vance*, 70 F.4th 1167, 1172 (9th Cir. 2023) (stating that the court “cannot provide” prospective injunctive relief “from EOs * * * that no longer exist”); see also, *e.g.*, *Livingston Educ. Serv. Agency v. Becerra*,

No. 22-1257, 2023 WL 4249469, at *1 (6th Cir. June 29, 2023); *Health Freedom Def. Fund v. President of the United States*, No. 22-11287, 2023 WL 4115990, at *2-*4 (11th Cir. June 22, 2023); *Missouri v. Biden*, No. 22-1104, 2023 WL 3862561, at *1 (8th Cir. June 7, 2023) (per curiam); *Hollis v. Biden*, No. 21-60910, 2023 WL 3593251, at *1 (5th Cir. May 18, 2023) (per curiam).

Even if revoking EO 14,043 in light of changed circumstances were viewed as akin to voluntarily ceasing to enforce it, this controversy would still be moot because the President “could not reasonably be expected” to reinstate EO 14,043. *Already, LLC*, 568 U.S. at 92 (citation omitted). A large majority of civilian federal employees already chose to become vaccinated against COVID-19. See EO 14,099, § 1, 88 Fed. Reg. at 30,891 (stating that the federal government had achieved “a 98 percent compliance rate,” taking into account approved or pending exemptions). If the COVID-19 pandemic were to reenter an acute phase posing heightened dangers to the public and the civilian federal workforce, any policies adopted in response to those developments would be based on and responsive to those new circumstances. Likewise, any future challenge to those hypothetical policies would have to take into account the circumstances justifying them. At this time, no reasonable prospect exists that the government will resume enforcing the same policy challenged here.

B. The Decision Below Would Have Warranted Review

Vacatur of a lower court’s decision because of intervening mootness is generally available only to “those who have been prevented from obtaining the review to which they are entitled.” *Camreta v. Greene*, 563 U.S. 692, 712 (2011) (quoting *Munsingwear*, 340 U.S. at 39). It has therefore been the longstanding position of the

United States that when a case becomes moot after the court of appeals enters its judgment but before this Court acts on a petition for a writ of certiorari, *Mun-singwear* vacatur is appropriate only if the question presented would have merited this Court's review had the case not become moot. See, e.g., Pet. at 16-17, *Yellen v. United States House of Representatives*, 142 S. Ct. 332 (2021) (No. 20-1738); see also Stephen M. Shapiro et al., *Supreme Court Practice* § 19.4, at 19-28 to 19-29 & n.34 (11th ed. 2019). That standard is amply satisfied here. Had this case not become moot, the Fifth Circuit's decision would have warranted this Court's review because it squarely conflicts with a decision of the D.C. Circuit, because it misapplies this Court's CSRA precedent, and because it erroneously resolves important questions of presidential authority and the proper scope of equitable relief.

1. The Fifth Circuit held that the district court had jurisdiction over respondents' challenge to EO 14,043 notwithstanding the CSRA's channeling provisions. See App., *infra*, 3a-21a. That holding directly conflicts with the D.C. Circuit's decision in a parallel case, *Payne v. Biden*, *supra*.

a. In *Payne*, the D.C. Circuit unanimously affirmed the dismissal of a challenge to EO 14,043 on CSRA preclusion grounds. 62 F.4th at 600. The plaintiff in that case was a civilian federal employee who alleged that EO 14,043 "violate[d] the separation of powers." *Id.* at 602. Like respondents, the employee sued the government in district court before being suspended or terminated for refusing to comply with EO 14,043. See *id.* at 604. The district court determined that the plaintiff's claims were "precluded under the CSRA" and therefore

“dismissed the suit for lack of subject matter jurisdiction.” *Id.* at 600.

In affirming, the D.C. Circuit explained that the CSRA sets forth comprehensive procedures for federal employees to challenge “major adverse [personnel] actions,” including removal from the civil service. *Payne*, 62 F.4th at 601 (citing 5 U.S.C. 7511-7515). The D.C. Circuit further explained that the CSRA generally channels disputes about such actions “first to the MSPB * * * and then to the Federal Circuit.” *Ibid.* The D.C. Circuit also recognized that this Court has held that “the CSRA’s ‘elaborate framework’ clearly ‘demonstrates Congress’ intent to entirely foreclose judicial review to employees to whom the CSRA denies statutory review.’” *Id.* at 603 (quoting *Elgin v. Department of the Treasury*, 567 U.S. 1, 11 (2012)).

The D.C. Circuit determined that the *Payne* plaintiff’s challenge to EO 14,043 was “the type of claim Congress planned to be assessed under the CSRA,” 62 F.4th at 604, therefore precluding district-court jurisdiction. As particularly relevant here, the court rejected the plaintiff’s attempt to characterize his challenge as an attack on the “vaccine mandate” writ large, rather than an attempt to pretermitt an eventual adverse personnel action, observing that “such re-framing is inconsistent with his overarching argument and does not alter the jurisdictional outcome.” *Ibid.*⁵

⁵ The Fourth Circuit reached the same conclusion in an unpublished decision from which the plaintiff did not seek further review. See *Rydie v. Biden*, No. 21-2359, 2022 WL 1153249, at *4-*8 (Apr. 19, 2022). Numerous district courts also dismissed challenges to EO 14,043, including on CSRA preclusion grounds. See, e.g., *Brass v. Biden*, No. 21-cv-2778, 2022 WL 11732833, at *1 (D. Colo. Oct. 20, 2022); *American Fed’n of Gov’t Emps. Local 2586 v. Biden*,

b. The D.C. Circuit’s decision in *Payne* cannot be reconciled with the Fifth Circuit’s decision here. The D.C. Circuit concluded that the CSRA precludes federal employees from challenging EO 14,043 in district court. The Fifth Circuit held in this case that a materially indistinguishable challenge to the exact same executive order could be heard in district court.

That conflict would have warranted this Court’s review under the Court’s traditional criteria. Sup. Ct. R. 10(a). Indeed, further review would have been particularly warranted in light of the universal scope of the preliminary injunction upheld by the Fifth Circuit. See App., *infra*, 40a-44a. The Fifth Circuit effectively permitted a single district court to grant preliminary injunctive relief to the very same federal employees who had been denied such relief in the D.C. Circuit case and the numerous other decisions rejecting challenges to EO 14,043. See p. 18 & n.5, *supra*. The en banc majority emphasized that those courts had denied relief on threshold grounds like CSRA preclusion or lack of standing, rather than on the merits. App., *infra*, 43a. But that only underscores the division of authority: The nationwide injunction upheld here effectively undid the considered decisions of multiple other federal courts, which had concluded that challenges to EO 14,043 must be channeled through the mechanisms prescribed in the CSRA.

2. The decision below also would have warranted this Court’s review because the Fifth Circuit incorrectly

616 F. Supp. 3d 1275, 1280-1283 (W.D. Okla. 2022); *American Fed’n of Gov’t Emps. Local 2018 v. Biden*, 598 F. Supp. 3d 241, 248-249 (E.D. Pa. 2022); cf. App., *infra*, 105a n.1 (vacated panel opinion) (observing that “[a]t least twelve district courts previously rejected challenges to [EO 14,043] for various reasons”).

resolved multiple important questions of federal law. The Fifth Circuit’s jurisdictional analysis cannot be squared with this Court’s CSRA precedent, and its cursory evaluation of the merits wrongly discounted the President’s statutory authority to establish regulations governing the selection of new civilian federal employees and the conduct of existing employees.

a. This Court has made clear that the CSRA precludes federal employees from suing in district court to challenge personnel actions covered by the Act. Those precedents do not permit any exception for preemptive challenges like this one.

In *United States v. Fausto*, 484 U.S. 439 (1988), a civilian federal employee was suspended from his job for 30 days without pay for misconduct. *Id.* at 442. The Federal Circuit held that the CSRA did not preclude the employee from suing for backpay because the CSRA did not afford employees in his civil service category any mechanism to challenge a 30-day suspension before the MSPB or a court. *Id.* at 443. This Court reversed, reasoning that Congress’s “deliberate exclusion” of such employees from the CSRA’s review provisions precluded the plaintiff from seeking review by other means. *Id.* at 455. The Court observed that the CSRA establishes an “elaborate” framework that “prescribes in great detail the protections and remedies” available to specified federal employees for covered personnel actions. *Id.* at 443. The Court thus held that the absence of any provision for employees like the plaintiff to obtain judicial review was not an oversight but rather a “manifestation of a considered congressional judgment” to deny such employees any “entitlement to review.” *Id.* at 448-449.

The Court reaffirmed that view of CSRA preclusion in *Elgin, supra*, which (unlike *Fausto*) involved federal

employees to whom the CSRA afforded review. See *Elgin*, 567 U.S. at 5-7. The employees were terminated under a statute that prohibits Executive agencies from employing individuals who “knowingly and willfully failed to register” for the Selective Service when required to do so. *Id.* at 7 (citing 5 U.S.C. 3328). Rather than pursuing the review mechanisms available to them under the CSRA, the employees sought to challenge the constitutionality of the employment bar in district court. *Id.* at 7-8. This Court held that the CSRA “precludes district court jurisdiction over [the employees’] claims.” *Id.* at 8. The Court explained that “[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.” *Id.* at 11 (citation omitted). The Court also explained that the CSRA does not contain any exception for “facial * * * constitutional challenges.” *Id.* at 12.

The Fifth Circuit’s decision contradicts *Fausto* and *Elgin*. Those precedents together make clear that, in terms of administrative and judicial review of covered personnel actions, what civilian federal employees “get under the CSRA is what [they] get.” *Fornaro v. James*, 416 F.3d 63, 67 (D.C. Cir. 2005) (Roberts, J.). In the decision below, however, the Fifth Circuit concluded that respondents could avoid the reticulated CSRA framework simply by suing in district court *before* suffering any “CSRA-covered personnel actions.” App., *infra*, 14a; see *id.* at 19a-21a. The Fifth Circuit stated that CSRA preclusion “depend[s] on the claims plaintiffs choose to bring,” and it accepted respondents’

characterization of the claims at issue here as a challenge to the “vaccine mandate” itself, “separate and apart from any personnel action.” *Id.* at 31a-32a.

That understanding of how the CSRA works would permit federal employees to “end run [this Court’s] precedent.” App., *infra*, 78a (Higginson, J., concurring in part and dissenting in part). Under the logic of the decision below, the plaintiffs in *Elgin* could have proceeded in district court by simply suing before being terminated and framing their suit as a challenge to the employment bar. Likewise, federal employees to whom the CSRA denies any review could circumvent this Court’s holding in *Fausto* by rushing to district court to challenge any policy that the employees fear will result in an otherwise-unreviewable personnel action.

Inviting such preemptive attacks would seriously undermine “[t]he CSRA’s objective of creating an integrated scheme of review” and would “reintroduce the very potential for inconsistent decisionmaking and duplicative judicial review that the CSRA was designed to avoid.” *Elgin*, 567 U.S. at 14. Congress did not enact an “exhaustively detailed * * * system of review before the MSPB and the Federal Circuit’ only to leave such a conspicuous (and unexplained) loophole.” *Payne v. Biden*, 602 F. Supp. 3d 147, 160 (D.D.C. 2022) (brackets and citation omitted), *aff’d*, 62 F.4th 598 (D.C. Cir. 2023), petition for cert. pending, No. 22-1225 (filed June 16, 2023).

b. The Fifth Circuit’s decision also would have warranted further review because the preliminary injunction upheld below wrongly circumscribed the President’s authority to superintend the federal civil service, including his express authority under 5 U.S.C. 3301, 3302, and 7301. EO 14,043 was a lawful exercise of those

powers. The Fifth Circuit apparently concluded otherwise, but the en banc majority failed to explain why—stating merely that it “substantially agree[d]” with the district court’s reasoning. App., *infra*, 40a. The majority thus addressed an important question about presidential authority in a “perfunctory” “two sentences.” *Id.* at 96a (Higginson, J., concurring in part and dissenting in part).

The district court’s reasoning was no more persuasive. The court stated that respondents were likely to succeed in showing that EO 14,043 exceeded the President’s authority to “prescribe regulations for the conduct of employees in the executive branch,” 5 U.S.C. 7301, because, in the court’s view, Section 7301 only authorizes the President to regulate “*workplace* conduct,” App., *infra*, 151a. But the court failed to justify that italicized limitation, which appears nowhere in the statutory text. And even if the President’s authority under Section 7301 were limited to prescribing regulations to govern “*workplace* conduct,” *ibid.*, the district court identified no persuasive reason to regard EO 14,043 as beyond the ambit of that authority. Numerous private employers likewise responded to the COVID-19 pandemic by requiring their employees to be vaccinated as a condition of employment. See p. 6, *supra*.

The district court did not discuss those private-sector measures, any of the historical antecedents invoked by the government, or the plain meaning of the term “conduct.” The district court instead reasoned that this Court’s then-recent decision in *NFIB v. OSHA*, 142 S. Ct. 661 (2022) (per curiam), had already established that “COVID-19 is not a workplace risk, but rather a ‘universal risk,’” App., *infra*, 151a (quoting *NFIB*, 142 S. Ct. at 665). But the statute at issue in *NFIB*

authorized the relevant agency to set occupational safety and health standards for certain *private* businesses. *NFIB*, 142 S. Ct. at 665. This Court was not addressing the President’s authority over the federal workforce that he himself superintends, nor was the Court construing the term “conduct” as used in Section 7301 (or any other statute). The district court failed to appreciate those distinctions.

EO 14,043 also rested in part on the President’s authority to prescribe “regulations for the admission of individuals into the civil service” and to “ascertain the fitness of applicants as to * * * health.” 5 U.S.C. 3301(1) and (2); see EO 14,043 Pmbl., 86 Fed. Reg. at 50,989. The district court dismissed Section 3301 as irrelevant because the plaintiffs here are (or include) “current federal employees,” App., *infra*, 149a, yet the court proceeded to enjoin the government from enforcing EO 14,043 with respect to *all* federal employees—even new entrants to the federal civil service—without any further discussion of Section 3301. The court also stated that “other courts have already held that whatever authority the provision does provide is not expansive enough to include a vaccine mandate,” *ibid.*, citing a pair of decisions addressing an entirely different Section 3301—namely, 41 U.S.C. 3301, a procurement statute with no relevance to the President’s authority over federal employees. The Fifth Circuit, in turn, wholly failed to address 5 U.S.C. 3301, let alone explain why it “substantially agree[d]” with the district court’s unreasoned extension of the preliminary injunction to new employees. App., *infra*, 40a.

c. The universal scope of the preliminary injunction further underscores that this Court’s review would have been warranted. Members of this Court have

repeatedly raised questions about the propriety of nationwide or “universal” injunctions, which lack any basis in Article III or traditional equitable principles. The increasingly routine issuance of such injunctions has “proven ‘unworkable, sowing chaos for litigants, the government, courts, and all those affected by these sometimes conflicting’ decrees.” *United States v. Texas*, 143 S. Ct. 1964, 1980 (2023) (Gorsuch, J., concurring in the judgment) (quoting *DHS v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring in the grant of stay)) (brackets omitted); see *Trump v. Hawaii*, 138 S. Ct. 2392, 2425-2429 (2018) (Thomas, J., concurring).

This case is yet another example of those myriad problems. Here, the district court’s issuance of sweeping nationwide relief to non-parties effectively overturned the results reached by numerous other courts, including the D.C. and Fourth Circuits, which had rejected analogous challenges to EO 14,043. See pp. 17-18 & n.5, *supra*. And the Fifth Circuit identified no plausible justification for such extraordinary relief, instead accepting the district court’s view that more tailored relief would have been “unwieldy” or “confus[ing]” because Feds for Medical Freedom claims to have more than 6000 members. App., *infra*, 41a (citation omitted). Neither of the lower courts explained why an injunction limited to the parties would have been any more “unwieldy” in this case than in any other case involving an organizational plaintiff. At a minimum, the nationwide scope of relief would have provided additional reason for this Court to grant review.

C. Vacatur Is Appropriate Under *Munsingwear*

When a case that would otherwise merit this Court’s review becomes moot “while on its way [to this Court]

or pending [a] decision on the merits,” the Court’s “established practice” is to “vacate the judgment below and remand with a direction to dismiss.” *Munsingwear*, 340 U.S. at 39. That practice ensures that no party is “prejudiced by a [lower-court] decision” and “prevent[s] a judgment, unreviewable because of mootness, from spawning any legal consequences.” *Id.* at 40-41; see *U.S. Bancorp Mortg. Co. v. Bonner Mall P’ship*, 513 U.S. 18, 21 (1994) (“If a judgment has become moot while awaiting review, this Court may not consider its merits, but may make such disposition of the whole case as justice may require.”) (brackets and citation omitted). The Court should follow that usual practice and vacate the Fifth Circuit’s decision in this case.

As this Court has repeatedly observed, the determination whether to vacate the judgment when a case becomes moot while pending review ultimately “is an equitable one,” *U.S. Bancorp*, 513 U.S. at 29, requiring the disposition that would be “most consonant to justice” in light of the circumstances, *id.* at 24 (citation omitted). See *Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018) (per curiam) (observing that because *Munsingwear* vacatur “is rooted in equity, the decision whether to vacate turns on ‘the conditions and circumstances of the particular case’”) (citation omitted).

The equities here favor vacatur. The case became moot because the President revoked EO 14,043 as part of a broader unwinding of measures that had been put into place during the acute phase of the COVID-19 pandemic. No principle of equity would support requiring the President to maintain the vaccination requirement, despite his determination that it is now unnecessary, merely to preserve the opportunity to ask this Court to review the Fifth Circuit’s erroneous decision. It would

be especially strange to put the President to such a choice in order to preserve the possibility that this Court would reject the Fifth Circuit’s analysis of CSRA preclusion—an issue with significant prospective importance to the Executive Branch, but no necessary connection to vaccination or the COVID-19 pandemic.

This Court has observed that, absent “exceptional circumstances,” vacatur may be unwarranted when “the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari,” such as when “mootness results from settlement.” *U.S. Bancorp*, 513 U.S. at 25, 29; cf. *id.* at 25 n.3. But different considerations apply when the mooting event is an action taken by a coordinate Branch in the exercise of authority and discretion vested in it by the Constitution and statutes, apart from litigation. For example, in *United States v. Microsoft Corp.*, 138 S. Ct. 1186 (2018) (per curiam), this Court vacated a lower court’s judgment after Congress passed and the President signed a new statute, and the Executive Branch sought and obtained a new search warrant under the new statute—the combination of which eliminated the “live dispute” between the parties on “the issue with respect to which certiorari was granted.” *Id.* at 1188. Similarly, in *Alvarez v. Smith*, 558 U.S. 87 (2009), the Court determined that vacatur was appropriate even when the State had voluntarily returned the disputed property to the respondents (thereby mooting the case), because the State had done so for reasons unrelated to the federal litigation. *Id.* at 96. Vacatur is equally appropriate here, where the President revoked the vaccination requirement not for the purpose of mooted this case but as part of a broader response to developments in public health conditions unrelated to the litigation.

This Court's recent practice further confirms that *Munsingwear* vacatur is appropriate when challenges to significant federal policies are mooted by Executive actions undertaken in good faith and for reasons unrelated to litigation. See, e.g., *Yellen v. United States House of Representatives*, 142 S. Ct. 332, 332 (2021) (challenge to certain expenditures moot after Executive Branch ceased the expenditures); *Innovation Law Lab*, 141 S. Ct. at 2842 (challenge to certain immigration practices moot after Executive Branch terminated the practices); cf. *Trump v. International Refugee Assistance*, 138 S. Ct. 353, 353 (2017) (challenge to executive order moot after expiration of order). As in those cases, neither justice nor the public interest would be served by forcing the Executive Branch to choose between maintaining a policy that it has concluded is no longer warranted and acquiescing in a precedential judicial decision that the Executive Branch believes would be contrary to its prerogatives and harmful to the public interest as a whole.

CONCLUSION

The Court should grant the petition for a writ of certiorari, 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.

ELIZABETH B. PRELOGAR
Solicitor General
BRIAN M. BOYNTON
*Principal Deputy Assistant
Attorney General*
BRIAN H. FLETCHER
Deputy Solicitor General
MATTHEW GUARNIERI
*Assistant to the Solicitor
General*
CHARLES W. SCARBOROUGH
SARAH CARROLL
CASEN B. ROSS
DANIEL WINIK
Attorneys

JULY 2023

APPENDIX

TABLE OF CONTENTS

	Page
Appendix A — Court of appeals en banc opinion (Mar. 23, 2023).....	1a
Appendix B — Court of appeals panel opinion (Apr. 7, 2022)	103a
Appendix C — Court of appeals stay motion opinion (Feb. 9, 2022)	124a
Appendix D — District court order denying stay (Feb. 11, 2022)	138a
Appendix E — District court memorandum opinion and order (Jan. 21, 2022)	140a
Appendix F — Court of appeals order granting en banc rehearing (June 27, 2022).....	158a
Appendix G — Statutory provisions:	
5 U.S.C. 3301	160a
5 U.S.C. 3302	160a
5 U.S.C. 7301	161a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22-40043

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

[Filed: Mar. 23, 2023]

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 3:21-CV-356

Before: RICHMAN, *Chief Judge*, and JONES, SMITH,
BARKSDALE, STEWART, DENNIS, ELROD, SOUTHWICK,
HAYNES, GRAVES, HIGGINSON, WILLETT, HO, DUNCAN,
ENGELHARDT, OLDHAM, and WILSON, *Circuit Judges*.

ANDREW S. OLDHAM, *Circuit Judge*, joined by JONES, SMITH, BARKSDALE, ELROD, WILLETT, HO, DUNCAN, ENGELHARDT, and WILSON, *Circuit Judges*:*

The primary question presented is whether we have jurisdiction over pre-enforcement challenges to President Biden’s vaccine mandate for federal employees. We do. On the merits, we affirm the district court’s order.

I.

On September 9, 2021, President Biden issued Executive Order 14043, which generally required all federal employees to be vaccinated. Employees who didn’t comply would face termination. He also issued Executive Order 14042, imposing the same requirements and punishments for federal contractors.

Feds for Medical Freedom is a non-profit organization with over 6,000 members employed by numerous federal agencies and contractors. Feds for Medical Freedom, along with a chapter of the American Federation of Government Employees and more than 50 individual plaintiffs, sued for declaratory and injunctive relief against the enforcement of both mandates.

Plaintiffs raised several constitutional and statutory claims. First, they asserted constitutional objections. They argued that the President did not have inherent Article II authority to issue either mandate. And any purported congressional delegation of such power violated either the major questions doctrine or the non-

* JUDGE WILLETT joins all except Part VI. JUDGE DOUGLAS was not a member of the court when this case was submitted to the court en banc and did not participate in this decision.

delegation doctrine. Second, they claimed both mandates were arbitrary, capricious, and otherwise not in accordance with law under the Administrative Procedure Act (“APA”). And the contractor mandate violated the APA because it was not in accordance with law. Finally, they sought relief under the Declaratory Judgment Act (“DJA”).

The day after filing their complaint, plaintiffs sought preliminary injunctions against both mandates. The district court declined to enjoin the contractor mandate because it was already the subject of a nationwide injunction. But it enjoined the employee mandate on January 21, 2022. The Government timely appealed that injunction.

On an expedited appeal, a divided panel of our court vacated the injunction. *See Feds for Medical Freedom v. Biden*, 30 F.4th 503 (5th Cir. 2022). The panel majority held “that the [Civil Service Reform Act of 1978 (“CSRA”)] precluded the district court’s jurisdiction. Accordingly, the plaintiffs’ claim for preliminary injunctive relief fails because they have not shown a substantial likelihood of success on the merits. We do not reach the parties’ arguments regarding the other requirements for a preliminary injunction.” *Id.* at 511. JUDGE BARKSDALE dissented. We granted rehearing en banc, vacating the panel opinion. *See Feds for Medical Freedom v. Biden*, 37 F.4th 1093 (5th Cir. 2022).

II.

“Jurisdiction is always first.” *Carswell v. Camp*, 54 F.4th 307, 310 (5th Cir. 2022) (quotation omitted). Congress gave federal district courts jurisdiction over “all civil actions arising under the Constitution, laws, or

treaties of the United States.” 28 U.S.C. § 1331. It’s undisputed that plaintiffs’ claims arise under federal law, both constitutional and statutory. It’s also undisputed that the CSRA nowhere *expressly* repeals district courts’ § 1331 jurisdiction over plaintiffs’ claims. The Government’s contention, however, is that the CSRA *implicitly* repeals § 1331 jurisdiction over plaintiffs’ claims.

Implicit jurisdiction-stripping turns on whether it’s “fairly discernible” from the statutory scheme that Congress silently took away the jurisdiction that § 1331 explicitly conferred. “To determine whether it is ‘fairly discernible’ that Congress precluded district court jurisdiction over petitioners’ claims, we examine the CSRA’s text, structure, and purpose.” *Elgin v. Dep’t of Treasury*, 567 U.S. 1, 10 (2012) (citations omitted). We (A) begin with the CSRA’s text and structure. Then we (B) discuss the statute’s purpose. Then we (C) hold that the CSRA does not apply to the plaintiffs’ claims and hence does not implicitly displace § 1331 jurisdiction.

A.

We begin with the CSRA’s text and structure. The CSRA’s “statutory framework provides graduated procedural protections depending on an [employment] action’s severity.” *Kloekner v. Solis*, 568 U.S. 41, 44 (2012). Two parts of that graduated procedural framework are central to this case.

The first is codified at Chapter 23. *See* 5 U.S.C. §§ 2301 *et seq.* Chapter 23 is the bottom of the CSRA’s pyramid. It governs the least severe employment actions the Government can take and provides concomi-

tantly fewer procedural protections and remedies for federal employees aggrieved by those employment actions.

Specifically, Chapter 23 prohibits federal employers from using a “prohibited personnel practice,” *id.* § 2302(a)(1), (b), to take a certain “personnel action,” *id.* § 2302(a)(2)(A). Chapter 23’s “prohibited personnel practice[s]” include various forms of discrimination (race, age, sex, &c.), nepotism, and retaliation for whistleblowing. *See id.* § 2302(b)(1) (discrimination), (b)(7) (nepotism), (b)(8) (whistleblowing). The triggering “personnel action[s]” are limited to the following twelve things:

- (i) an appointment;
- (ii) a promotion;
- (iii) an action under chapter 75 of this title or other disciplinary or corrective action;
- (iv) a detail, transfer, or reassignment;
- (v) a reinstatement;
- (vi) a restoration;
- (vii) a reemployment;
- (viii) a performance evaluation under chapter 43 of this title or under title 38;
- (ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph;

- (x) a decision to order psychiatric testing or examination;
- (xi) the implementation or enforcement of any non-disclosure policy, form, or agreement; and
- (xii) any other significant change in duties, responsibilities, or working conditions;

Id. § 2302(a)(2)(A). Chapter 23’s personnel actions obviously do not include severe measures such as demotions or terminations.¹

Given that Chapter 23 applies only to relatively mild personnel actions, Chapter 23’s review mechanisms are also relatively modest. When a federal employee suffers a Chapter 23 “personnel action” based on a “prohibited personnel practice,” the employee can file an allegation with the Office of Special Counsel (“OSC”). *Id.* §§ 1214(a), 2302. The OSC, in turn, can terminate the matter or refer it to the Merit Systems Protection Board (“MSPB”). *Id.* § 1214(a)(2) (termination), (b) (refer-

¹ Section 2302(a)(2)(A)(iii) (“romanette iii”) cross-references “an action under chapter 75 of this title.” Chapter 75 does not use the phrase “personnel action” but instead uses the phrase “an action.” 5 U.S.C. §§ 7502, 7512 (subchapter titles); *see also id.* § 7513(a), (b), (d), (e) (referring to “an action” taken against a federal employee). By virtue of romanette iii’s cross-reference, “personnel action” includes both a Chapter 23 personnel action and a Chapter 75 action. Throughout this opinion, we use “Chapter 23 personnel actions” to refer to the non-Chapter-75, less-severe employment actions listed in § 2302. We use “Chapter 75 personnel actions” or “Chapter 75 actions” to refer to the more-severe employment actions such as demotion and termination listed in § 7512. And unless context dictates otherwise, we use “personnel actions” or “CSRA-covered personnel actions” to include any employment actions covered by the CSRA.

ral). The employee can then seek judicial review of the MSPB's final order in the United States Court of Appeals for the Federal Circuit. *Id.* §§ 1214(c), 7703(b)(1)(A). Judicial review for Chapter 23 personnel actions is extremely limited, however. As then-Judge Scalia explained: "judicial scrutiny [is] limited, at most, to insuring compliance with the statutory requirement that the OSC perform an adequate inquiry." *Carducci v. Regan*, 714 F.2d 171, 175 (D.C. Cir. 1983) (quotation omitted).

The second part of the CSRA's graduated procedural framework is codified at Chapter 75. *See* 5 U.S.C. §§ 7501 *et seq.* Chapter 75 forms the top of the CSRA's pyramid and governs the most-severe employment actions—such as suspensions, reductions in pay, and terminations. *Id.* §§ 7502, 7512(1)-(5). When the Government proposes a suspension of fourteen days or less, the covered employee is entitled to notice, the opportunity to respond, the right to an attorney, and the right to a written decision. *Id.* § 7503(b)(1)-(4). When the Government proposes any other Chapter 75 action, the covered employee receives these same protections, *id.* § 7513(b), and can also appeal to the MSPB, *id.* § 7513(d), and to the Federal Circuit, *id.* § 7703(b)(1)(A).

Where a covered employee challenges a covered personnel action, the CSRA's review mechanisms are "exclusive." *Elgin*, 567 U.S. at 13-14. Take for example *McAullife v. Rice*, 966 F.2d 979 (5th Cir. 1992). There, a CSRA-covered employee challenged the Chapter-75-covered termination of her employment—but she tried to do it in the Western District of Texas under the APA, rather than in the MSPB and Federal Circuit under the CSRA. *See id.* at 979. We rejected the attempt be-

cause the CSRA provides the exclusive jurisdictional (and remedial) font for covered federal employees *when they are challenging CSRA-covered personnel actions*. See *ibid.*

The italicized clause is very important for two reasons. First, the Supreme Court has been clear that the CSRA eliminates § 1331 jurisdiction only for personnel actions covered by the CSRA. For example, in *United States v. Fausto*, 484 U.S. 439 (1988), the Court said the CSRA “displays a clear congressional intent to deny the excluded employees the protections of Chapter 75—including judicial review—for *personnel action covered by that chapter*.” *Id.* at 447 (emphasis added). Likewise in *Elgin*, the Court repeatedly limited its holding to the CSRA’s jurisdictional effects on “a *covered* employee challeng[ing] a *covered* action,” 567 U.S. at 13; “a *covered* employee’s appeal of a *covered* action,” *ibid.*; and “a *covered* employee [attempting to] challenge a *covered* employment action first in a district court,” *id.* at 14 (all emphases added); see also *id.* at 10, 20-21 (reiterating the limitation). The Court has never suggested—much less held—that the CSRA implicitly strips § 1331 jurisdiction over federal employees’ claims *outside* the CSRA’s covered personnel actions. See *Bosco v. United States*, 931 F.2d 879, 883 (Fed. Cir. 1991) (“The Supreme Court did not rule that the CSRA provided the only means of judicial review of *any* actions affecting federal employees, but rather that it was the only means of review as to the types of adverse personnel action specifically *covered* by the CSRA. . . . ” (emphases in original)).

Second, the Court has expressly said the opposite—that the CSRA does nothing to affect jurisdiction *outside* of its covered personnel actions:

Not all personnel actions are covered by this [CSRA] system. For example, there are no provisions for appeal of either suspensions for 14 days or less or adverse actions against probationary employees. In addition, certain actions by supervisors against federal employees, such as wiretapping, warrantless searches, or uncompensated takings, would not be defined as ‘personnel actions’ within the statutory scheme.

Bush v. Lucas, 462 U.S. 367, 385 n.28 (1983) (citations omitted). In accordance with this express command, federal courts across the country have time and again held that the CSRA does not strip § 1331 jurisdiction when federal employees challenge something *other than* a CSRA-covered personnel action. For example, installing a hidden camera in the women’s changing area of a VA medical center is not a CSRA-covered personnel action and hence can be challenged outside the CSRA. *See Gustafson v. Adkins*, 803 F.3d 883, 888 (7th Cir. 2015) (“Under the plain language of the statute, the term ‘personnel action’ does not encompass Adkins’s conduct . . . [of] installing the hidden camera. . . .”). Same with assaulting a federal employee. *See Orsay v. DOJ*, 289 F.3d 1125, 1131 (9th Cir. 2002), *abrogated on other grounds by Millbrook v. United States*, 569 U.S. 50 (2013) (“Claxton’s alleged aiming of a loaded weapon at Appellants does not fit any of the CSRA’s definitions of ‘personnel action.’ Consequently, the CSRA does not bar Appellants’ [Federal Tort Claims Act] claims. . . .”); *Brock v. United States*, 64 F.3d 1421, 1425 (9th

Cir. 1995) (sexual assault). Same with libeling a federal employee. See *Gutierrez v. Flores*, 543 F.3d 248, 253-54 (5th Cir. 2008) (holding the CSRA does not apply or strip jurisdiction because “this case does not involve . . . any adverse employment action”). And same with illegally searching a federal employee’s home. See *Collins v. Bender*, 195 F.3d 1076, 1080 (9th Cir. 1999) (“[W]e do not believe that Congress intended to deputize government supervisors as chieftains of security forces that police the private lives of their employees subject only to some administrative oversight, and we do not believe that Congress meant to shoehorn into the CSRA every odd occurrence where a supervisor forms and leads such a renegade posse.”).

Consider for example the Third Circuit’s recent decision in *Manivannan v. DOE*, 42 F.4th 163 (3d Cir. 2022). In that case, DOE attempted to fire a CSRA-covered scientist and then allowed him to resign. Manivannan sued DOE. Some of his claims challenged CSRA-covered personnel actions and hence could be brought under only the CSRA (and not under § 1331). *Id.* at 173 (holding employee could challenge DOE’s internal investigation only under the CSRA because that investigation constituted a CSRA-covered “significant change in working conditions”). But some of his claims were not covered by the CSRA and hence could be brought in the district court under § 1331. For example, DOE’s “decision to disclose an employee’s records to state prosecutors is not an adverse action” under Chapter 75 or a “personnel action” under Chapter 23. *Ibid.* Same with DOE’s conversion of Manivannan’s personal property:

Even construing the CSRA's language broadly, we fail to see how an employer's alleged conversion of a former employee's personal property, unrelated to the latter's federal employment, constitutes a 'disciplinary or corrective action,' 5 U.S.C. § 2302(a)(2)(A)(iii), a 'significant change in duties, responsibilities, or working conditions,' *id.* § 2302(a)(2)(A)(xii), or any other employment action set out in the statute.

Id. at 174.

In short, the text and structure of the CSRA creates a decades-old, well-established, bright-line rule: Federal employees must bring challenges to CSRA-covered personnel actions through the CSRA, but they remain free to bring other, non-CSRA challenges under the district courts' general § 1331 jurisdiction.

B.

The CSRA's purpose reinforces this conclusion. The CSRA was enacted "to replace the haphazard arrangements for administrative and judicial review of personnel action, part of the 'outdated patchwork of statutes and rules built up over almost a century.'" *Fausto*, 484 U.S. at 444 (quoting S. REP. NO. 95-969, at 3 (1978)). The old system created different grievance rights for federal employees in different agencies; it entailed labyrinthine and uncertain administrative review mechanisms that disincentivized managers from taking disciplinary action even when clearly warranted. *See id.* at 444-45 (citing S. REP. NO. 95-969, at 9 (1978)). The CSRA "replaced the patchwork system with an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of

sound and efficient administration.” *Id.* at 445 (citing S. REP. NO. 95-969, at 4 (1978)).

Thus, the CSRA’s purpose is to streamline and integrate the review system for federal employees’ challenges to *personnel actions*. It does nothing to promote that purpose to interpret the CSRA as stripping § 1331 jurisdiction over disputes *beyond* CSRA-covered personnel actions. If anything, it would disserve the CSRA’s purposes to rewrite it, as the Government requests, to strip jurisdiction over every claim any federal employee could ever bring. That’s because the MSPB has expertise in the byzantine procedures for taking and challenging CSRA-covered personnel actions, but it knows nothing about peephole cameras and wiretaps and searches. It would substantially burden the MSPB to task it with such non-CSRA matters. And more to the point, if Congress wanted to make the CSRA process applicable to every claim an employee could ever bring against a federal employer, it could’ve said so. That would’ve made the CSRA less complicated by obviating all the personnel-action limitations in Chapter 23 and Chapter 75—a road Congress plainly did not take. *See SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1357 (2018) (“We need not and will not invent an atextual explanation for Congress’s drafting choices when the statute’s own terms supply an answer.” (quotation omitted)).

The Government offers two responses. First, the Government claims that allowing plaintiffs to bring suits in district court would undermine the CSRA’s purpose of creating “an integrated scheme of review.” Gov’t En Banc Br. 22. The theory appears to be that federal employees can’t otherwise sue in district court, so it would

undermine the integration of the MSPB and the Federal Circuit to allow this case to get past the CSRA's roadblocks. This contention is quite odd. As the Government well knows, one of the most common suits brought by federal employees is the so-called "mixed case." It's so-called because the employee mixes CSRA-covered claims (for example, for CSRA-governed Chapter 75 violations) with non-CSRA claims (for example, for sex discrimination under Title VII). See *Kloeckner*, 568 U.S. at 44-48 (describing mixed cases). Both Congress and the Supreme Court say that federal employees are free to bring their mixed cases in district court without ever dealing with the MSPB or the Federal Circuit in any way. See 5 U.S.C. § 7703(b)(2); *Kloeckner*, 568 U.S. at 50 (holding "mixed cases shall be filed in district court"); see also *Punch v. Bridenstine*, 945 F.3d 322, 324-25 (5th Cir. 2019) (holding "the employee [bringing a mixed case] need not start with the MSPB—or take any of the roads running from it"—and instead can file in district court). Thus, it's simply not true that federal employees face an "integrated" grievance system that never includes district court.

Second, the Government claims that it would create a "gaping loophole" if employees could see a CSRA-covered personnel action coming down the pike and then race to district court to invoke § 1331 jurisdiction before it otherwise disappears. Gov't En Banc Br. 22. Of course it's our job to interpret the words Congress actually wrote, not to entertain such policy arguments for writing the CSRA differently. See, e.g., *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 479 (2006). And in any event, the Government's policy concerns misunderstand the nature of plaintiffs' claims. In a case like this one, where plaintiffs are *not* challenging a CSRA-

covered personnel action, § 1331 jurisdiction would not disappear *even if* the Government took CSRA-covered personnel actions against them. That’s why, for example, Manivannan could litigate his non-CSRA claims *even after* incurring a CSRA-covered personnel action. *See Manivannan*, 42 F.4th at 174. So there’s no race to the courthouse because the plaintiff can stay in district court *before or after* the CSRA-covered personnel action so long as he’s not challenging that CSRA-covered personnel action.

C.

The text, structure, and purpose of the CSRA all show that it provides the exclusive review procedures and employment remedies for CSRA-covered personnel actions. The dispositive question therefore is whether plaintiffs are challenging CSRA-covered personnel actions. If they are, they must channel their claims through the CSRA; if they are not, their claims are cognizable in the district court.

We hold plaintiffs are not challenging CSRA-covered personnel actions. Plaintiffs are 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. “Even construing the CSRA’s language broadly, we fail to see how an employer’s” medical mandate could constitute a covered personnel action. *Ibid.*

We (1) begin with Chapter 23. Then we (2) discuss Chapter 75.

1.

First, the Government fails to prove plaintiffs are challenging a “personnel action” under Chapter 23.

Neither § 2302(a)(2)(A)(xii) (“romanette xii”) nor § 2302(a)(2)(A)(iii) (“romanette iii”) applies to plaintiffs’ claims.

Romanette xii

Romanette xii is a residual clause that appears at the end of a twelve-item list. After defining Chapter 23’s “personnel action[s]” to include things such as appointments, promotions, and reassignments, Congress concluded the list by covering “any other significant change in duties, responsibilities, or working conditions.” 5 U.S.C. § 2302(a)(2)(A)(xii). Such residual clauses trigger “the maxim *ejusdem generis*, the statutory canon that where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.” *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001) (quotation omitted). All eleven of the personnel actions that precede romanette xii are typical, everyday employment decisions to, say, promote or reassign a single employee; none is an irrevocable decision that extends beyond the term of employment. See *Turner v. U.S. Agency for Glob. Media*, 502 F. Supp. 3d 333, 367 (D.D.C. 2020) (“[C]ourts have determined that the term ‘working conditions’ generally refers to the daily, concrete parameters of a job, for example, hours, discrete assignments, and the provision of necessary equipment and resources.”). Accordingly, we must interpret romanette xii to refer to these discrete employment decisions—not government-wide mandates that commandeer the personal medical decisions of every federal employee. And we must interpret romanette xii to only include conditions that last for the duration of the em-

ployee’s job tenure—not mandated vaccinations that have consequences long after the employee leaves the federal workforce.

Moreover, it strains romanette xii’s text far beyond its breaking point to say it includes permanent medical decisions made outside the workplace. “[D]uties, responsibilities, or working conditions” plainly refer to duties, responsibilities, or working conditions of the employee’s workplace. 5 U.S.C. § 2302(a)(2)(A)(xii). It doesn’t apply to personal medical choices. That result follows *a fortiori* from *Gustafson* because if “working conditions” does not include peephole cameras *in workplace changing rooms*, it certainly does not include private, irreversible medical decisions made in consultation with private medical professionals outside the federal workplace. *See* 803 F.3d at 888.

This interpretation of romanette xii is further reinforced by the Supreme Court’s decision in *NFIB v. OSHA*, 142 S. Ct. 661 (2022) (per curiam). There, the Court considered whether OSHA’s COVID-19 vaccine mandate could constitute an “occupational safety and health standard[.]” *Id.* at 665 (quoting 29 U.S.C. § 655(b)). The Court held no—both because “[w]e expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance,” and because workplace-safety standards refer to “hazards that employees face at work” and not “day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases.” *Ibid.* (quotation omitted). Likewise here, Congress would need to speak much more clearly than it did in romanette xii if it wanted to strip § 1331 jurisdiction over challenges to a mandate that extends to every sin-

gle federal employee’s irreversible medical decisions. *Cf. Sistek v. Dep’t of Veterans Affs.*, 955 F.3d 948, 954-56 (Fed. Cir. 2020) (holding Congress’s enumeration of eleven specific personnel actions in the first eleven clauses of § 2302(a)(2)(A) precludes interpreting the residual clause in romanette xii to include a modest retaliatory investigation of a single employee).

Romanette iii

Nor does romanette iii help the Government. It defines Chapter 23’s “personnel action[s]” to include “disciplinary or corrective action” against federal employees. 5 U.S.C. § 2302(a)(2)(A)(iii). But plaintiffs have not received any “disciplinary or corrective action,” and hence their claims do not challenge such actions. Some plaintiffs received “letters of counseling” and “letters of reprimand” for their failures to comply with the executive order. ROA. 1195-1202, 1204, 1206, 1212, 1216, 1229, 1232, 1242, 1244, 1486, 1493, 1745. But it’s well settled that such letters are not “disciplinary or corrective action[s]” under the CSRA. *See, e.g., Sistek*, 955 F.3d at 955-57 (letter of reprimand was not a “personnel action” under the CSRA); *Graham v. Ashcroft*, 358 F.3d 931, 933 (D.C. Cir. 2004) (Roberts, J.) (letter of censure was not a “personnel action” under the CSRA).² Ab-

² The circuits likewise have held that letters of reprimand and other written warnings are not “materially adverse actions” in the analogous Title VII context. *See Durant v. D.C. Gov’t*, 875 F.3d 685, 698 (D.C. Cir. 2017); *Baloch v. Kempthorne*, 550 F.3d 1191, 1199 (D.C. Cir. 2008) (Kavanaugh, J.); *Medina v. Income Support Div., N.M.*, 413 F.3d 1131, 1137 (10th Cir. 2005); *Whitaker v. N. Ill. Univ.*, 424 F.3d 640, 648 (7th Cir. 2005); *Stewart v. Evans*, 275 F.3d 1126, 1136 (D.C. Cir. 2002); *Krause v. City of La Crosse*, 246 F.3d 995, 1000 (7th Cir. 2001).

sent any evidence of such action, the Government has no basis to suggest plaintiffs' claims are governed by romanette iii.

And the Government all but concedes the point. In its panel-stage brief, the Government obliquely suggests an employee could seek review under the CSRA when he receives a letter of reprimand, but it never explains how or why such review comports with a wall of contrary precedent from around the country. Moreover, the Government concedes that receipt of a letter is merely "an early stage of [a] *still-hypothetical* progressive disciplinary process." Blue Br. 24 (emphasis added). That concession all but proves that counseling and reprimand letters do not trigger the CSRA's review provisions. And it's telling that the Government abandons the point altogether in its later-filed briefs.³

2.

Second, the Government fails to prove that Chapter 75 implicitly strips the court of jurisdiction. As JUDGE BARKSDALE noted in his panel dissent, the Government has never argued that plaintiffs have suffered any of the Chapter 75 personnel actions. *See Feds for Medical Freedom*, 30 F.4th at 513 (Barksdale, J., dissenting). And as JUDGE BARKSDALE correctly concluded, "[t]he EO's *enactment* . . . does not constitute an adverse action subject to CSRA. The case at hand is instead a pre-enforcement challenge to a government-wide policy, imposed by the President, that would affect the million

³ Even if Chapter 23 did govern plaintiffs' claims, it's entirely speculative to think plaintiffs could ever get them before a federal court. *See infra* Part IV (discussing the OSC process).

federal civilian workers, including the 6,000 members of Feds for Medical Freedom.” *Ibid.*

In its en banc briefs, the Government does not contest JUDGE BARKSDALE’S premise; it effectively concedes that plaintiffs have not yet incurred reviewable Chapter 75 employment actions. Rather, the Government (incorrectly) contests JUDGE BARKSDALE’S conclusion; it contends plaintiffs *might one day* incur Chapter 75 actions, and that alone should implicitly strip the jurisdiction explicitly conferred by § 1331 *today*.

We disagree. “It is quite clear, that the jurisdiction of the Court depends upon the state of things at the time of the action brought, and that after vesting, it cannot be ousted by subsequent events.” *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824); *see also Carr v. Alta Verde Indus., Inc.*, 931 F.2d 1055, 1061 (5th Cir. 1991) (“As with all questions of subject matter jurisdiction except mootness, standing is determined as of the date of the filing of the complaint, and subsequent events do not deprive the court of jurisdiction.”). And it’s equally clear that we do not make jurisdictional determinations based on hypothetical future facts. *See, e.g., Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409-11 (2013) (rejecting attempt to make jurisdictional determinations based on “[a]llegations of *possible* future injury” and “mere speculation” about what the Government will do (quotation omitted)). Just as plaintiffs cannot invoke a district court’s jurisdiction based on speculation about what the Government will do in the future, the Government cannot deny a district court’s jurisdiction based on

speculation about what its employment supervisors will do in the future.⁴

Plaintiffs' complaint does not challenge any personnel action reviewable under the CSRA. Nor does it challenge any personnel action they could hypothetically incur in the future. Rather, plaintiffs claim that the President's vaccine mandate violates the U.S. Constitution and the APA. *See Manivannan*, 42 F.4th at 172 (“[W]hen assessing whether the CSRA bars federal jurisdiction over an otherwise reviewable claim, courts should look to the *specific underlying conduct being challenged* to determine whether that conduct is an employment action covered by the statute.” (emphasis

⁴ The contrary rule would have untenable consequences. Consider, for example, the amount-in-controversy requirement for diversity jurisdiction under 28 U.S.C. § 1332. “Events occurring subsequent to the institution of suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction.” *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289-90 (1938). “[O]nce the district court’s jurisdiction is established, subsequent events that reduce the amount in controversy to less than \$75,000 generally do not divest the court of diversity jurisdiction.” *Gebbia v. Wal-Mart Stores, Inc.*, 233 F.3d 880, 883 (5th Cir. 2000) (citations omitted). “Importantly, the jurisdictional facts must be judged as of the time the complaint is filed; subsequent events cannot serve to deprive the court of jurisdiction once it has attached.” *St. Paul Reinsurance Co., Ltd. v. Greenberg*, 134 F.3d 1250, 1253-54 (5th Cir. 1998) (citations omitted). Yet on the Government’s theory here, a defendant could defeat diversity jurisdiction by saying: “We recognize plaintiffs properly pleaded an amount in controversy of \$75,001, but we’ll produce documents in discovery to show the real amount in controversy is around \$25,000.” Such future-hypothetical-fact arguments have never been allowed to defeat (or create) subject matter jurisdiction.

added)).⁵ The Government does not dispute that plaintiffs' claims are ripe and otherwise cognizable under § 1331. And we can find nothing in the CSRA's text, structure, or purpose that implicitly displaces that jurisdiction for a claim outside the CSRA's coverage. We therefore hold that the district court properly exercised its jurisdiction over plaintiffs' claims.

III.

Our reading of the CSRA's text, structure, and purpose is confirmed by precedent. A long line of cases establishes that federal employees can bring facial, pre-enforcement actions against federal policies outside of the CSRA.

For example, in *NFFE v. Weinberger*, 818 F.2d 935 (D.C. Cir. 1987), civilian federal employees sued to enjoin a directive establishing a "Drug Abuse Testing Program." *Id.* at 937. The government argued that the CSRA precluded pre-enforcement review in federal court. Rejecting this argument, the court noted that its decisions "have made it absolutely clear that civilian federal employees may seek to enjoin government actions that violate their constitutional rights." *Id.* at 940 (citation omitted).

NTEU v. Devine, 733 F.2d 114 (D.C. Cir. 1984), similarly rejected the government's argument that the

⁵ JUDGE HIGGINSON points out that some members of *Feds for Medical Freedom* may have incurred adverse personnel actions. *See post*, at 66-67 & n.8 (Higginson, J., dissenting). That would matter only if such actions could displace § 1331 jurisdiction that otherwise attaches to claims that do not implicate the CSRA. *See supra*, at 12 (rejecting this contention); *accord Manivannan*, 42 F.4th at 174.

CSRA precludes jurisdiction over pre-enforcement challenges. The court held:

This claim is meritless. It is one thing to say that when a statute provides a detailed scheme of administrative protection for defined employment rights, less significant employment rights of the same sort are implicitly excluded and cannot form the basis for relief directly through the courts. It is quite different to suggest, as appellant does, that a detailed scheme of administrative adjudication impliedly precludes preenforcement judicial review of rules.

Id. at 117 n.8 (citations omitted).

The Supreme Court has also, on multiple occasions, entertained pre-enforcement challenges to laws or directives affecting federal employees without a word about CSRA preclusion. *See, e.g., NTEU v. Von Raab*, 489 U.S. 656 (1989) (pre-enforcement challenge to drug-testing program for federal employees); *United States v. NTEU*, 513 U.S. 454 (1995) (pre-enforcement challenge to a law prohibiting federal employees from accepting honoraria).

We have done the same. For example, in *AFGE v. FLRA*, 794 F.2d 1013 (5th Cir. 1986), we cited *Devine* for the proposition that a union of federal employees would be able to bring a pre-enforcement challenge to OPM regulations in district court. *See id.* at 1015-16. Similarly, in *NTEU v. Bush*, 891 F.2d 99 (5th Cir. 1989), we addressed the merits of a pre-enforcement suit challenging an executive order mandating drug testing for federal employees. *See id.* at 100. We didn't mention CSRA preclusion, even though the claims in the suit centered on the CSRA. *See ibid.*

The Government has two responses. First, it points out that these cases predate *Elgin*, which according to the Government, abrogated them. But as we recently held in *Cochran v. SEC*, 20 F.4th 194 (5th Cir. 2021) (en banc), *cert. granted*, 142 S. Ct. 2707 (2022), *Elgin* did not “break new ground” regarding implicit preclusion. *Id.* at 206. Nor did *Elgin* address pre-enforcement challenges at all. And the Government’s position entails that *Elgin* held *sub silentio* that the Court lacked jurisdiction in all its past cases entertaining pre-enforcement challenges to federal employment policies—including *Von Raab* and *United States v. NTEU*. So *Elgin* can’t support the weight the Government puts on it.

The Government’s other response is to claim that most of these decisions involve “drive-by jurisdictional rulings” on the scope of CSRA preclusion. Gray Br. 6 (quoting *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 91 (1998)). That’s certainly not true of *Weinberger* and *Devine*. In those cases, the D.C. Circuit carefully considered and emphatically rejected the Government’s theory of CSRA preclusion as “discredited” and “meritless.” *Weinberger*, 818 F.2d at 939-42; *Devine*, 733 F.2d at 117 n.8. So it’s no surprise that litigants and courts gave it less-thorough consideration in later cases.

IV.

Because the CSRA’s text, structure, and purpose foreclose the Government’s implicit-jurisdiction-stripping theory, we need not proceed to an analysis of the factors listed in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). See *Elgin*, 567 U.S. at 10; *Cochran*, 20 F.4th at 204. But even if we reach them, those factors only confirm that the CSRA left intact the district court’s jurisdiction over this suit.

The first *Thunder Basin* factor is whether “a finding of preclusion could foreclose all meaningful judicial review.” 510 U.S. at 212-13. The Government contends that plaintiffs have two avenues for meaningful judicial review: Chapter 23 and the All Writs Act, 28 U.S.C. § 1651.

Chapter 23 provides no guarantee of judicial review—much less a meaningful one. With exceptions not relevant here,⁶ claims covered by Chapter 23 are vindicable only by OSC. And here’s how the OSC process works: The employee first files a complaint with the OSC. *See* 5 U.S.C. § 1214(a)(1)(A). If the OSC finds “reasonable grounds” of a “prohibited personnel practice,” the OSC must report it to the employing agency, MSPB, and OPM. *Id.* § 1214(b)(2)(B). If the agency doesn’t fix the problem, the OSC “*may* petition” to the MSPB. *Id.* § 1214(b)(2)(C) (emphasis added). And only a final order from the MSPB is reviewable before the Federal Circuit. *See id.* § 1214(c). This process gives the OSC total and unfettered discretion to decide whether to bring the claims before the MSPB. *See Krafzur v. Davenport*, 736 F.3d 1032, 1034 (6th Cir. 2013) (“[I]f the Special Counsel . . . declines to refer the case to the Board, the employee is out of luck. A court may not review the Special Counsel’s decisions unless the Counsel has declined to investigate a complaint at all.” (quotation omitted)). Its decisions not to pur-

⁶ For example, Congress created an “individual right of action” in certain reprisal cases under § 2302(b)(8) and § 2302(b)(9)(A)(i), (B), (C), and (D) that allows some employees to sue without OSC’s involvement. *See* 5 U.S.C. §§ 1221, 1214(a)(3); *Orr v. Dep’t of Treasury*, 83 M.S.P.R. 117 (1999). But the Government doesn’t argue that this exception, or any other, applies.

sue claims are unreviewable. *Cf. Heckler v. Chaney*, 470 U.S. 821, 837 (1985) (prosecutorial discretion not reviewable).

This is not particularly surprising, given that Chapter 23 is the bottom of the CSRA's pyramid and warrants the fewest procedural protections for federal employees. *See Carducci*, 714 F.2d at 175. But the narrowness of Chapter 23's review provisions—and the fact that any review at all turns on the unreviewable discretion of Government officials—puts the lie to the Government's two-sentence suggestion that the OSC or MSPB could or would give the plaintiffs relief against a nationwide vaccine mandate. *See Gov't En Banc Br. 26* (so suggesting).

As for the Government's invocation of the All Writs Act, it proves both too much and too little. It's too much because the Government cannot explain how the CSRA implicitly strips § 1331 jurisdiction but somehow does not strip § 1651 jurisdiction. And all of the Government's policy arguments about the former—that it undermines the CSRA's "integrated" review, creates a "loophole," &c.—apply equally to the latter. But the Government's reliance on the All Writs Act also proves too little because as the Government itself concedes, mandamus relief is a "drastic and extraordinary" remedy "reserved for really extraordinary causes." *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004) (quotation omitted). So it's hard to see how it provides "meaningful review." Moreover, as then-Judge Roberts noted for the D.C. Circuit, employees with CSRA-covered claims cannot avail themselves of the All Writs Act. *See Fornaro v. James*, 416 F.3d 63, 69-70 (D.C. Cir. 2005). So the only way the All Writs Act could ap-

ply, on the Government's own logic, is to hold that the plaintiffs' claims are *outside* the CSRA, thus obviating the need for the All Writs Act in the first place. In all events, the All Writs Act does not provide "meaningful review" here.

The second *Thunder Basin* factor is whether plaintiffs' claims are "wholly collateral" to the CSRA's review provisions. 510 U.S. at 212 (quotation omitted). "[W]hether a claim is collateral to the relevant statutory-review scheme depends on whether that scheme is intended to provide the sort of relief sought by the plaintiff." *Cochran*, 20 F.4th at 207.

This factor again cuts against stripping the district court of jurisdiction. As detailed in Part II.A, the CSRA scheme is a highly reticulated web of statutes and regulations spanning multiple federal agencies (including the employee's own, the OSC, the OPM, the EEOC, and the MSPB) with overlapping procedural requirements and complicated substantive rules. *See, e.g., Butler v. West*, 164 F.3d 634, 637 (D.C. Cir. 1999) (describing it as a "complicated tapestry"). We've described the CSRA as a winding road which cannot be driven by "the easily carsick." *Punch*, 945 F.3d at 324. The important point for present purposes, however, is that individual federal employees are forced to navigate it to air their individual grievances regarding individual personnel actions. The standard fare for the MSPB's docket includes employee misconduct, hostile work environments, whistleblowing, and the like. No part of it includes reviewing an executive order for compliance with the APA or ordering injunctive relief that affects thousands or millions of employees. No part of its byzantine procedures is suited for (or even appears to allow)

an emergency preliminary injunction. And the Government does not cite a single case, nor have we found one, where OSC agreed in its unreviewable discretion to petition the MSPB for relief that remotely resembles what plaintiffs request here.

The Government nevertheless contends plaintiffs' claims are not wholly collateral to the CSRA because what plaintiffs *really* want is to "avoid adverse employment action," namely their terminations. Gov't En Banc Br. 17, 21-22. This is an untenable recharacterization of plaintiffs' suit, which prayed to have a federal court "[h]old unlawful and set aside the Federal Employee Mandate" and did not make specific employment-related claims. ROA. 138 (complaint). Declaring unlawful an executive order that requires millions of people to undergo a medical procedure is hardly "relief that the CSRA routinely affords." *Elgin*, 567 U.S. at 22.

The third *Thunder Basin* factor is whether the claims at issue are "outside the agency's expertise." 510 U.S. at 212. As in *Cochran*, this case involves constitutional issues and "standard questions of administrative law, which the courts are at no disadvantage in answering." 20 F.4th at 207-08 (quotation omitted). By contrast, MSPB's expertise lies in "ensur[ing] that Federal employees are protected against abuses by agency management, that Executive branch agencies make employment decisions in accordance with the merit system principles, and that Federal merit systems are kept free of prohibited personnel practices." MERIT SYSTEMS PROTECTION BOARD, AN INTRODUCTION TO THE MERIT SYSTEMS PROTECTION BOARD 5 (1999).

The Government doesn't argue that plaintiffs' claims fall under the MSPB's expertise. Rather, the Govern-

ment argues that “the MSPB’s resolution of *preliminary* questions unique to the employment context could obviate the need to address” plaintiffs’ claims. Gov’t En Banc Br. 17 (quotation omitted) (emphasis added). The Government provides no further support for this claim, however, and we therefore hold that it’s forfeited. *Innova Hosp. San Antonio, Ltd. P’ship v. Blue Cross & Blue Shield of Ga., Inc.*, 892 F.3d 719, 732 (5th Cir. 2018).

V.

JUDGE HIGGINSON’s dissent warrants a few additional words. He agrees that we have jurisdiction over plaintiffs’ constitutional claims. Thus, thirteen of the seventeen members of our en banc court agree that the CSRA does not implicitly strip the jurisdiction that § 1331 explicitly confers on the district court to hear plaintiffs’ constitutional claims. And eleven members agree that the CSRA does not implicitly strip jurisdiction over *any* of plaintiffs’ claims, constitutional and non-constitutional alike. But he disagrees with how we reach that conclusion. We write to address these areas of disagreement.

A.

As an initial matter, JUDGE HIGGINSON’s disagreement with the majority opinion is perplexing. On the one hand, the dissenting opinion says “the CSRA does not provide meaningful judicial review of the plaintiffs’ pre-enforcement challenge and [therefore] Congress did *not* intend the CSRA to foreclose judicial review of their separation-of-powers claim” against the vaccine requirement, *post*, at 50 (Higginson, J., dissenting) (emphasis added), and “*nothing* in the CSRA shows that

Congress meant to preclude federal jurisdiction to adjudicate separation-of-powers challenges to employment policies set by the President,” *id.* at 76 (emphasis added). On the other hand, the dissenting opinion says, “Congress’s intent to preclude judicial review over challenges to the [vaccine] requirement is fairly discernible within the statutory scheme,” *id.* at 63, “Congress’s intent to preclude jurisdiction over pre-enforcement challenges is fairly discernible in the statute,” *id.* at 64, and “the only conclusion consistent with the text of the [CSRA] and binding Supreme Court authority is that Congress’s intent to preclude pre-enforcement challenges is fairly discernible in the CSRA,” *id.* at 69. It’s difficult to reconcile these two positions.

The dissent tries to square that circle by arguing that plaintiffs’ separation-of-powers challenges raise unique constitutional concerns and thereby preclude Congress from implicitly stripping § 1331 jurisdiction in this case. *See, e.g., id.* at 75-76 & n.16. But it’s unclear where the dissenting opinion would root its concerns in the Constitution or Supreme Court precedent. True, the Supreme Court has said the Constitution requires a federal forum for certain habeas claims, *see Boumediene v. Bush*, 553 U.S. 723, 795 (2008), and takings claims, *see First Eng. Evangelical Lutheran Church of Glendale v. Los Angeles Cnty., Cal.*, 482 U.S. 304, 315-19 (1987); RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 330 (7th ed. 2015) [HART & WECHSLER]. But it’s well established that Congress need not provide a federal forum for constitutional claims more generally. To the contrary, the first Congress did not create general federal question jurisdiction in the Judiciary Act of 1789, so

all manner of constitutional claims were denied a federal forum at the Founding without offending any constitutional principle. See HART & WECHSLER, *supra*, at 25-26; Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1585-93 (1990).⁷

Even if the dissenting opinion could identify a constitutional problem to be avoided, it then must identify an alternative interpretation of the statutory text that avoids it. See *Nielsen v. Preap*, 139 S. Ct. 954, 972 (2019) (“The trouble with this argument is that constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction. The canon has no application absent ambiguity.” (quotation omitted)); *Zadvydas v. Davis*, 533 U.S. 678, 696 (2001) (“Despite this constitutional problem, if Congress has made its intent in the statute clear, we must give effect to that intent.” (quotation omitted)). But the dissent raises no such plausible alternative reading. It simply says there’s a constitutional problem of unknown constitutional provenance, so plaintiffs must win to

⁷ If the dissenting opinion intends to ally itself with an Amarian conception of Article III, § 2, clause 1—namely, that Congress somehow must provide a federal forum for all cases arising under federal law, see Akhil R. Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985)—then it proves too much. That’s because Article III, § 2, clause 1 says the judicial power extends to “all Cases, in Law and Equity, arising under this Constitution [*and*] the Laws of the United States. . . .” (emphasis added). The Amarian view of Article III would require Congress to provide a federal forum for plaintiffs’ statutory APA claims, which the dissenting opinion expressly rejects. See *post*, at 70 n.12 (Higginson, J., dissenting) (arguing Congress can strip all jurisdiction over plaintiffs’ claims arising under the APA).

avoid it. That's a quite-odd form of constitutional avoidance.

B.

Second, the dissent argues that the CSRA implicitly strips § 1331 jurisdiction over CSRA-covered personnel actions. *See, e.g., post*, at 54 (Higginson, J., dissenting). We agree. *Elgin, Fausto*, this majority opinion, and the dissent all agree (quite clearly) that where the CSRA applies, it implicitly strips the district court's § 1331 jurisdiction. The question of course is whether the CSRA applies.

And on that question, the dissent appears to say that the CSRA applies to both personnel actions *and pre-enforcement* personnel actions. But this proposition belies confusion over (1) what plaintiffs are challenging and (2) what sort of jurisdiction the CSRA strips. Plaintiffs are challenging the President's vaccine mandate—not any personnel action that may or may not be taken in conjunction with that mandate. And the CSRA's implicit effects on jurisdiction depend on the claims plaintiffs choose to bring. That's why the CSRA can apply when a plaintiff challenges his demotion or termination under Chapter 75 and not apply when the employee's boss installs a hidden camera in a workplace changing room. *See supra*, at 8. Thus, if the employee is subject to surveillance and then gets fired, she has a multitude of claims. She might, for example, challenge her termination—which would be subject to the CSRA/MSPB process. But if the employee seeks damages for *the invasion of privacy itself*, which is an obvious injury separate and apart from the employment action, that challenge does nothing to trigger the CSRA

or to implicitly strip § 1331 jurisdiction. *See Gustafson*, 803 F.3d at 888; *Bush*, 462 U.S. at 385 n.28.

So it might be true, as the dissenting opinion sometimes suggests, that the CSRA would implicitly strip jurisdiction over an employee’s pre-termination suit to enjoin her termination (*i.e.*, “pre-enforcement challenge to a covered personnel action”). We take no position on that because it’s irrelevant here. All that matters here is that plaintiffs have identified an illegal vaccine mandate and, separate and apart from any personnel action the President might one day take to enforce that illegal order, the plaintiffs want judicial review of it. The CSRA does nothing to implicitly strip jurisdiction over these claims because the vaccine mandate itself is not a personnel action—even if a future employer at some future time might take some future action to impose some future personnel action on a future plaintiff who might violate the mandate in the future.

C.

The dissenting opinion next says the vaccine mandate itself is a “working condition” of federal employment. That’s so, the dissent says, because *romanette xii*’s reference to “working conditions” is so capacious that it includes—and hence channels into the MSPB—*any* significant change to *any* “circumstances under which an employee performs his or her job.” *Post*, at 57 (Higginson, J., dissenting). Under the dissenting opinion’s theory, it’s unclear there are any limits at all on what the President could call a change in “working conditions.” But we know there are limits because the Supreme Court has said that warrantless searches and wiretaps are so far afield from the CSRA’s list of personnel actions that they remain actionable in district

court. See *Bush*, 462 U.S. at 385 n.28; see also *Collins*, 195 F.3d at 1080. And our sister circuits have said the same thing about peephole cameras and assaults. See *Gustafson*, 803 F.3d at 888; *Brock*, 64 F.3d at 1425; *Orsay*, 289 F.3d at 1131.

The dissenting opinion hazards no argument that an employee's irrevocable medical decision like the one at issue here is somehow the employer's prerogative in ways that wiretaps, peephole cameras, and assaults are not. Rather, the dissenting opinion contends that Congress contravened *Bush v. Lucas* (and *Gustafson*, *Brock*, *Orsay*, and *Collins* by extension) when it added romanettes x through xii to the CSRA. See *post*, at 59-61 & n.5 (Higginson, J., dissenting). Those romanettes bring under the CSRA "a decision to order psychiatric testing or examination," "the implementation or enforcement of any nondisclosure policy, form, or agreement," and "any other significant change in duties, responsibilities, or working conditions." 5 U.S.C. § 2302(a)(2)(A)(x)-(xii). They say nothing about wiretaps, peephole cameras, workplace assaults, or for that matter irrevocable medical decisions. We cannot infer that Congress's decision to cover nondisclosure agreements under the CSRA brings with it an implied congressional decision to cover elephantine medical decisions in romanette xii's ambiguous catchall phrase. To conclude otherwise, "we would have to conclude that Congress not only had hidden a rather large elephant in a rather obscure mousehole, but had buried the ambiguity in which the pachyderm lurks beneath an incredibly deep mound of specificity, none of which bears the footprints of the beast or any indication that Congress even suspected its presence." *ABA v. FTC*, 430 F.3d 457, 469 (D.C. Cir. 2005) (Sentelle, J.).

Nor would it matter if the President ordered employees to make their irrevocable medical decisions “at work.” *Post*, at 62 (Higginson, J., dissenting). The vaccine mandate still would not be covered by the CSRA in any event. After all, the peephole camera in *Gustafson* was in the workplace. *See* 803 F.3d at 886-87. So too with the hypothesized wiretaps in *Bush*. *See* 462 U.S. at 385 n.28. So too with the assaults in *Brock*. *See* 64 F.3d at 1425. The reason these illegalities were actionable outside of the CSRA had nothing to do with the location or timing of the employer’s actions. They were actionable outside of the CSRA because the definition of “personnel action” cannot reasonably be read to include peephole cameras, assaults, or illegal wiretaps. The same is true of irrevocable medical decisions. The fact that the President ordered employees to make medical decisions outside of the workplace—and to live with those irrevocable decisions even after they leave the federal workforce—bolsters plaintiffs’ argument that the mandate is not a “working condition.” But it’s not necessary.

D.

The dissenting opinion next contends that its reading of the CSRA is compelled by “the logic of *Fausto*.” *Post*, at 64 (Higginson, J., dissenting). Again, we respectfully disagree.

Fausto involved the removal of a federal employee— unquestionably a “personnel action” covered by the CSRA. *See* 5 U.S.C. §§ 2302(a)(2)(A)(iii), 7512(1) (covering “a removal”). While the CSRA covered the employer’s personnel action, it did not cover Fausto himself because he served in the “excepted service.” *Fausto*, 484 U.S. at 441 & n.1. Because Congress carved

Fausto out of the CSRA's coverage, he sought remedies under a different federal statute called the Back Pay Act, 5 U.S.C. § 5596. The question presented was whether Congress's decision not to cover Fausto under the CSRA impliedly preempted his ability to seek more generous remedies under the Back Pay Act. The Court held yes because to hold otherwise "would have given him greater rights than were available under the CSRA to employees who enjoyed rights under that statute—primarily those in the competitive service." *Graham*, 358 F.3d at 934.

Likewise in *Graham*, the D.C. Circuit held that an employee covered by the CSRA must use that process—and only that process—to challenge his employer's personnel actions. *See ibid.* And it did not matter that the particular personnel action at issue in *Graham* (the issuance of a censure letter) was not one of the listed personnel actions covered by the CSRA. As then-Judge Roberts wrote: "in granting review with respect to some personnel actions under the CSRA, Congress meant to preclude review of others." *Ibid.*

These cases teach that the CSRA establishes a comprehensive framework for (1) federal employees challenging (2) personnel actions. Under both *Fausto* and *Graham*, an employee cannot avoid the CSRA's implicit stripping of § 1331 jurisdiction by saying "Congress's decision to limit (1) covered employees and (2) covered personnel actions" should be read to allow (1) uncovered employees to avoid the CSRA or (2) judicial review of uncovered personnel actions.

But neither decision strips § 1331 jurisdiction over claims that *do not challenge personnel actions*. That's why, again, the Supreme Court said that federal em-

ployees can bring claims unrelated to personnel actions outside of the CSRA. *See Bush*, 462 U.S. at 385 n.28. Congress certainly could pass a statute that says, “federal employers are suable under the CSRA and only under the CSRA.” But that’s not what Congress said. Congress said personnel-action claims must go through the CSRA process—thus leaving undisturbed whatever § 1331 jurisdiction might otherwise attach to claims unrelated to personnel actions, like wiretaps, peephole cameras, and irrevocable medical decisions.

E.

The dissenting opinion is also incorrect to contend “this case is justiciable because it involves challenges to CSRA-covered personnel actions.” *Post*, at 67 (Higginson, J., dissenting). The dissent’s theory appears to be that plaintiffs *only* have standing because the Government threatens to take CSRA-covered personnel actions against noncompliant employees. *See ibid.*

We respectfully disagree because the plaintiffs alleged an injury distinct from any personnel action. The mandated medical decision alone is an injury. When a “regulation is directed at [plaintiffs] in particular” and “requires them to make significant changes,” plaintiffs have suffered an injury to challenge the order *even if* the Government has yet to elucidate the precise consequences of failing to comply. *Abbott Lab’ys v. Gardner*, 387 U.S. 136, 154 (1967); *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561-62 (1992). Plaintiffs do not have to identify exactly how the Government will enforce the mandate; it’s enough that plaintiffs face the ominous order, “get vaccinated or else.” *See Abbott Lab’ys*, 387 U.S. at 151 (holding that plaintiffs subject to a regulation had standing to challenge it even though the

Attorney General had yet to “authorize criminal and seizure actions for violations of the statute”).

Moreover, plaintiffs did not seek or receive relief against any personnel action. Plaintiffs only sought an injunction against the executive order. The executive order nowhere references any threatened or actual personnel action. *See* EXEC. ORDER 14043. And the district court’s injunction nowhere restricts the Government from bringing personnel actions against plaintiffs. Rather, it prevents the Government from “implementing or enforcing Executive Order 14043 until this case is resolved on the merits.” ROA. 1770. The Government is thus prohibited from ordering plaintiffs to get vaccinated—but the Government is not prohibited from taking personnel actions against them.

True, when a plaintiff seeks pre-enforcement review of a government mandate, ripeness is always a concern. *See, e.g., Abbott Lab’ys*, 387 U.S. at 148. But in this case, it’s not difficult “to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.” *Id.* at 149. The issue for judicial decision is the purely legal one of whether the President can lawfully enact this order. *See ibid.* (holding “the issues presented are appropriate for judicial resolution at this time” because “all parties agree that the issue tendered is a purely legal one”). And the hardships to the plaintiffs of withholding a decision are plain: they’ll be forced to undergo irrevocable medical procedures and comply with a potentially unlawful order or face unknown consequences that “may be even more costly.” *See id.* at 153; *id.* at 152 (finding hardship and hence ripeness where “[t]he regulations are clear-cut, and were made effective immediately upon

publication; [and the Government’s lawyers made clear] that immediate compliance with their terms was expected”). The mandate thus plainly affects plaintiffs’ “primary conduct” and hence is ripe for review irrespective of any personnel actions the Government has taken or might eventually take. *Nat’l Park Hosp. Ass’n v. Dep’t of Interior*, 538 U.S. 803, 810 (2003).

F.

Finally, the dissenting opinion claims that “[t]his circuit’s door is now open to all pre-enforcement challenges to federal employment policies. Plaintiffs are welcome to challenge any personnel action before it takes place.” *Post*, at 67-68 (Higginson, J., dissenting) (footnote omitted). “But this is one of those instances in which the dissent clearly tells us what the law is not.” *Waste Mgmt. of La., L.L.C. v. River Birch, Inc.*, 920 F.3d 958, 978 (5th Cir. 2019) (Oldham, J., dissenting) (quotation omitted).

Plaintiffs in this circuit, as in every circuit of which we’re aware, are not free to challenge federal personnel actions under § 1331. Instead, challenges to federal personnel actions must be channeled through the CSRA process. True, § 1331 jurisdiction remains undisturbed for claims that do *not* challenge federal personnel actions. But even then, the eye of the federal employee’s needle is narrow. The plaintiff still must demonstrate an injury in fact under well-established standing principles. And if the employee seeks pre-enforcement review of a federal mandate, he must sat-

isfy well-established ripeness rules.⁸ And even if the plaintiff can thread that needle, again, he cannot “challenge any personnel action before it takes place.” *Post*, at 68 (Higginson, J., dissenting). He can only challenge the Government’s illegal actions that do *not* constitute a personnel action.

Ours is hardly the first court to recognize that this needle, while narrow, can be threaded. The plaintiffs in *Gustafson, Brock, Orsay*, and *Collins* all managed to do it. The sky did not fall, and the doors of the inferior federal courts were not blown open to claims that otherwise belonged in the CSRA/MSPB process. Therefore in our view, the dissenting opinion’s rhetoric is misplaced.

VI.

As noted, the panel limited its decision to jurisdiction. *See Feds for Medical Freedom*, 30 F.4th at 511. Finding that we have jurisdiction, we review the district court’s decision regarding the other factors necessary for a preliminary injunction for abuse of discretion. *See NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 447 (5th Cir. 2022). “A preliminary injunction is an extraordinary remedy never awarded as of right.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Id.* at 20.

⁸ For example, the district judge in this case rejected a previous challenge to this same mandate as unripe. *See Rodden v. Fauci*, 571 F. Supp. 3d 686, 689 (S.D. Tex. 2021).

The district court carefully considered these factors and wrote a thorough opinion explaining its decision to grant preliminary relief. After carefully considering the district court’s opinion and the Government’s criticisms of it, we are unpersuaded that the district court abused its discretion. And we need not repeat the district court’s reasoning, with which we substantially agree.

The one issue that warrants additional discussion is the scope of injunctive relief. The Supreme Court has recently stayed nationwide injunctions. *See, e.g., DHS v. New York*, 140 S. Ct. 599 (2020) (mem.). But the Court has yet to tell us they’re verboten. Some Justices have expressed concerns that such injunctions can contravene equitable principles because “[e]quitable remedies, like remedies in general, are meant to redress the injuries sustained by a particular plaintiff in a particular lawsuit.” *New York*, 140 S. Ct. at 600 (Gorsuch, J., concurring); *see also Trump v. Hawaii*, 138 S. Ct. 2392, 2426 (2018) (Thomas, J., concurring) (“Universal injunctions do not seem to comply with those [equitable] principles.”). For example, the English system of equity did not authorize injunctions against the King. *See Trump*, 138 S. Ct. at 2427 (Thomas, J., concurring). And “as a general rule, American courts of equity did not provide relief beyond the parties to the case.” *Ibid.* As with all general rules, of course, this one was subject to exceptions—the most important of which was that an injunction *could* benefit non-parties as long as “that benefit was merely incidental.” *Ibid.*

It appears that the district court did its best to follow these equitable principles in this case. The court carefully carved the President out of its injunction, which is an obviously imperfect analogue to the English king but

an equally obvious good-faith recognition of the rule. It also recognized that, unlike the plaintiffs in both *New York* and *Hawaii*, the lead plaintiff in this case has over 6,000 members spread across every State in the Nation and nearly every federal agency in the entire Government. ROA. 1770. And plaintiffs cited multiple instances in the aftermath of Executive Order 14043 where the Government wrongfully targeted unvaccinated federal employees who sought exemptions—despite assurances from the Government that it would not do so. ROA. 1454, 1464, 1600, 1625, 1645. The court therefore expressed its “fears that limiting the relief to only those before it would prove unwieldy and would only cause more confusion.” ROA. 1770. On this record and absent binding precedent from the Supreme Court, we cannot say that the district court abused its discretion in rejecting the Government’s assurances that it could and would comply with an injunction limited to the plaintiffs’ members.

The Government’s position on the scope of the injunction also sits awkwardly with its position on the merits. On the merits, the Government wants “consistency across government in enforcement of this government-wide vaccine policy.” ROA. 810. But on the scope of the injunction, the Government wants piecemeal enforcement, where thousands of plaintiffs’ members across the Nation are subject to the district court’s injunction, others are given exemptions from vaccination, and only the remainder are subject to the President’s mandate. That undermines rather than supports the Government’s purported interest in “consistency across government in enforcement of this government-wide vaccine policy.” ROA. 810.

Finally, a word about concerns expressed by JUDGE HAYNES and JUDGE STEWART regarding a purported conflict between this injunction and the decisions of other courts across the country. They worry that the district court’s injunction awards relief to parties who have already lost their claims elsewhere. But our esteemed colleagues reference no cases where plaintiffs have lost their claims *on the merits*. They first cite *Rydie v. Biden*, No. 21-2359, 2022 WL 1153249 (4th Cir. Apr. 19, 2022) (unpublished). There, our sister circuit vacated a district court judgment denying a preliminary injunction of Executive Order 14043 but *only* because the court concluded that the CSRA stripped the district court of jurisdiction. *See id.* at *1. The panel dismissed the case under FED. R. CIV. P. 12(b)(1) without prejudice and without reaching the merits. *See id.* at *8 (“We therefore vacate the district court’s judgment and remand the case with instructions that it be dismissed without prejudice for lack of subject-matter jurisdiction.”). The D.C. Circuit took the same route in *Payne v. Biden*, 62 F.4th 598 (D.C. Cir. 2023). *See id.* at 607 (dismissing for lack of subject matter jurisdiction without reaching the merits). In all the other cases JUDGE STEWART cites, the districts courts dismissed the claims without prejudice on the grounds that the CSRA stripped jurisdiction. *See Am. Fed’n of Gov’t Emps. Loc. 2018 v. Biden*, 598 F. Supp. 3d 241, 248-49 (E.D. Pa. 2022); *Payne v. Biden*, 602 F. Supp. 3d 147, 151 (D.D.C. 2022); *Am. Fed’n of Gov’t Emps. Loc. 2586 v. Biden*, No. CIV-21-1130-SLP, 2022 WL 3695297, at *6 (W.D. Okla. July 22, 2022). The overwhelming majority of district courts that have dismissed these challenges have also done so for lack of jurisdiction under FED. R. CIV. P. 12(b)(1). *See, e.g., Calderwood v. United States*, No.

2:21-CV-702-CLM, 2022 WL 4353382 (N.D. Ala. Aug. 25, 2022); *Church v. Biden*, No. 21-2815 (CKK), 2022 WL 1491100 (D.D.C. May 11, 2022); *Am. Fed'n of Gov't Emps. Loc. 501 v. Biden*, 576 F. Supp. 3d 1155 (S.D. Fla. 2021); *McCray v. Biden*, 574 F. Supp. 3d 1 (D.D.C. 2021); *Brass v. Biden*, No. 21-CV-02778-CNS-MEH, 2022 WL 11732833 (D. Colo. Oct. 20, 2022). Thirteen members of this court, including JUDGE HAYNES, agree that we have jurisdiction and must reach the merits of the preliminary injunction. Accordingly, any perceived conflict is misconstrued, and any benefit to outside parties is “merely incidental.” *See Trump*, 138 S. Ct. at 2427 (Thomas, J., concurring).

We hasten to emphasize that this case only involves a *preliminary* injunction. The preliminary injunction’s purpose is to maintain the status quo until the parties have the chance to adjudicate the merits. *See Benisek v. Lamone*, 138 S. Ct. 1942, 1945 (2018) (“[T]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. . . . ” (quotation omitted)); *Texas v. United States*, 809 F.3d 134, 187 n.205 (5th Cir. 2015), *affirmed by an equally divided Court*, 579 U.S. 547 (2016) (per curiam) (similar). When the parties proceed to the merits in the district court, the plaintiffs will have to *prove* that whatever injunction they request is broad enough to protect against their proven injuries and no broader. And the Government will have another chance to show that any permanent injunction should be narrower than the preliminary one. And both sides will have to grapple with the White House’s announcement that the COVID emergency will finally end on May 11, 2023. *See* Exec. Off. of the President,

44a

Statement of Administration Policy Re: H.R. 382 &
H.J. Res. 7 (Jan. 30, 2023).

AFFIRMED.

JAMES C. HO, *Circuit Judge*, joined by JONES, *Circuit Judge*, concurring:

Our court today holds that we have jurisdiction to hear this challenge to the President’s vaccine mandate for federal employees. Moreover, by affirming the preliminary injunction, we also hold that coercing an employee to comply with a vaccine mandate as a condition of continued employment constitutes irreparable injury.¹ I concur.

Judge Higginson agrees that we have jurisdiction. But he concludes that we should deny relief on the merits and therefore reverse. He notes that “the ‘executive Power’—all of it—is ‘vested in a President,’ who must ‘take Care that the Laws be faithfully executed.’” *Post*, at 77 (Higginson, J., concurring in part and dissenting in part) (quoting *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191 (2020) (quoting U.S. CONST. art. II, § 1, cl. 1; *id.* at § 3)). He concludes that the President possesses the constitutional authority to order federal employees to comply with his vaccine mandate, if they wish to avoid removal from office.

I certainly agree that “[t]he entire ‘executive Power’ belongs to the President alone.” *Seila Law*, 140 S. Ct. at 2197. *Contrast* U.S. CONST. art. I, § 1 (vesting the legislative power in a bicameral Congress); *id.* art. III,

¹ Cf. *NFIB v. OSHA*, 142 S. Ct. 661, 665 (2022) (“A vaccination . . . cannot be undone at the end of the workday.”) (quotations omitted); *Louisiana v. Biden*, 55 F.4th 1017, 1022 (5th Cir. 2022) (noting that “employees would have to undertake an irreversible decision—vaccination—in order to be compliant with this mandate”); see also *Sambrano v. United Airlines, Inc.*, 45 F.4th 877, 878-79 (5th Cir. 2022) (Ho, J., concurring in denial of rehearing en banc) (same).

§ 1 (vesting the judicial power in “one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish”). To be sure, “it would be impossible for one man to perform all the great business of the State.” *Seila Law*, 140 S. Ct. at 2197 (quotations omitted). So “the Constitution assumes that lesser executive officers will assist the supreme Magistrate in discharging the duties of his trust.” *Id.* (quotations omitted). But “[t]hese lesser executive officers must remain accountable to the President, whose authority they wield.” *Id.*

All of this means that the President *should* possess the constitutional authority under Article II to remove his subordinates from office. See, e.g., *Myers v. United States*, 272 U.S. 52, 122, (1926) (“[W]hen the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal.”); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 498 (2010) (insulating subordinates from removal “subverts the President’s ability to ensure that the laws are faithfully executed—as well as the public’s ability to pass judgment on his efforts”); *Seila Law*, 140 S. Ct. at 2203-04 (observing that “the threat of removal” allows the President to “meaningfully control[]” subordinates, and that “removal at will” is “the most direct method of presidential control”); *Collins v. Yellen*, 141 S. Ct. 1761, 1787 (2021) (“The President must be able to remove not just officers who disobey his commands but also those he finds negligent and inefficient, those who exercise their discretion in a way that is not intelligent or wise, those who have different views of policy, those who come from a competing political party who is dead

set against [the President’s] agenda, and those in whom he has simply lost confidence.”) (cleaned up).²

In reality, however, the President actually controls surprisingly little of the Executive Branch. Only a tiny percentage of Executive Branch employees are subject to Presidential removal. The overwhelming majority of federal employees, by contrast, are protected against Presidential removal by civil service laws. *Compare* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2023, at 83 (2022) (4.2 million Executive Branch employees), *with* HOUSE COMMITTEE ON OVERSIGHT AND REFORM, UNITED STATES GOVERNMENT POLICY AND SUPPORTING POSITIONS 209-15 (2020) (commonly known as the “Plum Book”) (fewer than four thousand Executive Branch employees are subject to removal at will by the President).

The net result is that there are only a “small number of politically appointed leaders” who “enjoy only limited control of the mass of civil servants.” Eric Posner, *And if Elected: What President Trump Could or Couldn’t Do*, N.Y. TIMES, June 3, 2016. Federal civil service laws make it virtually impossible for a President to implement his vision without the active consent and cooperation of an army of unaccountable federal employees. And that presents a rather curious distortion

² *But see Collins v. Mnuchin*, 938 F.3d 553, 614 (5th Cir. 2019) (en banc) (Higginson, J., dissenting in part) (“The Constitution affords sparse materials to resolve this question—only broad pronouncements that ‘[t]he executive Power shall be vested’ in the President and that ‘he shall take Care that the Laws be faithfully executed.’ Art. II §§ 1, 3. These clauses say nothing about removal of executive-branch officers.”).

of our constitutional structure. The Constitution requires the President, the Vice President, and every member of Congress to stand for re-election if they wish to continue holding federal office and exercising federal power. Meanwhile, countless Executive Branch employees have the ability to influence or implement federal policy in their capacity as subordinates of the President—yet they enjoy a *de facto* form of life tenure, akin to that of Article III judges. See U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour”).

It’s a phenomenon that legal scholars have identified (and decried) for decades. “The critical fact of civil service today is that covered employees are rarely discharged from government for inadequately doing their jobs. The civil service system has provided the equivalent of life tenure (at least until retirement) once a brief probation period is passed, absent what the government considers a serious act of misconduct.” Gerald E. Frug, *Does the Constitution Prevent the Discharge of Civil Service Employees?*, 124 U. PA. L. REV. 942, 945 (1976). See also PHILIP K. HOWARD, NOT ACCOUNTABLE: RETHINKING THE CONSTITUTIONALITY OF PUBLIC EMPLOYEE UNIONS 136 (2023) (“Federal government . . . is an accountability-free zone. More federal employees die on the job than are terminated for poor performance. Regular stories emerge of employees who cannot be terminated despite outrageous behavior.”).

Not surprisingly, these “tenure-like protections for the civil service have sharply reduced the president’s ability to change the direction of the permanent bureau-

cracy.” John Yoo, *Unitary, Executive, or Both?*, 76 U. CHI. L. REV. 1935, 1956 (2009).

What’s more, federal employees know it—and they take full-throated advantage of it. As anyone who has ever held a senior position in the Executive Branch can attest, federal employees often regard themselves, not as subordinates duty-bound to carry out the President’s vision whether they personally agree with it or not, but as a free-standing interest group entitled to make demands on their superiors. See, e.g., Philip K. Howard, *Civil Service Reform: Reassert the President’s Constitutional Authority*, THE AMERICAN INTEREST, Jan. 28, 2017 (“The slow dissipation of presidential power is a story rich with irony—designed to avoid interest group capture, the civil service became its own special interest.”).

As a result, “Presidents can have a hard time implementing their agenda if civil servants collectively drag their feet or lack the competence to carry out the President’s orders.” Jason Marisam, *The President’s Agency Selection Powers*, 65 ADMIN. L. REV. 821, 863 (2013). “Even if a president has the perfect ally running an agency, that ally may still fail to produce the desired results if the ally runs into resistance from his civil servants.” *Id.*

Indeed, one scholar has pointedly noted that the single “*biggest* obstacle” for any President “is not the separation of powers” designed by our Founders, “but the millions of federal employees who are supposed to work for him.” Posner, *supra* (emphasis added). “These

employees can drag their feet, leak to the press, threaten to resign and employ other tactics to undermine [a President's] initiatives if they object to them." *Id.* "They're also hard to fire, thanks to Civil Service protections." *Id.* See, e.g., Marisam, *supra*, at 863-64 ("For example, the efforts of President Reagan's EPA Administrator, Ann Gorsuch, to slow down and halt EPA regulatory actions was marked by staff resistance to the Administration's attempt to change the agency's goals.") (cleaned up).

In an appropriate case, we should consider whether laws that limit the President's power to remove Executive Branch employees are consistent with the vesting of executive power exclusively in the President. See, e.g., HOWARD, NOT ACCOUNTABLE, *supra*, at 140 ("[T]he president and federal supervisory officials must have authority to manage personnel. . . . This requires, among other remedies, invalidating specific provisions of the Civil Service Reform Act of 1978 that . . . disempower the president and his appointees from removing officers."); Yoo, *supra*, at 1957 ("[P]residents consistently followed a common position toward the civil service that sought to maintain the right to fire federal employees in order to guarantee a uniform execution of federal law."); Christopher S. Yoo, Steven G. Calabresi, and Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945-2004*, 90 IOWA L. REV. 601, 660 (2005) ("[T]he idea that the civil service laws limit the president's power to remove is of fairly recent vintage dating back only to 1974."); Frug, *supra*, at 949 (noting that "the President's absolute power of removal of federal employees was established in principle" in 1789).

This is not that case, however. That’s because the Government doesn’t challenge the validity of the CSRA or invoke the President’s Article II removal power in this case. It doesn’t do so in its briefing. And it reconfirmed during oral argument that it doesn’t challenge the constitutionality of the CSRA here. During oral argument, I asked whether the President has the power under the Constitution to remove any Executive Branch employee, notwithstanding laws like the CSRA. Counsel for the Government responded: “Plaintiffs say periodically we haven’t challenged the constitutionality of the CSRA. That’s absolutely right—we have not.” Oral Arg. at 5:40-6:23.

The argument is thus forfeited. We therefore have no occasion to decide whether this case implicates the President’s constitutional power to remove employees who are unwilling to faithfully execute his policy vision for our country—or if, instead, the President is impermissibly leveraging (and therefore exceeding) his removal power in order to meddle in the private lives of federal employees. *See post*, at 52 (Higginson, J., concurring in part and dissenting in part) (noting that the President’s vaccine mandate “requires federal employees to ‘protect themselves’ against COVID-19 by getting FDA-approved vaccinations”); *cf. Louisiana v. Biden*, 55 F.4th 1017, 1030 (5th Cir. 2022) (“unlike the non-

discrimination, E-Verify, *Beck* rights, and sick leave orders, which govern the conduct of *employers*, the [President’s federal contractor] vaccine mandate purports to govern the conduct of *employees*—and more than their conduct, purports to govern their individual healthcare decisions”).³

³ See also *Horvath v. City of Leander*, 946 F.3d 787, 799 (5th Cir. 2020) (Ho, J., concurring in the judgment and dissenting in part) (observing that a municipal vaccine mandate “forces [an employee] to choose between sacrificing his faith or working under unequal conditions”); *BST Holdings, L.L.C. v. Occupational Safety & Health Admin.*, 17 F.4th 604, 618-19 (5th Cir. 2021) (OSHA vaccine mandate implicates “the liberty of individuals to make intensely personal decisions according to their own convictions”); *Sambrano v. United Airlines, Inc.*, 19 F.4th 839, 841 (5th Cir. 2021) (Ho, J., dissenting) (“Vaccine mandates . . . present a crisis of conscience for many people of faith. It forces them to choose between the two most profound obligations they will ever assume—holding true to their religious commitments and feeding and housing their children.”); *Sambrano v. United Airlines, Inc.*, 2022 WL 486610, *9 (5th Cir. Feb. 17, 2022) (“United has presented plaintiffs with two options: violate their religious convictions or lose all pay and benefits indefinitely. That is an impossible choice for plaintiffs who want to remain faithful but must put food on the table.”).

HAYNES, *Circuit Judge*, concurring in the judgment in part and dissenting in part:

I. Concurrence

I concur in the en banc court’s judgment that we have jurisdiction over pre-enforcement challenges to President Biden’s vaccine mandate for federal employees. I also concur in the affirmance of the preliminary injunction as to the parties in this case, but I respectfully dissent from the affirmance of the grant of a nationwide injunction.

II. Dissent¹

The district court noted that it was “cognizant of the ‘equitable and constitutional questions raised by the rise of nationwide injunctions.’” *Feds for Medical Freedom v. Biden*, 581 F. Supp. 3d 826, 836 (S.D. Tex. 2022) (quoting *Dep’t of Homeland Sec. v. New York*, 140 S. Ct. 599, 601 (2020) (Gorsuch, J., concurring)). Nevertheless, the district court concluded that tailoring relief here was impractical. 581 F. Supp. 3d at 836. According to the district court, the fact that the lead Plaintiff—Feds for Medical Freedom—has more than 6000 members spread across every state and in nearly every federal agency means that limiting the injunction’s scope would “prove unwieldy and would only cause more confusion.” *Id.* (quotation omitted).

However, a federal court’s “constitutionally prescribed role is to vindicate the individual rights of the people appearing before it,” and accordingly “[a] plaintiff’s remedy must be tailored to redress the plaintiff’s particular injury.” *Gill v. Whitford*, 138 S. Ct. 1916,

¹ Judges Higginson and Willett join in Section II.

1933-34 (2018) (emphasis added); *see also Dep't of Homeland Sec.*, 140 S. Ct. at 600 (Gorsuch, J., concurring) (“[W]hen a court . . . order[s] the government to take (or not take) some action with respect to those who are strangers to the suit, it is hard to see how the court could still be acting in the judicial role of resolving cases and controversies.”); *Georgia v. President of the United States*, 46 F.4th 1283, 1303 (11th Cir. 2022) (“In their universal reach to plaintiffs and nonplaintiffs alike, nationwide injunctions push against the boundaries of judicial power, and very often impede the proper functioning of our federal court system.”). This seems especially true where, as here, several district courts (and two circuit courts) across the country have come out differently from this district court on these issues.² For instance, the Government noted that it has successfully defended the executive order in the Fourth Circuit³ and is currently defending the dismissal of similar challenges in the Third and D.C. Circuits,⁴ “[b]ut those cases are ren-

² At least twelve district courts previously rejected challenges to Executive Order 14043 for various reasons. *See Feds for Med. Freedom*, 30 F.4th at 505 n.1 (collecting cases).

³ The Fourth Circuit, like the panel opinion in this case, determined that the CSRA deprived the district court of jurisdiction. Accordingly, it vacated the district court’s judgment denying relief to the plaintiffs on the merits and dismissed the suit for lack of jurisdiction. *Rydie v. Biden*, No. 21-2359, 2022 WL 1153249, at *8 (4th Cir. Apr. 19, 2022).

⁴ The Government subsequently noted that the D.C. Circuit ruled in its favor. *See Payne v. Biden*, 62 F.4th 598 (D.C. Cir. 2023).

dered essentially meaningless by this nationwide injunction.”⁵

Nor is tailored injunctive relief unworkable here. The district court could direct Feds for Medical Freedom to submit the names of its members to the Government and employing agencies in order to provide them relief. If it has not already done so, Feds for Medical Freedom also could provide either online proof of membership or physical cards to that effect that the unvaccinated individual member employees could utilize as proof to avoid any adverse employment actions. Additionally, as the Government notes, “[a]s for the court’s view that tailored relief would be unworkable because [Feds for Medical Freedom] ‘is actively adding new member[s],’ it is far from clear that [Feds for Medical Freedom] has standing to litigate on behalf” of potential or future members.⁶ In contrast, the plaintiffs wholly

⁵ The majority opinion misunderstands my point here: we should generally only address the *parties*’ request for a preliminary injunction, particularly in this circumstance, where other litigants are raising the same issues in other circuits. In other words, I am less concerned with whether we are creating circuit splits than whether we are appropriately limiting the scope of our decisions to the parties before us. The reasoning other circuits use to resolve these issues is therefore not my point. That said, the majority is plainly incorrect that its opinion doesn’t truly conflict with other courts’ decisions. The other circuits’ jurisdictional rulings are far from “merely incidental”—they are wholly fatal to the plaintiffs’ claims. Therefore, a nationwide ruling which the majority opinion seems to find overrules the other circuits is also problematic because we have no greater jurisdiction to grant relief (or make decisions about federal court jurisdiction) than the other circuits.

⁶ The majority opinion’s last substantive paragraph notes that this case “only involves a preliminary injunction” which has the

failed to meet their burden to show that tailoring was not workable. *See, e.g., Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004) (on appeal from grant of preliminary injunction, the party who “bears the burden of proof on the ultimate question” bears the same burden on appeal); *Enter. Int’l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472 (5th Cir. 1982) (“[T]he district court must remember that a preliminary injunction is an extraordinary and drastic remedy, and that the movant has a heavy burden of persuading the district court that all four elements are satisfied. Thus, if the *movant* does not succeed in carrying its burden on any one of the four prerequisites, a preliminary injunction may not issue and, if issued, will be vacated on appeal.” (internal quotation marks, alteration, and citation omitted) (emphasis added)).

III. Conclusion

Accordingly, the district court erred in issuing a nationwide injunction when a tailored injunction is not workable or impossible to apply. Therefore, I dissent from the court’s decision to leave the nationwide injunction in place rather than reversing the portion of the injunction that extends beyond the plaintiffs.

“purpose to maintain the status quo until the *parties* have the chance to adjudicate the merits.” *Ante*, at 37 (emphasis added). Exactly—we should not address the interests of non-parties where, as here, it is certainly feasible to tailor the injunctive relief to the plaintiffs.

STEPHEN A. HIGGINSON, *Circuit Judge*, joined by SOUTHWICK, *Circuit Judge*, concurring in part and dissenting in part:

This case begins with the question of whether we have jurisdiction to review the President's vaccine requirement for Executive Branch employees. If the answer is yes, we also must decide whether the President's order exceeded his authority to require his employees to get an FDA-approved vaccination during a pandemic that has killed over a million Americans.

For the wrong reasons, our court correctly concludes that we do have jurisdiction. But contrary to a dozen federal courts—and having left a government motion to stay the district court's injunction pending for more than a year—our court still refuses to say why the President does not have the power to regulate workplace safety for his employees.

* * *

The Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. § 1101 *et seq.*, generally precludes subject-matter jurisdiction over pre-enforcement challenges to Executive Branch employment policies. For that reason, I cannot agree with our court's blueprint for covered employees to short circuit the CSRA by filing a federal lawsuit against workplace regulations before they are disciplined. Now, litigants can forum shop challenges to federal employment policies in our court, even though Congress directed their cases to the Federal Circuit. However, because I conclude the CSRA does not provide meaningful judicial review of the plaintiffs' pre-enforcement challenge and Congress did not intend the CSRA to foreclose judicial review of their separation-of-

powers claim, I concur that we have jurisdiction over this claim.

On the merits, our court is wrong that the plaintiffs are entitled to a preliminary injunction, let alone one that sweeps nationwide. The vaccine requirement fell within the President’s power to regulate his employees. Nor have the plaintiffs shown that they are likely to suffer an irreparable injury from the requirement in the absence of injunctive relief. Without identifying any reason that the requirement exceeded Presidential authority or any irreparable injury that the plaintiffs will suffer, our court concludes that such an injunction, which overruled all other federal courts that left the mandate untouched, is justified.

Setting aside the substance of what our court says on the merits, I disagree with *how* we say it. Today, our court affirms a nationwide injunction, put in place over a year ago, without explanation or analysis of any of the preliminary injunction factors. This method of rubberstamping a district court’s nullification of the President’s authority over the Executive Branch is unprecedented and improper on en banc rehearing. The People’s trust in our independence is undermined when we answer vital constitutional questions without showing our work—especially when the questions before us “are inescapably entangled in political controversies” and “touch the passions of the day.” *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 149 (1951) (Frankfurter, J., concurring).

I.

By September 2021, more than 600,000 Americans had died from COVID-19. *Covid Data Tracker Weekly*

Review: Easy as 1-2-3, CTRS. FOR DISEASE CONTROL & PREVENTION (Interpretive Summary for Aug. 27, 2021). Millions were missing work each week. *Educational Attainment for Adults Not Working at Time of Survey, by Main Reason for Not Working and Source Used to Meet Spending Needs, Weekly 37 Household Pulse Survey: Sept. 1 - Sept. 13*, U.S. CENSUS BUREAU (Sept. 21, 2021).

To combat those threats to “the health and safety of the [f]ederal workforce and the efficiency of the civil service,” on September 9, 2021, the President issued Executive Order 14043. Exec. Order No. 14043, 86 Fed. Reg. 50,989, 50,989 (Sept. 9, 2021). This order requires federal employees to “protect themselves” against COVID-19 by getting FDA-approved vaccinations. *Id.* Specifically, the President directed executive agencies to implement “a program to require COVID-19 vaccination for all of its [f]ederal employees, with exceptions only as required by law.” *Id.* at 50,990.

Pursuant to the Executive Order, the Safer Federal Workforce Task Force issued guidance stating that covered employees would “need to be fully vaccinated by November 22, 2021.” *Vaccinations*, SAFER FED. WORKFORCE, <https://perma.cc/G8T6-K8XN>. The guidance said that agencies “may be required to provide a reasonable accommodation to employees” who did not get vaccinated “because of a disability” or “a sincerely held religious belief, practice, or observance.” *Id.*

The guidance also explained how agencies could enforce the vaccine requirement. Agencies should first provide “an appropriate period of education or counseling” to employees who initially fail to comply with the requirement. *Id.* Afterwards, if an employee still

does not get vaccinated, an agency could “issue a letter of reprimand, followed by a short suspension,” which would “generally” last “14 days or less.” *Id.* The agency could propose that the employee be removed if the employee does not comply with the requirement during the suspension. *Id.* The guidance further noted that “[e]mployees who violate lawful orders,” like the requirement, “are subject to discipline, . . . including termination or removal.” *Id.*

In December 2021, Feds for Medical Freedom, individual federal employees, and other plaintiffs challenged Executive Order 14043 in federal district court. They alleged that the Executive Order is ultra vires because it exceeded the President’s constitutional and statutory authority, and they challenged the Executive Order as arbitrary and capricious under the Administrative Procedure Act (APA), 5 U.S.C. § 706. The plaintiffs moved for a preliminary injunction, which the district court granted. *See Feds for Med. Freedom v. Biden*, 581 F. Supp. 3d 826, 836-37 (S.D. Tex. 2022), *vacated*, 30 F.4th 503 (5th Cir. 2022), *reh’g granted*, 37 F.4th 1093. In granting the injunction, the district court split from a dozen other district courts who had already rejected similar challenges.¹ *See Feds for Med. Freedom*, 30 F.4th at 505 n.1 (collecting cases).

¹ The district court’s decision also conflicts with the Fourth Circuit’s and D.C. Circuit’s conclusion that Congress precluded jurisdiction over a similar challenge to the vaccine requirement. *See Payne v. Biden*, 62 F.4th 598 (D.C. Cir. 2023); *Rydie v. Biden*, No. 21-2359, 2022 WL 1153249 (4th Cir. Apr. 19, 2022). Another appeal is pending before the Third Circuit. *See Smith v. Biden*, No. 21-CV-19457, 2021 WL 5195688 (D.N.J. Nov. 8, 2021), *appeal docketed*, No. 21-3091 (3d Cir. Nov. 10, 2021).

The government appealed and moved for a stay pending appeal. A divided panel carried the motion with the case, *see Feds for Med. Freedom v. Biden*, 25 F.4th 354 (5th Cir. 2022) (per curiam), and a divided panel then vacated the injunction on the basis that the CSRA precluded the district court’s exercise of jurisdiction, *see Feds for Med. Freedom v. Biden*, 30 F.4th 503, 511 (5th Cir. 2022). Our court granted rehearing en banc. *Feds for Med. Freedom v. Biden*, 37 F.4th 1093 (5th Cir. 2022) (per curiam).

II.

Congress’s constitutional power to establish inferior federal courts includes the power to define their jurisdiction. *See* U.S. Const. art III, § 1; *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943). Pursuant to this power, Congress can preclude district courts from exercising jurisdiction by requiring certain claims “to proceed exclusively through a statutory review scheme.” *Elgin v. Dep’t of Treasury*, 567 U.S. 1, 10 (2012).

In determining whether a statute precludes district court jurisdiction, we consider whether Congress’s intent to do so is “fairly discernible in the statutory scheme.” *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994). If so, we decide whether the plaintiffs’ claims “are of the type Congress intended to be reviewed within this statutory structure.” *Id.* at 212. Three factors are relevant to this inquiry: whether (1) “a finding of preclusion could foreclose all meaningful judicial review,” (2) the claims are “wholly collateral to a statute’s review provisions,” and (3) the claims are “outside the agency’s expertise.” *Id.* at 212-13 (cleaned up).

Applying this Supreme Court test, the CSRA generally precludes district court jurisdiction over pre-enforcement challenges to Executive Branch employment policies. But, as I explain below, the plaintiffs' separation-of-powers claim is the rare type of pre-enforcement challenge that Congress did not intend to preclude in the CSRA. Therefore, I agree narrowly in outcome with the majority that we have jurisdiction over plaintiffs' pre-enforcement challenge to the Executive Order as *ultra vires*.²

But the majority takes two significant wrong turns in reaching its jurisdictional conclusion, which rejects Supreme Court precedent and imperils Congress's CSRA regime. First, the majority is incorrect that plaintiffs are not challenging a "personnel action" within the meaning of the CSRA. In addition, the majority is mistaken that Congress did not intend the CSRA to preclude jurisdiction over pre-enforcement challenges to personnel actions covered by the statute. This second error of our court is grave and lets any covered employee facing proposed discipline rush to federal court ahead of the statutory timeline contrary to Supreme Court precedent and the text of the CSRA.

A.

The CSRA imposed a "comprehensive and integrated review scheme" for "personnel action taken against federal employees." *United States v. Fausto*, 484 U.S.

² With the benefit of en banc argument, I have reconsidered my initial view that the district court likely lacked jurisdiction over the entire case. *Feds for Med. Freedom v. Biden*, 25 F.4th 354, 356 (5th Cir. 2022) (Higginson, J., dissenting), though I continue to believe that jurisdiction over plaintiffs' APA claim is precluded.

439, 454, 455 (1988). This system replaced a set of “haphazard” and “patchwork” “arrangements for administrative and judicial review of personnel action,” which had resulted in a “wide variation[] in [district court] decisions issued on the same or similar matters.” *Id.* at 444-45 (cleaned up). Among other reforms, the CSRA created the Merit Systems Protection Board (MSPB), “a quasi-judicial agency with the power to adjudicate disputes arising from adverse personnel actions taken against covered federal employees.” *Zummer v. Sallet*, 37 F.4th 996, 1003 (5th Cir. 2022), *cert. denied*, — S. Ct. —, 2023 WL 2563318 (2023).

Under the CSRA’s “elaborate new framework,” challenges to “minor adverse action[s],” “major adverse action[s],” and “prohibited personnel practices” are channeled into separate procedural tracks. *Fausto*, 484 U.S. at 443, 445-47 (cleaned up); *see* 5 U.S.C. §§ 1212, 1214, 2301, 2302, 7502, 7503, 7512, 7513; *see also* 5 U.S.C. § 4303 (review of actions based on unacceptable performance).

Minor adverse actions, meaning suspensions lasting fourteen days or less, are not appealable to the MSPB. *See* 5 U.S.C. § 7503; *Fausto*, 484 U.S. at 446. Instead, an employee against whom such a suspension is proposed is entitled to certain procedural protections, including notice, an opportunity to respond, representation by an attorney, and a written decision. 5 U.S.C. § 7503(b)(1)-(4).

Major adverse actions, including removal and suspension for more than fourteen days, *id.* § 7512(1)-(5); *Fausto*, 484 U.S. at 446-47, trigger a similar set of safeguards. When such an action is proposed against an employee, he or she is generally entitled to “at least

[thirty] days' advance written notice," "a reasonable time . . . not less than [seven] days . . . to answer," representation by an attorney, and a written decision. 5 U.S.C. § 7513(b)(1)-(4).

Unlike minor adverse actions, major adverse actions can be reviewed in federal court. But this channel is narrowly prescribed. An employee "against whom [a major adverse] action is taken . . . is entitled to appeal to the [MSPB]," *id.* § 7513(d), and the United States Court of Appeals for the Federal Circuit has jurisdiction over appeals from the MSPB's final orders and decisions. *See id.* § 7703(a)(1), (b)(1)(A).

Finally, the CSRA includes a mechanism for employees to challenge a "personnel action" that is a "prohibited personnel practice." *Id.* § 2302(a)(1), (a)(2), (b). The statute lists eleven types of personnel actions and includes a residual clause that covers "any other significant change in duties, responsibilities, or working conditions." *Id.* § 2302(a)(2)(A)(xii). An employee may challenge a prohibited personnel practice by making an allegation to the Office of Special Counsel (OSC). *Id.* § 1214(a)(1)(A), (a)(3); *see id.* § 1212(a)(2). OSC must investigate the allegation, *id.* § 1214(a)(1)(A), and may petition the MSPB for corrective action, *id.* § 1214(b)(2)(C). The Federal Circuit can review a final order of the MSPB in response to such a petition. *Id.* §§ 1214(c), 7703(b)-(c). Therefore, where prohibited personnel practices are concerned, access to the MSPB and the Federal Circuit depends on OSC's discretion with limited exceptions. *See id.* § 1214(a)(3) (exceptions for cases where (i) other law provides a right of direct appeal to the MSPB or (ii) OSC declines to seek corrective action after terminating an investigation

into retaliation as described in § 2302(b)(8) and § 2302(b)(9)(A)(i), (B), (C), and (D)).

B.

The Supreme Court has held that the CSRA “forecloses judicial review” for employees “to whom the CSRA *grants* administrative and judicial review” as well as for those employees “to whom the CSRA *denies* statutory review.” *Elgin*, 567 U.S. at 11.

Specifically, in *Elgin v. Department of Treasury*, the Court, in an opinion written by Justice Thomas, decided that the CSRA precluded jurisdiction over employees’ constitutional claims challenging their removal from federal employment. 567 U.S. 1, 8 (2012). And in *United States v. Fausto*, the Court, in an opinion written by Justice Scalia, decided that the exclusion of certain employees from the CSRA review scheme for major adverse actions precluded jurisdiction over those employees’ challenges to those actions. 484 U.S. 439, 455 (1988).

These precedents control here.

1.

To begin, because the vaccine requirement is a “significant change in [an employee’s] . . . working conditions,” 5 U.S.C. § 2302(a)(2)(A)(xii), the CSRA gives plaintiffs a mechanism for “administrative and judicial review,” *Elgin*, 567 U.S. at 11.

“Working conditions” are the circumstances under which an employee performs his or her job.³ The vac-

³ See *Fort Stewart Schs. v. Fed. Lab. Relations Auth.*, 495 U.S. 641, 645 (1990) (explaining, with reference to different CSRA pro-

cine requirement changes those circumstances. Employees covered by the requirement have to get vaccinated before going to work and work only with other vaccinated or exempted employees. Being vaccinated against a pandemic disease and being surrounded by vaccinated people are circumstances under which an employee does his job according to *any* test: vaccination is a physical condition of labor because it affects the employee’s body during work, *Hesse*, 217 F.3d at 1378; vaccination manifestly impacts absenteeism and “the efficiency of the civil service,” Exec. Order No. 14043, 86 Fed. Reg. at 50,990; see *Mahoney*, 721 F.3d at 636, by reducing the incidence and severity of disease; and vaccination is a “daily, concrete parameter[]” of federal employment because it concerns “the provision of necessary . . . resources”—shots that ensure employees can stay healthy and do their jobs, *Turner*, 502 F. Supp. 3d at 367.⁴ A vaccination requirement is

vision, that “working conditions . . . refers, in isolation, only to the ‘circumstances’ or ‘state of affairs’ attendant to one’s performance of a job”); *Hesse v. Dep’t of State*, 217 F.3d 1372, 1378 (Fed. Cir. 2000) (defining the phrase in § 2302 to mean “the physical conditions under which an employee labors”); *Mahoney v. Donovan*, 721 F.3d 633, 636 (D.C. Cir. 2013) (defining the phrase in § 2302 as concerning actions that “affect the ability of [employees] to do their jobs efficiently and effectively”); *Turner v. U.S. Agency for Glob. Media*, 502 F. Supp. 3d 333, 367 (D.D.C. 2020) (defining the phrase in § 2302 as “generally refer[ring] to the daily, concrete parameters of a job, for example, hours, discrete assignments, and the provision of necessary equipment and resources”); see also *Sistek v. Dep’t of Veterans Affs.*, 955 F.3d 948, 955 (Fed. Cir. 2020) (“[A] retaliatory investigation, either on its own or as part of a broader set of circumstances, may . . . rise[] to the level of a significant change in working conditions.” (cleaned up)).

⁴ Many Executive Branch employees do not have the luxury to decide for themselves to put up plexiglass barriers, require attor-

therefore a “working condition” within the meaning of § 2302(a)(2)(A)(xii).

Statutory context shows that vaccination is a working condition. The CSRA lists twelve categories of “personnel action” in § 2302(a)(2)(A), starting with nine conventional types of “individualized employment decisions,” as the majority puts it. These include “appointment,” “promotion,” “disciplinary or corrective action,” “detail, transfer, or reassignment,” “reinstatement,” “restoration,” “reemployment,” “performance evaluation,” and “decision[s] concerning pay, benefits, or awards, or concerning education or training.” 5 U.S.C. § 2302(a)(2)(A)(i)-(ix). Notably, then, the list shifts. Romanette xi refers in relevant part to “the implementation of any non-disclosure *policy*.” *Id.* § 2302(a)(2)(A)(xi) (emphasis added). And romanette x concerns “a decision to order psychiatric testing or examination”—a medical procedure that very well could occur outside the workplace. *Id.* § 2302(a)(2)(A)(x). So, contrary to the majority’s view, § 2302(a)(2)(A) does include workplace medical policies that are “government-wide” and require “medical decisions made outside the workplace.”

neys to wear masks, and conduct judicial proceedings by videoconference, as we can order at our discretion. *See, e.g.*, Order, General Dkt. No. 2020-5, United States Court of Appeals for the Fifth Circuit (authorizing panels to conduct remote oral arguments). Indeed, some federal courts mandated vaccinations for court employees and lawyers appearing for in-person oral argument. *See* Order Regarding Masking, Vaccination, and COVID-19 Self-Certification, General Order No. 21-009, United States Court of Appeals for the Seventh Circuit. State courts took similar measures. *See* Keshia Clukey, *Four Unvaccinated Judges in New York Face Sanctions, Removal*, BLOOMBERG LAW (Mar. 23, 2022).

Indeed, Congress has amended § 2302(a)(2)(A) several times to broaden its scope to include policies like a workplace vaccine requirement. When first enacted, § 2302(a)(2)(A) consisted of romanettes i to ix (the nine conventional employment decisions listed above) and a modified version of what is now romanette xii: “any other significant change in duties or responsibilities *which is inconsistent with the employee’s salary or grade level.*” CSRA, Pub. L. No. 95-454, ch. 23, § 2302(a)(2)(A)(x), 92 Stat. 1111 (Oct. 13, 1978) (emphasis added). This language made a qualifying change in “duties or responsibilities” dependent on an individual employee’s position. And originally, psychiatric testing, nondisclosure policies, and significant changes in working conditions were not covered personnel actions.

Then, in 1994, Congress added the “psychiatric testing or examination” romanette and edited romanette xii. *See* Act of Oct. 29, 1994, Pub. L. No. 103-424, sec. 5, § 2302(a)(2)(A)(x), 108 Stat. 4361. Instead of “any other significant change in duties or responsibilities *which is inconsistent with the employee’s salary or grade level,*” the romanette was expanded to cover “any other significant change in duties, responsibilities *or working conditions.*” *Id.* § 2302(a)(2)(A)(x), 108 Stat. 4361 (emphasis added). Finally, in 2012, Congress added the “nondisclosure policy” romanette. *See* Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, sec. 104, § 2302(a)(2)(A)(xi), 126 Stat. 1465.

In sum, the “working conditions” phrase (i) substituted for a restrictive clause linking changes in “duties or responsibilities” to individual employee status, (ii) was added immediately after a romanette dealing with medical activities, and (iii) became the neighbor of a

romanette about nondisclosure policies. Together, these amendments show that Congress understood the “working conditions” language to extend beyond the traditional types of individual employment decisions § 2302(a)(2)(A) had previously covered, to reach a workplace health policy like the vaccine requirement.⁵

The majority reads § 2302(a)(2)(A)(xii) as excluding the vaccine requirement because the requirement is “government-wide, involves “medical decisions made outside the workplace,” and has “consequences long af-

⁵ The majority relies on *Gustafson v. Adkins*, a Seventh Circuit case holding that placement of a hidden camera in a workplace changing area was not a “personnel action” under § 2302(a)(2)(A). 803 F.3d 883, 889 (7th Cir. 2015). *Gustafson* based this decision on dicta in *Bush v. Lucas* that “wiretapping” and “warrantless searches” would not be personnel actions within the CSRA. 462 U.S. 367, 385 n.28 (1983). But *Lucas* was decided almost a decade before Congress amended the CSRA to include the “working conditions” phrase. And it is difficult to see how the hidden camera at issue in *Gustafson* did not significantly change “working conditions” for the surveilled employees.

The majority’s reliance on *NFIB v. OSHA* is also misplaced. 142 S. Ct. 661 (2022). That case held that the Occupational Safety and Health Administration lacked authority under the Occupational Safety and Health Act (OSHA) to issue a vaccine requirement for certain private employers because the statute empowered the agency “to set workplace safety standards, not broad public health measures,” and Congress had not spoken clearly in “authorizing [OSHA] to exercise powers of vast economic and political significance.” *Id.* at 665 (cleaned up). The jurisdictional issue in this case is not whether the President had authority under the CSRA to require vaccinations, but rather whether such a requirement changed working conditions for affected employees. And in *NFIB v. OSHA*, the Court accepted that COVID-19 posed occupational risks; the problem was that OSHA’s requirement went beyond those risks to address “general public health.” *Id.* at 666.

ter the employee leaves the federal workforce.” This alternative reading is inconsistent with common sense and the text of the statute.

First, the majority thinks “working conditions” refers only to “discrete employment decisions.” Under this interpretation, any employment policy that changed working conditions for more than one employee would not be a “significant change in . . . working conditions.” 5 U.S.C. § 2302(a)(2)(A)(xii). But there is no one-at-a-time requirement in the text of § 2302(a)(2)(A). Like all general policies, the vaccine requirement changes working conditions for each individual employee who is covered by it.

Next, the majority reasons that “working conditions” cannot refer to “medical decisions made outside the workplace.” Yet the majority fails to explain why medical decisions that impact the circumstances under which a job is performed—indeed, as we have seen globally, make work possible during a pandemic—are not working conditions, regardless of where the medical decision is made or the duration of its effects.

To the extent the majority argues that medical decisions made *outside* the workplace are not covered by § 2302(a)(2)(A)(xii), the majority draws a line, absent from the statute, based on *where* the conduct targeted by an employment policy occurs. If the majority is right, a policy that promotes a “Drug-Free Federal Workplace” by prohibiting employees from using illegal drugs outside work, as President Reagan enacted, would not be a significant change in working conditions.⁶

⁶ Our court found that President Reagan’s order survived a facial constitutional challenge. See *NTEU v. Bush*, 891 F.2d 99, 102

See Exec. Order No. 12,564, 51 Fed. Reg. 32,889, 32,889-90 (1986). Similarly, under this novel interpretation, a ban on employees drinking liquor before work, requiring them to be sober at work, would not be a significant change in working conditions. A policy that employees have to use birth control outside work in order to refrain from being pregnant at work would not be a significant change in working conditions. Conversely, according to the majority's logic, if the Executive Order or guidance had only required employees to receive the vaccine (or birth control) *at work*, the requirement would fall within § 2302(a)(2)(A). This arbitrary distinction ignores that there is a change in "working conditions" when the effects of a policy are felt at work, irrespective of the initial place where the policy must be followed.

And if the majority argues that medical decisions made *at* the workplace are not covered by § 2302(a)(2)(A)(xii), that reading is contrary to the plain meaning of the text as courts have interpreted it. See, e.g., *Fort Stewart Schs.*, 495 U.S. at 645; *Hesse*, 217 F.3d at 1378; *Mahoney*, 721 F.3d at 636; *Turner*, 502 F. Supp. 3d at 367. Under the majority's interpretation, a directive that an employee receive *any* sort of medical treatment at work in order to continue working—like an order that an employee take antimalarial medicine while detailed to a tropical environment—wouldn't be a

(5th Cir. 1989). Prior to this appeal, relying on the Supreme Court dicta that warrantless searches are not personnel actions, see *supra* note 5, the district court had found that the CSRA did not preclude jurisdiction over a challenge to the warrantless urinalysis testing aspect of President Reagan's program. See *NTEU v. Reagan*, 651 F. Supp. 1199, 1200-02 (E.D. La. 1987). As I explained, because of amendments to the statute, the district court's reasoning in reliance on this dicta is no longer persuasive.

change in that employee’s working conditions. The employee told to swallow the pills at her desk might be surprised to hear that news.

Finally, the majority says that § 2302(a)(2)(A)(xii) “only include[s] conditions that last for the duration of the employee’s job tenure.” The majority does not explain why vaccinations, which may not last forever or even for the entire term of employment, violate this rule. But more importantly, the statute does not exclude a change in the circumstances of work that has persistent or permanent effects on the employee from the term “working conditions.” Like the majority’s other attempts to limit the scope of “working conditions,” this constraint has no basis in the text of the statute.

For those reasons, § 2302 provides a vehicle for review of the vaccine requirement under the CSRA, and Congress’s intent to preclude judicial review over challenges to the requirement is fairly discernible within the statutory scheme. *See Elgin*, 567 U.S. at 11.

2.

Were we to assume that the vaccine requirement cannot be challenged under § 2302, the CSRA still generally precludes pre-enforcement challenges to employment policies that, if violated, would result in discipline.⁷

⁷ As I explain below, the requirement has been enforced against at least some of the plaintiffs because disciplinary actions have been taken against them, and this suit challenges those disciplinary actions. But if this suit is conceived of as a true pre-enforcement challenge, as the majority insists—for example, if this suit only challenged the requirement insofar as the requirement might be used to terminate the plaintiffs in the future—then the CSRA still precludes pre-enforcement challenges for the reasons stated in this section.

This is because the CSRA (i) provides for post-enforcement review of major adverse actions like removal, *see* 5 U.S.C. § 7513(d), and (ii) confers pre-enforcement due process protections to employees against whom minor and major adverse actions are proposed *without* providing those or other employees with immediate review, *see id.* §§ 7503(b)(1)-(4), 7513(b)(1)-(4). In other words, the CSRA gives statutory review to some employees (those against whom major adverse actions have been taken) and not others (those against whom major adverse actions have not been taken). Since the CSRA denies statutory review to employees before they violate a policy and disciplinary action is taken against them, Congress's intent to preclude jurisdiction over pre-enforcement challenges is fairly discernible in the statute. *See Elgin*, 567 U.S. at 11.

This conclusion follows from the logic of *Fausto*. There, the Supreme Court considered whether the CSRA's "withholding of remedy" from certain employees "was meant to preclude judicial review for those employees, or rather merely to leave them free to pursue the remedies that had been available before enactment of the CSRA." 484 U.S. at 443-44. *Fausto*, who had been suspended for thirty days from his job as an administrator at a "Young Adult Conservation Corps camp," was a "nonpreference member of the excepted service." *Id.* at 441 & n.1. The CSRA does not include nonpreference excepted service members in the definition of employees covered for minor and major adverse actions, *see* 5 U.S.C. § 7511(a)(1), and so the CSRA did not give *Fausto* a way to obtain administrative review of his suspension and then appeal to the Federal Circuit. *See Fausto*, 484 U.S. at 447-48. The Court concluded that "the *absence* of provision for these em-

ployees to obtain judicial review” is a “manifestation of a considered congressional judgment that they should not have statutory entitlement to review for [minor and major adverse actions].” *Fausto*, 484 U.S. at 448-49 (emphasis added).

In part, the Court reasoned that if *Fausto* could get judicial review of his thirty-day suspension because he was excluded from the CSRA scheme, then he could also get judicial review of a ten-day suspension even though the CSRA does not provide covered employees with administrative and judicial review of suspensions less than fourteen days. *Id.* at 449-50. And if *Fausto* had such an expanded right to judicial review, the “preferred position” of covered employees in the statutory scheme would be turned upside down. *Id.* In a footnote, the Court clarified that this line of reasoning assumes that employees “who *are* given review rights by [the CSRA] . . . cannot expand these rights by resort to pre-CSRA remedies.” *Id.* at 450 n.3; *See Graham v. Ashcroft*, 358 F.3d 931, 934 (D.C. Cir. 2004) (Roberts, J.) (charting this logic).

Like *Fausto*, the plaintiffs here would have expanded rights under the CSRA if they could obtain judicial review of the vaccine requirement before major adverse actions are taken against them. There is generally no statutory mechanism for judicial review of minor adverse actions. When a covered employee faces a *proposed* minor or major adverse action, the CSRA gives him procedural protections but no path to judicial review. *See* 5 U.S.C. §§ 7503(b)(1)-(4), 7513(b)(1)-(4). Rather, an employee must wait until the agency takes a major adverse action against him before appealing to the MSPB and the Federal Circuit. *See id.* § 7513(d).

Resort to judicial review for a minor adverse action or a proposed action would thus expand an employee's right to judicial review outside the bounds of the CSRA. *See Graham*, 358 F.3d at 934 (applying this logic to hold that the CSRA precludes jurisdiction over “a personnel action as to which the CSRA grants no right of review, even for employees who are otherwise granted such rights under the CSRA in other circumstances”); *Nyunt v. Chairman, Broadcasting Bd. of Governors*, 589 F.3d 445, 448 (D.C. Cir. 2009) (Kavanaugh, J.) (“When Congress wants to preserve remedies outside the CSRA, it does so expressly; for example, the CSRA maintains federal employees’ rights to bring suit under Title VII and other anti-discrimination laws.”). The same is true where an employee seeks to challenge an employment policy, like the vaccine requirement, that permits an agency to discipline violators. *See Vaccinations, SAFER FED. WORKFORCE*, <https://perma.cc/G8T6-K8XN>. The CSRA says that an employee subject to such a policy has to wait until a major adverse action is taken against him to get judicial review—and if the discipline imposed falls below threshold of a major adverse action, or is merely proposed, then no judicial review is available under the scheme.

The majority argues that jurisdiction over the plaintiffs’ claims is not precluded because while the CSRA provides the exclusive means to challenge “[p]ersonnel actions covered by the CSRA,” “plaintiffs are not challenging CSRA-covered ‘personnel actions.’”

But the whole point of this lawsuit is to challenge CSRA-covered personnel actions. The first paragraph of the complaint says so. “[F]ederal employees” like the plaintiffs “have been put in an intolerable bind,” the

complaint alleges: “either submit to forced vaccination pursuant to illegal agency requirements, or forfeit a career[.]” Consistent with this allegation, the plaintiffs say that they have been disciplined through formal reprimands and threatened with suspension and termination. They have put forward evidence that disciplinary actions, including minor adverse actions, have been taken against them for their noncompliance with the vaccine requirement.⁸ Accordingly, while the plaintiffs allege that they “do not challenge any individual employment decisions,” and ask the court to hold the vaccine requirement unlawful, they also seek to enjoin the government “from enforcing or implementing” the vaccine requirement—which would keep the government from taking CSRA-covered personnel actions, like suspension and termination, against them.

Indeed, this case is justiciable because it involves challenges to CSRA-covered personnel actions. The plaintiffs’ Article III injuries stem from personnel actions that they allege have been or will be taken against them because of their refusal to comply with the vaccine

⁸ See, e.g., *Feds for Med. Freedom v. Biden*, No. 21-CV-356, Aff. of Brian Fouche ¶ 4, Dkt. No. 35-1, Ex. 39 (asserting that employee “received . . . notice of a 14-day unpaid suspension,” which is a minor adverse action under 5 U.S.C. § 7502); *id.*, Aff. of John Armbrust ¶ 6, Dkt. No. 3, Ex. 15 (asserting that employee received “written letter of reprimand stating [that] it is [a] ‘disciplinary action’”); *id.*, Aff. of Nevada Ryan ¶ 6, Dkt. No. 3, Ex. 27 (similar); *id.*, Aff. of Michael Ball ¶ 6, Dkt. No. 3, Ex. 16 (asserting that employee “was disciplined in the form of a Letter of Counseling and Education”); *id.*, Aff. of M. LeeAnne Rucker-Reed ¶ 6, Dkt. No. 3, Ex. 26 (asserting that employee was prohibited from traveling “to attend necessary training” or “to work Judicial [C]onference or protection details” and “was not selected for a promotion opportunity”).

requirement. As the plaintiffs alleged in their complaint, “[t]he entire point of the [m]andate[] is to force vaccinations quickly by threatening to initiate drastic employment or contractual harms.” There is no mandate and no justiciable case without, in the plaintiffs’ words, a “sword of Damocles,” or, as the Supreme Court put it, “expos[ure] to the imposition of strong sanctions,” *Abbot Lab’s v. Gardner*, 387 U.S. 136, 154 (1967)—here, the personnel actions. And the district court found this case ripe because plaintiffs “already have received letters from their employer agencies suggesting that suspension or termination is imminent, have received letters of reprimand, or have faced other negative consequences.”⁹ *Feds for Med. Freedom*, 581 F. Supp. 3d at 832.

The majority calls this suit a “pre-enforcement challenge” that the plaintiffs can bring “outside of the CSRA,” and the broader implication of this holding is unmistakable. This circuit’s door is now open to all pre-enforcement challenges to federal employment policies.¹⁰ Plaintiffs are welcome to challenge any personnel action before it takes place.

⁹ The majority contends that because the plaintiffs “claim that the President’s vaccine requirement violates the U.S. Constitution and the APA,” the plaintiffs do not challenge any personnel action. But the legal arguments or causes of action by which the plaintiffs try to attack the personnel actions taken or proposed against them are immaterial to what the plaintiffs hope to get out of this suit: injunctive relief to avoid personnel actions. See *Elgin*, 567 U.S. at 8 (concluding that “the CSRA precludes district court jurisdiction over petitioners’ claims even though they are constitutional claims for equitable relief”).

¹⁰ The majority claims that the ripeness doctrine closes this loophole because “any suit to enjoin a personnel action before it occurs

Under the majority’s rule, Justice Thomas’s *Elgin* and Justice Scalia’s *Fausto* are dead letters. *Elgin*, who brought a constitutional challenge to a federal statute “bar[ring] from employment by an Executive agency anyone who has knowingly and willfully failed to register” for the Selective Service, *Elgin*, 567 U.S. at 7, could have forum shopped into our court if he filed when his removal from federal employment was ripe but had not yet taken place. *Elgin*, 567 U.S. at 7. Likewise, *Fausto* could have sued when the agency “advised [him] that it intended to dismiss him for a number of reasons.” *Fausto*, 484 U.S. at 441.¹¹ So the majority would let plaintiffs end run Supreme Court precedent.

will likely be unripe.” This ignores that a personnel action may be certain to occur or imminent—and therefore ripe—long before the action is taken against an employee. See *Texas v. United States*, 523 U.S. 296, 300 (1998) (“A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.”).

¹¹ The majority invokes two pre-*Fausto* cases that explicitly exercised jurisdiction over certain pre-enforcement challenges. See *NFFE v. Weinberger*, 818 F.2d 935, 940 (D.C. Cir. 1987); *NTEU v. Devine*, 733 F.2d 114, 117 n.8 (D.C. Cir. 1984). Because these cases were decided before both *Fausto* and *Elgin* mapped the landscape of CSRA preclusion, they are inapposite. In particular, *Devine* reasoned that just because it is true that “when a statute provides a detailed scheme of administrative protection for defined employment rights, less significant employment rights of the same sort are implicitly excluded and cannot form the basis for relief directly through the courts,” it does not follow that “a detailed scheme of administrative adjudication impliedly precludes preenforcement judicial review of rules.” 733 F.2d at 117 n.8. But this proposition runs headlong into the logic of *Fausto*, which I outlined in this section. As for *Weinberger*, there the court relied entirely on the premise that “civilian federal employees may seek to enjoin government actions that violate their constitutional rights.” 818

F.2d at 940. However, by ruling that covered employees’ constitutional claims had to run through the CSRA scheme, *Elgin* unsettled that assumption. As the D.C. Circuit recently recognized, this part of *Weinberger* “cannot survive the Supreme Court’s subsequent decisions in *Thunder Basin* and *Elgin*.” *Payne*, 62 F.4th at 606.

Finally, the majority cites two Supreme Court cases that adjudicated the merits of pre-enforcement challenges to laws and programs affecting federal employees without addressing CSRA preclusion. See *United States v. NTEU*, 513 U.S. 454 (1995); *NTEU v. Von Raab*, 489 U.S. 656 (1989). Both these cases involved constitutional claims and were decided before *Elgin*, which clarified the standard for determining whether the CSRA precludes constitutional claims, see 567 U.S. at 8-10, and applied the appropriate standard to find that *Elgin*’s claims were precluded, see *id.* at 10-16.

For additional reasons, neither *United States v. NTEU* nor *NTEU v. Von Raab* is persuasive. It is unclear whether enforcement of the statute at issue in *United States v. NTEU* would have triggered CSRA review. See 513 U.S. at 460 (enforcement through civil penalty). And in *NTEU v. Von Raab*, 489 U.S. 656, the district court *did* consider whether the CSRA precluded jurisdiction, see 649 F. Supp. 380, 384-86 (E.D. La. 1986). The district court’s jurisdictional holding rested on two principal grounds, one of which was abrogated by the CSRA amendments and the other undermined by *Elgin*. First, the district court reasoned that the challenged program, a drug-testing scheme for certain Customs Service employees, was a warrantless search. 649 F. Supp. at 384-85. Relying on dicta in *Lucas* that warrantless searches were not personnel actions under the CSRA, the district court decided that a challenge to the drug-testing scheme was not covered under the CSRA. See *id.* (discussing *Lucas*, 462 U.S. at 385 n.28). As I explained, *supra* note 5, at the time of the district court’s and the Supreme Court’s decisions, the CSRA had not yet been amended to add the “working conditions” phrase—abrogating the *Lucas* dicta and this part of *Von Raab*. Regardless, since the *Lucas* dicta was highly persuasive when *Von Raab* was decided, it is unsurprising that the Supreme Court did not take up jurisdiction sua

Accordingly, the only conclusion consistent with the text of the statute and binding Supreme Court authority is that Congress’s intent to preclude pre-enforcement challenges is fairly discernible in the CSRA.

C.

But our inquiry does not stop there. Jurisdiction over the plaintiffs’ claims is only precluded if their “claims are of the type Congress intended to be reviewed within” the CSRA. *Thunder Basin*, 510 U.S. at 212. Three factors are probative of Congress’s intent: whether preclusion could foreclose all meaningful judicial review of the claims; whether the claims are collateral to the review scheme; and whether the claims are outside the agency’s expertise. *See Thunder Basin*, 510 U.S. at 212-13; *Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477, 489 (2010) (cleaned up) (“[W]e presume that Congress does not intend to limit jurisdiction if a finding of preclusion could foreclose all meaningful judicial review; if the suit is wholly collateral to a statute’s review provisions; and if the claims are outside the agency’s expertise.” (cleaned up)).

Here, preclusion would foreclose meaningful judicial review of plaintiffs’ pre-enforcement challenge to the requirement. So we ask whether Congress intended the CSRA to have that effect in this case. Since plaintiffs’ challenge to the requirement as ultra vires sounds in separation-of-powers principles, I conclude, in this nar-

sponte after neither party raised the issue. *See* Pet’rs’ Br., *NTEU v. Von Raab*, No. 86-1879, 1988 WL 1025626; Resp’t’s Br., *NTEU v. Von Raab*, No. 86-1879, 1987 WL 880093. Second, like *Weinberger*, the district court relied on the idea that the plaintiffs were seeking to enjoin unconstitutional activity. *See Von Raab*, 649 F. Supp. at 385-86. But *Elgin* calls this theory into question.

row circumstance, that *this* claim is not of the kind Congress intended to be precluded by the CSRA under *Elgin* and *Fausto*.¹²

1.

Neither § 2302, the All Writs Act, nor the procedure for challenging major adverse actions provides for meaningful judicial review of plaintiffs' pre-enforcement challenge.

I agree with the majority that plaintiffs do not have a path to meaningful judicial review of their separation-of-powers claim under § 2302 or the All Writs Act, 28 U.S.C. § 1651. As described above, judicial review under § 2302 is not available unless the OSC petitions the MSPB for corrective action. *See* 5 U.S.C. §§ 1214(b)(2)(C), 1214(c), 7703(b)-(c). The plaintiffs would have to wait and see if the OSC filed a petition. And the OSC could insulate the requirement from judicial review by declining to escalate to the MSPB.¹³

¹² Preclusion of plaintiffs' claim under the APA, on the other hand, does not raise the same constitutional concerns. After all, the APA does not apply to the President, *see Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992), and Congress's potential withdrawal of jurisdiction over agency-by-agency implementation of the requirement does not raise the specter of the President altering the separation of powers or implicate a constitutionally necessary remedy. Moreover, for the reasons stated in the panel opinion, *Feds for Med. Freedom*, 30 F.4th at 510-12, the APA claim is not wholly collateral to the CSRA scheme and does not exceed the MSPB's expertise.

¹³ The plaintiffs could seek a writ of mandamus compelling the OSC to take the ministerial act of investigating a complaint, but not to petition the MSPB for corrective action, which is within

Mandamus relief under § 1651 does not offer meaningful judicial review, either. While § 1651 “authorizes employment of extraordinary writs, it confines the authority to the issuance of process ‘in aid of’ the issuing court’s jurisdiction.” *Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999) (quoting 28 U.S.C. § 1651(a)). If the CSRA strips jurisdiction from federal courts to hear pre-enforcement challenges in their “arising under” jurisdiction, 28 U.S.C. § 1331, then no jurisdiction exists for mandamus to aid.¹⁴ And as the majority points out, there is no reason why the CSRA would strip jurisdiction under § 1331 but not § 1651.

Finally, the CSRA channel for appellate review over major adverse actions is not meaningfully available in

OSC’s discretion. *See Carson v. U.S. Off. of Special Counsel*, 633 F.3d 487, 491-92 (6th Cir. 2011).

¹⁴ The prospective jurisdiction doctrine ordinarily permits an appellate court to issue writs that “are within its appellate jurisdiction although no appeal has been perfected.” *FTC v. Dean Foods Co.*, 384 U.S. 597, 630 (1966). “Once there has been a proceeding of some kind instituted before an agency . . . that might lead to an appeal, it makes sense to speak of the matter as being within our appellate jurisdiction—however prospective or potential that jurisdiction might be.” *In re Tennant*, 359 F.3d 523, 529 (D.C. Cir. 2004) (Roberts, J.) (cleaned up). Arguably, in the event that a pre-enforcement complaint could be made with the OSC, the possibility that the OSC would petition the MSPB and that the MSPB would issue an appealable final order would render the case in the Federal Circuit’s protective jurisdiction. *Cf. In re Donohoe*, 311 F. App’x 357, 358-59 (Fed. Cir. 2008) (per curiam) (concluding that the court lacked authority under the All Writs Act to mandamus the MSPB where the petitioner ‘did not seek remedy from [the MSPB] or initiate any proceeding at [the MSPB] before seeking relief from [the Federal Circuit]’). But since the CSRA likely strips the Federal Circuit of § 1651 jurisdiction, this theory is a non-starter.

this case. See 5 U.S.C. §§ 7513(d), 7703(a)(1), (b)(1)(A). The Executive Order does not require agencies to take major adverse actions against noncompliant employees, see Exec. Order No. 14043, 86 Fed. Reg. at 50,990, and neither does the guidance. Instead, the guidance gives agencies discretion but does not explicitly require them to discipline employees with “a letter of reprimand, followed by a short suspension,” “a longer second suspension,” and “proposing removal.” *Vaccinations*, SAFER FED. WORKFORCE; see *Guidance on Enforcement of Coronavirus Disease 2019 Vaccination Requirement for Federal Employees - Executive Order 14043*, OFF. OF PERSONNEL MGMT. https://chcoc.gov/sites/default/files/Enforcement-Guidance-FAQs_508.pdf (similar). This disciplinary policy would not necessarily result in a major adverse action like removal. At most, the guidance states that “consistency across Government in enforcement of this Government-wide vaccine policy is desired, and the Executive Order does not permit exceptions from the vaccination requirement except as required by law.” *Vaccinations*, SAFER FED. WORKFORCE; compare Exec. Order No. 12,564, 51 Fed. Reg. at 32,889-90 (“Agencies *shall* initiate action to remove from the service any employee who is found to use illegal drugs.” (emphasis added)).

In theory, under the vaccination requirement and the CSRA, agencies could circumvent judicial review by only taking minor adverse actions against employees who refused vaccination. This appears to have been agency practice. During the almost two months that passed from the start of enforcement to the district court’s injunction, there is no evidence that any agency proposed a major adverse action against any noncompliant employee. Had the vaccine requirement been al-

lowed to continue, agencies could have continued suspending employees for fourteen-day periods without triggering the major adverse action process. Because the requirement’s disciplinary policy gives agencies discretion to evade judicial review, and because implementation of the policy had that effect, I conclude that CSRA preclusion would foreclose all meaningful review.¹⁵

2.

The plaintiffs’ challenge to the vaccine requirement as exceeding the President’s statutory and constitutional authority is not the sort of claim that Congress intended to remove from all meaningful judicial review.

“Congress generally does not violate Article III when it strips federal jurisdiction over a class of cases.” *Patchak v. Zinke*, 138 S. Ct. 897, 906 (2018) (plurality op.). But there are limits on this jurisdiction-stripping power, at least two of which are relevant here. “Jurisdiction-stripping statutes can violate other provisions of the Constitution.” *Patchak*, 138 S. Ct. at 906 n.3 (plurality op.). And they can violate Article III “if

¹⁵ The district court found this case ripe in part because “some plaintiffs face an inevitable firing.” *Feds for Med. Freedom*, 581 F. Supp. 3d at 832. But the government letter upon which the district court relied imposed a fourteen-day suspension and said, “any further misconduct . . . will not be tolerated and *may* result in more severe discipline.” Regardless, there is daylight between when an action becomes ripe because of the threat of disciplinary action and when a major adverse action is sufficiently certain such that meaningful judicial review is not foreclosed. Of course, it will not always be the case that a disciplinary policy that permits but does not require major adverse actions be taken against employees will foreclose all meaningful review. But the language of the guidance and patterns of agency enforcement show that preclusion would foreclose review here.

they attempt to direct the result by effectively altering legal standards that Congress is powerless to prescribe.” *Id.* (quoting *Bank Markazi v. Peterson*, 578 U.S. 212, 228 (2016)).

These principles raise serious constitutional doubts about an interpretation of the CSRA that would foreclose all federal jurisdiction over plaintiffs’ ultra vires claim. Congress, not the President, has the power to define federal court jurisdiction. *See* U.S. Const., art. I, § 8 (giving Congress the power to “constitute Tribunals inferior to the supreme Court”); *id.* art. III, § 1 (vesting the judicial power “in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish”). If we read the CSRA as permitting the President to say which of his federal employment policies were subject to judicial review—here, by creating a disciplinary scheme that might never permit appeal from a personnel action—the statute might transfer jurisdictional control from Article I to Article II.

In the usual course of administration under the CSRA, this lurking threat of an unconstitutional delegation never surfaces. *See Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (Congress “may not transfer to another branch ‘powers which are strictly and exclusively legislative.’” (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43 (1825))). When a covered employee violates an employment policy, the Executive Branch merely decides whether a particular infraction warrants a major adverse action or not. These discretionary decisions about how to punish employees are a lawful exercise of Executive authority “to implement and enforce” the CSRA. *Id.* Similarly, the Executive

can usually decide that a particular class of conduct does not merit a major adverse action as punishment without triggering a constitutional question.

But the threat of an unconstitutional delegation becomes material when the Executive uses the CSRA to decide the outcome of a separation-of-powers challenge to a federal employment policy. Whatever power the President has to enact those policies comes from Congressional enactments and the Constitution, neither of which the President can change himself. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). So, by designing an employment policy in such a way that the CSRA precludes *all* federal jurisdiction to review a separation-of-powers challenge, the President could nullify any limits on his powers set by Article I and Article II.¹⁶ Further, by doing so, he would de-

¹⁶ This scenario is a variation on the puzzle that the Supreme Court solved in *United States v. Klein*, 80 U.S. 128 (1872). There, the plaintiff sought to recover the sale proceeds of expropriated property on behalf of an estate under a Civil War law that allowed recovery if the owner had “never given any aid or comfort to the present rebellion.” *Bank Markazi*, 578 U.S. at 227 (cleaned up). The original estate holder had been pardoned by President Lincoln, and the Supreme Court had held that a Presidential pardon satisfied the loyalty requirement of the expropriation statute. See *United States v. Padelford*, 76 U.S. 531, 543 (1870). Congress then passed a statute repudiating the Supreme Court’s decision. The statute said that pardons could not be used to prove loyalty, that accepting a pardon under certain circumstances would prove disloyalty, and that the Court of Claims and the Supreme Court had “to dismiss for want of jurisdiction any claim based on a pardon.” *Bank Markazi*, 578 U.S. at 227. In *Klein*, the Supreme Court held that this jurisdiction-stripping statute “passed the limit which separated the legislative from the judicial power,” *Klein*, 80 U.S. at 147, by seeking “to nullify” “Presidential pardons . . .

cide the outcome of this litigation. I doubt that Congress, in enacting the CSRA, intended to give the President control of federal jurisdiction so that he might acquire powers that the plaintiffs contend have not been given to him by statute or the Constitution.

In addition, if the CSRA foreclosed all meaningful review over the plaintiffs' ultra vires claim, a serious constitutional question would arise about whether Congress had eliminated a mandatory remedy for separation-of-powers violations. There may be some "constitutionally necessary remedies for the violation of constitutional rights" that Congress cannot preclude through jurisdiction stripping. Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1134 (2010). Injunctive relief for Executive Branch actions that exceed the President's authority may be one such remedy.¹⁷ See *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902) ("The acts of all [Executive Branch] officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief. . . . Otherwise, the individ-

by withdrawing federal-court jurisdiction," *Bank Markazi*, 578 U.S. at 227 n.19. Stated in general terms, Congress had impermissibly "exercise[d] its authority . . . to regulate federal jurisdiction . . . in a way that require[d] a federal court to act unconstitutionally." *Id.* (cleaned up) (quoting Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 Geo. L.J. 2537, 2549 (1998)).

¹⁷ The same might be true of individual constitutional claims. See *Webster v. Doe*, 486 U.S. 592, 603 (1988) ("[S]erious constitutional question[s] . . . would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." (cleaned up)).

ual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law, and is in violation of the rights of the individual.).

Had Congress foreclosed all meaningful judicial review over plaintiffs' ultra vires claim, we would have to confront these difficult constitutional questions today. But nothing in the CSRA shows that Congress meant to preclude federal jurisdiction to adjudicate separation-of-powers challenges to employment policies set by the President. An ultra vires claim like the plaintiffs' is therefore within our narrow subject-matter jurisdiction and outside the comprehensive CSRA scheme described by the Supreme Court in *Elgin* and *Fausto*.

III.

Because we have jurisdiction over plaintiffs' challenge to the requirement as ultra vires, we next must consider whether the district court abused its discretion in granting the plaintiffs' request for a nationwide preliminary injunction. See *Atchafalaya Basinkeeper v. U.S. Army Corps of Eng'rs*, 894 F.3d 692, 696 (5th Cir. 2018). To obtain a preliminary injunction, the plaintiffs must establish that they are "likely to succeed on the merits" and "likely to suffer irreparable harm in the absence of preliminary relief," "that the balance of the equities tips in [their] favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

For the reasons I offered in my motions panel dissent, see *Feds for Med. Freedom*, 25 F.4th at 356-60, re-

produced in relevant part below,¹⁸ *infra* Section III.A, the plaintiffs have not shown that they are entitled to a preliminary injunction, and a nationwide injunction is inappropriate.

A.

Had our court ever given it the chance, the government likely would have succeeded in showing that the President has authority to promulgate this Executive Order pertaining to the federal executive 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. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191 (2020) (quoting U.S. Const. art. II, § 1, cl. 1; and then quoting *id.* § 3). The President’s executive power has long been understood to include “general administrative control of those executing the laws.” *Id.* at 2197-98 (quoting *Myers v. United States*, 272 U.S. 52, 163-64 (1926)). Accordingly, the President “has the right to prescribe the qualifications of [Executive Branch] employees and to attach conditions to their employment.” *Friedman v. Schwellenbach*, 159 F.2d 22, 24 (App. D.C. Cir. 1946); *see also Old Dominion Branch No. 496, Nat’l Ass’n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 273 n.5 (1974) (noting “the President’s responsibility for the efficient operation of the Executive Branch”); *Crandon v. United States*, 494 U.S. 152, 180 (1990) (Scalia, J., concurring in the judgment) (describing “the President’s discretion-laden power” to regulate the Executive Branch under 5 U.S.C. § 7301); *NTEU v. Bush*, 891 F.2d 99 (5th Cir. 1989) (upholding President

¹⁸ I have made some edits to the text.

Reagan’s executive order authorizing random drug testing of certain federal employees). The President, as head of the federal executive workforce, has authority to establish the same immunization requirement that many private employers imposed to ensure workplace safety and prevent workplace disruptions caused by COVID-19.

The district court rejected the above argument as “a bridge too far,” given “the current state of the law as just recently expressed by the Supreme Court” in *NFIB v. OSHA*, 142 S. Ct. 661 (2022), and *Biden v. Missouri*, 142 S. Ct. 647 (2022). However, the district court misapprehended the single, animating principle that all Justices embraced in these decisions. As Justice Gorsuch explained in his *NFIB* concurrence, “The central question we face today is: Who decides?” 142 S. Ct. at 667 (Gorsuch, J., concurring). In *NFIB*, the Court stayed an immunization requirement that unelected agency officials imposed on private employers that do not receive federal funding, explaining that “[a]dministrative agencies are creatures of statute” and that the Occupational Safety and Health Act does not “plainly authorize[] the Secretary’s [immunization or testing] requirement.” 142 S. Ct. at 665. Comparatively, in *Biden v. Missouri*, which involved an immunization requirement that unelected agency officials imposed on the staff of healthcare facilities receiving Medicare and Medicaid funding, the Court concluded that “the Secretary’s rule falls within the authorities that Congress has conferred upon him.” 142 S. Ct. at 652. Notably, even the dissenting Justices in that case acknowledged that “[v]accine requirements . . . fall squarely within a State’s police power.” *Id.* at 658 (Thomas, J., dissenting); *see also NFIB v. OSHA*, 142 S. Ct. at 667

(Gorsuch, J., concurring) (“There is no question that state and local authorities possess considerable power to regulate public health.”). Thus, in these two cases, the Court gave a consensus answer to Justice Gorsuch’s question: it is elected, democratically-accountable officials, including members of Congress¹⁹ and state legislators,²⁰ who have authority to decide—and answer for—the infection-fighting measures that they impose, including immunization requirements, such as mandatory smallpox vaccination, that our country has utilized for centuries. See *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (upholding the authority of states to enforce compulsory vaccination laws); *Austin v. U.S. Navy Seals-26*, 142 S. Ct. 1301 (2022) (staying district court order preventing Navy from considering vaccination status in making operational decisions); *Lukaszczyk v. Cook Cnty.*, 47 F.4th 587 (7th Cir. 2022) (upholding state

¹⁹ Cf. 8 U.S.C. § 1182(a)(1)(A)(ii) (statutory requirement that any alien “who seeks admission as an immigrant” must “receive[] vaccination against vaccine-preventable diseases,” including “mumps, measles, rubella, polio, tetanus and diphtheria toxoids, pertussis, influenza type B and hepatitis B”).

²⁰ For example, at least one state governor recently exercised his executive authority to permanently require COVID-19 vaccinations for certain state employees. See Off. of Governor Jay Inslee, State of Wash., Directive 22-13.1, COVID-19 Vaccination Standards for State Employees (Aug. 5, 2022). A bill has been introduced in the Washington House to permit reemployment for state employees who were dismissed from their jobs for failing to get vaccinated. H.B. 1029, 68th Leg., Reg. Sess. (Wash. 2023). Conversely, in Texas, Governor Abbot issued an executive order prohibiting Texas entities from requiring employees to get vaccinated and that would terminate when the Texas legislature passed legislation “consider[ing] this issue.” Exec. Dep’t, State of Tex., Exec. Order GA 40, Relating to Prohibiting Vaccine Mandates, Subject to Legislative Action (Oct. 11, 2021).

and local vaccine requirements), *cert. denied sub nom.*, *Troogstad v. Chicago*, 143 S. Ct. 734 (2023).²¹

The President is not an unelected administrator. He is instead the head of a co-equal branch of government and the most singularly accountable elected official in the country. This federal workplace safety order displaces no state police powers and coerces no private sector employers. Instead, consistent with his Article II duty to “take Care that the Laws be faithfully executed,” the President performed his role as CEO of the federal workforce,²² taking executive action in order to keep open essential government buildings,²³ to maintain the provision of vital government services, such as the Transportation Security Administration; and to pre-

²¹ Indeed, executive immunization requirements predate the birth of this country, with George Washington famously requiring members of the Continental Army to be inoculated against smallpox. See *Letter from George Washington to William Shippen, Jr.* (Feb. 6, 1777), in 8 THE PAPERS OF GEORGE WASHINGTON, REVOLUTIONARY WAR SERIES, 6 JANUARY 1777-27 MARCH 1777, 264 (Frank E. Grizzard, Jr., ed.) (1998) (“Finding the small pox to be spreading much and fearing that no precaution can prevent it from running thro’ the whole of our Army, I have determined that the troops shall be inoculated.”).

²² Notably, in a recent survey of nearly 500 employers, the employee benefits consultancy Mercer “found 44% with a [vaccine] requirement currently in place and 6% planning to implement one, with another 9% still considering it.” Beth Umland & Mary Kay O’Neill, *Worksite Vaccine Requirements in the Wake of the OSHA ETS* (Jan. 27, 2022), <https://www.mercer.us/our-thinking/healthcare/worksite-vaccine-requirements-in-the-wake-of-the-osha-ets.html>.

²³ As noted earlier, in contrast to many of the essential services and executive agencies that the President oversees, Article III institutions such as this court can close our buildings to the public.

vent unvaccinated federal employees from infecting co-workers or members of the public who, whether because of age or infirmity, might be highly vulnerable to hospitalization and death.

Federal employees that disagree with the content of Executive Order 14043 retain the right to claim an exemption, to leave the government's employment, to collectively bargain, to challenge the order through the CSRA, or to challenge the order in federal court, as they have done in this case. Of course, any American who disagrees with the content of the order has the right to vote the President out of office. Relatedly, Congress rescinded the President's requirement that members of the Armed Forces get vaccinations. *See* James M. Inhofe Nat'l Def. Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 525 (2022). Thus, consistent with *NFIB v. OSHA* and *Biden v. Missouri*, and applying the Supreme Court's methodology for assessing the President's emergency powers in the absence of direct Congressional intervention, *see Youngstown*, 343 U.S. at 635-38 (Jackson, J., concurring in the judgment and opinion of the Court); *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981) (“[E]xecutive action in any particular instance falls . . . at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition. This is particularly true as respects cases . . . involving responses to international crises the nature of which Congress can hardly have been expected to anticipate in any detail.”), accountability for the federal executive employee immunization requirement is open, obvious, and vested in one elected, democratically accountable official. These cases do not cast doubt on, but rather determinatively confirm, the President's emergency power to issue Ex-

ecutive Order No. 14043. Yet our court refuses to explain why the President does not have this power.

In addition to the issues discussed above, the government is also likely to succeed in showing that the plaintiffs have not met their burden for obtaining a preliminary injunction. A plaintiff seeking such an injunction must establish, among other requirements, “that he is likely to suffer irreparable harm in the absence of preliminary relief.” *Winter*, 555 U.S. at 20. However, even if the plaintiffs were to lose their jobs as a result of this order, we have explained in a previous case involving “discharge under the federal civil service laws” that “[i]t is practically universal jurisprudence in labor relations in this country that there is an adequate remedy for individual wrongful discharge after the fact of discharge”: “reinstatement and back pay.” *Garcia v. United States*, 680 F.2d 29, 31-32 (5th Cir. 1982). The CSRA makes this remedy available to the plaintiffs. See 5 U.S.C. § 7118(a)(7)(C). Accordingly, the district court did not show that the plaintiffs are likely to suffer irreparable harm in the absence of preliminary relief. Our court rubberstamps the injunction without identifying any irreparable harm, either.

Finally, even if I were to conclude that the plaintiffs were entitled to injunctive relief, I agree with Judge Haynes and would not affirm the district court’s grant of a nationwide injunction.²⁴ As our court recently explained, nationwide injunctions “can constitute ‘rushed, high-stake, low-information decisions,’ while more limited equitable relief can be beneficial.” *Louisiana v. Becerra*, 20 F.4th 260, 264 (5th Cir. 2021) (quoting *Dep’t*

²⁴ In this respect, I join Judge Haynes’s separate opinion.

of *Homeland Sec. New York*, 140 S. Ct. 599, 600, (2020) (Gorsuch, J., concurring in the grant of a stay)); see *Kentucky v. Biden*, 57 F.4th 545, 556-57 (6th Cir. 2023) (finding district court abused its discretion in extending preliminary injunction of vaccine requirement for federal contracts to non-parties); see also *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring) (observing that nationwide injunctions “are beginning to take a toll on the federal court system—preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch”).²⁵

²⁵ The majority argues that a nationwide injunction is permissible because “any benefit to outside parties is ‘merely incidental.’” I fail to understand how this is so. Historically, courts of equity “did not provide relief beyond the parties to the case.” *Trump v. Hawaii*, 138 S. Ct. 2392, 2427 (2018) (Thomas, J., concurring). Of course, an injunction tailored to the parties in a case might sometimes incidentally benefit a nonparty. For example, “injunctions barring public nuisances” might “benefit[] third parties . . . merely [as] a consequence of providing relief to the plaintiff,” *id.*, because when a source of water or air pollution is enjoined, everyone’s water or air gets cleaner. But a nationwide injunction barring the vaccine requirement is not analogous to an injunction barring a public nuisance. Outside parties to this case who don’t want to get vaccinated are *directly* shielded from federal government enforcement action by the nationwide injunction; they are *direct* “beneficiaries” of the relief granted to plaintiffs, even though they are not plaintiffs. In sum, there is no way to turn upside down Justice Thomas’s skepticism toward nationwide injunctions by framing this case as an exception to “historical limits on equity and judicial power.” *Id.* at 2429 (Thomas, J., concurring). Rather, by affirming the Executive Order, every court excepts ours has respected the President’s decision to protect federal employees and the public from the effects of a pandemic disease and respected the

Cognizant of the separation of powers, as well as our judicial ignorance of the immense task of running the Executive Branch of government, for which the President, informed by public health experts, is solely accountable, I would not allow an unelected lower court to impose its Article III fiat on millions of Article II employees, above all when a dozen other lower courts have declined to enjoin the President's order. More egregious, our court should not have approved this unaccountable exercise of the judicial power without explaining why an injunction was warranted in the first place.

B.

In affirming the district court's nationwide injunction, the majority defends the scope of the injunction but does not say why the district court properly exercised its discretion in granting any injunction at all. "After carefully considering the district court's opinion and the Government's criticisms of it, we are unpersuaded that the district court abused its discretion. And we need not repeat the district court's reasoning, with which we substantially agree"—that's it. In two sentences and without any explanation, after more than a year of government attempts to get our court to engage, we limit the President's authority to protect federal employees from a pandemic. Our perfunctory treatment of this important and difficult issue does not reflect a "[d]ue regard for the implications of the distribution of powers in our Constitution and for the nature of the judicial process as the ultimate authority in interpreting the Constitution." *Youngstown*, 343 U.S. at 597 (Frankfurter, J., concurring). Nor does it meet our basic "obligation

principle that courts do not make federal policy. *See id.* at 2427 (Thomas, J., concurring).

to say enough that the public can be confident that cases are decided in a reasoned way.” *United States v. Handlon*, 53 F.4th 348, 353 (5th Cir. 2022); see *Rita v. United States*, 551 U.S. 338, 356 (2007).

* * *

This case requires us to determine the powers of the President to regulate the Executive Branch workforce—in other words, “to intervene in determining where authority lies as between the democratic forces in our scheme of government.” *Youngstown*, 343 U.S. at 597 (Frankfurter, J., concurring). As Justice Frankfurter warned during another national emergency, “we should be wary and humble” in drawing those lines. *Id.* Contrary to his teachings, our court, asserting that it is right but unable to explain why, hastily sketches the President as a diminished figure in our system of government.

I respectfully dissent.

CARL E. STEWART, *Circuit Judge*, joined by RICHMAN, *Chief Judge*, and DENNIS and GRAVES, *Circuit Judges*, dissenting:

Respectfully, I dissent from the en banc majority opinion because, as the original panel opinion held, the Civil Service Reform Act (“CSRA”), 5 U.S.C. § 1101 *et seq.*, precludes district court review of challenges to Executive Order 14043 (“the Order”). See *Feds for Med. Freedom v. Biden* (“*Feds II*”), 30 F.4th 503, 511 (5th Cir. 2022). As the Supreme Court explained in *United States v. Fausto*, “the CSRA comprehensively overhauled the civil service system, creating an elaborate new framework for evaluating adverse personnel actions against [federal employees].” 484 U.S. 439, 443 (1988) (internal quotation marks and citations omitted). “It prescribes in great detail the protections and remedies applicable to such action, including the availability of administrative and judicial review.” *Id.*

As we explained in *Feds II*, “[t]he CSRA established ‘the comprehensive and exclusive procedures for settling work-related controversies between federal civil-service employees and the federal government.’” 30 F.4th at 506 (quoting *Rollins v. Marsh*, 937 F.2d 134, 139 (5th Cir. 1991)). Prior to the enactment of the CSRA, administrative and judicial review under the civil service system was “haphazard,” resulting from the “outdated patchwork of statutes and rules built up over almost a century.” *Fausto*, 484 U.S. at 444 (quoting S. REP. NO. 95-969, at 3 (1978)). This system drew “widespread” criticism, in part because it produced inconsistent judicial decisions on similar matters due to the “concurrent jurisdiction, under various bases of jurisdiction, of district courts in all Circuits and the Court

of Claims.” *Id.* at 445. In response to these issues, Congress enacted the CSRA, which imposed “an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration.” *Id.*

The CSRA provides different procedures for employees facing different types of employment actions. *Feds II*, 30 F.4th at 507 (“The CSRA distinguishes between employees facing ‘proposed’ adverse action and those who have already suffered an adverse action[.]”). Employees facing “proposed” action are entitled to notice, an opportunity to respond, legal representation, and written reasons supporting the employing agency’s decision. 5 U.S.C. § 7513(b). A Merit Systems Protection Board (“MSPB”) appeal, however, is only guaranteed to “employee[s] against whom an action is taken.” *Feds II*, 30 F.4th at 508; § 7513(d). “If the employee prevails on appeal, the MSPB can order the agency to comply with its decision and award ‘reinstatement, backpay, and attorney’s fees.’” *Id.* at 507; *Elgin v. Dep’t of Treasury*, 567 U.S. 1, 6 (2012) (citing 5 U.S.C. §§ 1204(a)(2), 7701(g)). “An employee who is dissatisfied with the MSPB’s decision is entitled to judicial review in the United States Court of Appeals for the Federal Circuit’ under § 7703.” *Id.* (quoting *Elgin*, 567 U.S. at 6). The jurisdiction of the Federal Circuit over such appeals is “exclusive.” *Id.* (citing 28 U.S.C. § 1295(a)(9)). Once an employee appeals to the Federal Circuit, that court must “review the record and hold unlawful and set aside any agency action, findings, or conclusions that are (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or

regulation having been followed; or (3) unsupported by substantial evidence.” *Id.* (citing 5 U.S.C. § 7703(c)(1)-(3) (internal quotation marks omitted)). This remedial scheme is intricate and as the Supreme Court has recognized, “[g]iven 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.* (quoting *Elgin*, 567 U.S. at 11-12).

In *Elgin v. Department of Treasury*, the Supreme Court addressed an attempt by former federal employees to “carve out an exception to CSRA exclusivity for facial or as-applied constitutional challenges to federal statutes.” 567 U.S. at 12. The Court rejected their attempt, explaining that the CSRA’s text and structure demonstrated that “[t]he availability of administrative and judicial review under the CSRA generally turns on the type of civil service employee and adverse employment action at issue,” not whether a challenged action is constitutionally authorized. *Id.* at 12-13. The Court further noted that the CSRA’s purpose, which is to create an integrated scheme of review, confirms that “the statutory review scheme is exclusive.” *Id.* at 13. The Court ultimately 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.” *Id.* at 5.

Relying on this Supreme Court guidance, the *Feds II* panel majority reasoned that this case is “the vehicle by which [the plaintiffs] seek to avoid imminent adverse employment action” for not complying with the Order,

“which is precisely the type of personnel action regularly adjudicated by the MSPB and the Federal Circuit within the CSRA scheme.” 30 F.4th at 511 (citing *Elgin*, 567 U.S. at 22) (internal quotation marks omitted). The panel majority further determined that the plaintiffs’ claims did not exceed the MSPB’s expertise. *Id.* (citing *Elgin*, 567 U.S. at 22 (recognizing that “many threshold questions . . . may accompany a constitutional claim” and “the MSPB can apply its expertise” to those questions)).

A unanimous Fourth Circuit panel agreed with our view that “Congress intended for the CSRA to cover [the plaintiffs’] claims” and “that the district court lacked jurisdiction” over a challenge to the Order. *See Rydie v. Biden*, No. 21-2359, 2022 WL 1153249, at *3 (4th Cir. Apr. 19, 2022). Like the *Feds II* panel majority, *Rydie* relied on *Elgin* to hold that “Congress intended the CSRA to foreclose judicial review in at least some circumstances.” *Id.* at *4. As the *Rydie* panel observed, courts use the three *Thunder Basin* factors¹ to determine whether Congress intended the CSRA to foreclose judicial review in certain cases and concluded that the factors militated in favor of preclusion. *Rydie*, 2022 WL 1153249, at *4-7. Both the *Feds II* and *Rydie* decisions align with those of other courts that have considered challenges to the Order since April of last year. *See Am. Fed’n of Gov’t Emps. Loc. 2018 v. Biden*, 598

¹ The *Thunder Basin* factors are: “(1) whether a finding of preclusion could foreclose all meaningful judicial review; (2) whether the claims were wholly collateral to a statute’s review provisions; and (3) whether the claims were outside the agency’s expertise.” *See Cochran v. SEC*, 20 F.4th 194, 205 (5th Cir. 2021), *cert. granted SEC v. Cochran*, No. 21-1239, 2022 WL 1528373 (U.S. May 16, 2022) (citing *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994)).

F. Supp. 3d 241, 248 (E.D. Pa. 2022) (“This action will be dismissed in its entirety for lack of subject-matter jurisdiction.”); *Payne v. Biden*, 602 F. Supp. 3d 147, 151 (D.D.C. 2022) (“The Court will grant the Government’s Motion because the Civil Service Reform Act deprives the Court of subject-matter jurisdiction over this workplace dispute involving a covered federal employee.”)²; *Am. Fed’n of Gov’t Emps. Loc. 2586 v. Biden*, No. CIV-21-1130-SLP, 2022 WL 3695297, at *4 (W.D. Okla. July 22, 2022) (“[T]he Court finds the CSRA’s scheme is detailed, comprehensive and exclusive and it is fairly discernible that Congress intended the Civilian Employees’ claims to be encompassed within that scheme.”).

Because I am not persuaded that we should create a split with the Fourth Circuit or depart from the sound reasoning of numerous other federal courts that have since heard similar challenges and reached the same result, I would affirm our original holding in *Feds II* that the CSRA precludes the district court’s jurisdiction in this case. See 30 F.4th at 511.

² The D.C. Circuit has since ruled in the Government’s favor. See *Payne v. Biden*, 62 F.4th 598 (D.C. Cir. 2023).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22-40043

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

[Filed: Apr. 7, 2022]

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 3:21-CV-356

Before BARKSDALE, STEWART, and DENNIS, *Circuit
Judges.*

CARL E. STEWART, *Circuit Judge:*

On September 9, 2021, President Biden issued Executive Order 14043, which mandates COVID-19 vaccina-

tion for all executive branch employees, subject to medical and religious exceptions. Several plaintiffs filed suit, alleging that the President exceeded his authority. The district court found that the plaintiffs were likely to succeed on the merits of their claim and that the equities favored them. It therefore preliminarily enjoined enforcement of the Order nationwide. The Government appealed.

For the following reasons, we VACATE the district court's preliminary injunction and REMAND to the district court with instructions to DISMISS for lack of jurisdiction.

I. FACTS & PROCEDURAL HISTORY

Executive Order 14043 provides that “[e]ach agency shall implement, to the extent consistent with applicable law, a program to require COVID-19 vaccination for all of its Federal employees, with exceptions only as required by law.” Requiring Coronavirus Disease 2019 Vaccination for Federal Employees, 86 Fed. Reg. 50,989, 50,990 (Sept. 9, 2021). The Order directed the Safer Federal Workforce Task Force to publish guidance on implementing the vaccine mandate. *Id.* at 50,989. President Biden issued the Order “[b]y the authority vested in [him] as President by the Constitution and the laws of the United States of America, including” 5 U.S.C. §§ 3301, 3302, and 7301. *Id.*

On September 13, 2021, the Task Force published guidance directing agencies to apply their usual processes for evaluating religious and medical exceptions to the mandate. *See* Safer Federal Workforce Task Force, Vaccinations, <https://go.usa.gov/xe5aC> (last visited April 7, 2022). It also required non-exempt em-

ployees to be fully vaccinated by November 22, 2021, *id.*, but the Government later postponed that deadline to early 2022. Under the guidance, non-exempt employees who either refuse vaccination or fail to disclose whether they have received a vaccine face escalating disciplinary procedures that include counseling, suspension, and termination. *Id.* Employees are not subject to discipline while their exception requests are pending, and they have two weeks after an exception request’s denial to receive their first (or only) dose of a COVID-19 vaccine. *Id.*

On December 21, 2021, a 6,000-member organization called “Feds for Medical Freedom,” along with several other organizations and individual plaintiffs, challenged Executive Order 14043 in federal court. They moved for a nationwide preliminary injunction, alleging that the Order likely exceeds the President’s authority. The district court agreed and granted preliminary injunctive relief on January 21, 2022. It recognized that “the federal-worker mandate had already been challenged in several courts across the country.”¹ *Feds for*

¹ At least twelve district courts previously rejected challenges to Executive Order 14043 for various reasons. *See Brnovich v. Biden*, No. CV-21-1568, — F. Supp. 3d —, 2022 WL 252396 (D. Ariz. Jan. 27, 2022); *Oklahoma v. Biden*, No. CIV-21-1136, — F. Supp. 3d —, 2021 WL 6126230 (W.D. Okla. Dec. 28, 2021); *Brass v. Biden*, No. 21-cv-2778, 2021 WL 6498143 (D. Colo. Dec. 23, 2021) (report and recommendation), *adopted*, 2022 WL 136903 (D. Colo. Jan. 14, 2022); *AFGE Local 501 v. Biden*, No. 21-23828-CIV, — F. Supp. 3d —, 2021 WL 6551602 (S.D. Fla. Dec. 22, 2021); *Donovan v. Vance*, No. 21-CV-5148, — F. Supp. 3d —, 2021 WL 5979250 (E.D. Wash. Dec. 17, 2021); *McCray v. Biden*, No. 21-2882, 2021 WL 5823801 (D.D.C. Dec. 7, 2021); *Navy Seal 1 v. Biden*, No. 21-cv-2429, — F. Supp. 3d —, 2021 WL 5448970 (M.D. Fla. Nov. 22, 2021); *Rydie v. Biden*, No. 21-2696, — F. Supp. 3d —, 2021 WL 5416545

Med. Freedom v. Biden (“*Feds for Med. Freedom I*”), No. 3:21-CV-356, — F. Supp. 3d —, 2022 WL 188329, at *2 (S.D. Tex. Jan. 21, 2022). However, the district court attempted to distinguish those cases as having fallen victim to “procedural missteps by the plaintiffs or a failure to show imminent harm.” *Id.*

The district court rejected the Government’s argument that the Civil Service Reform Act of 1978 (“CSRA”), 5 U.S.C. § 1101 *et seq.*, deprived it of jurisdiction. *Id.* at *2-3. Specifically, it held that the CSRA did not apply because this case involves a “challenge [to] the mandate pre-enforcement,” whereas the CSRA contemplates review after an employee suffers an adverse employment action. *Id.* The district court also held that some of the plaintiffs had ripe claims because those who were not seeking exemptions “face[d] an inevitable firing.” *Id.* at *3. As to the merits, the district court broke with every other court to consider the issue and held that the plaintiffs were likely to show that neither the Constitution nor federal statute authorized Executive Order 14043. *Id.* at *4-6. It also found that the plaintiffs were likely to suffer irreparable harm absent an injunction and that the equities and public interest favored the plaintiffs. *Id.* at *4, *7. The district court

(D. Md. Nov. 19, 2021); *Altschuld v. Raimondo*, No. 21-cv-2779, 2021 WL 6113563 (D.D.C. Nov. 8, 2021); *Church v. Biden*, No. 21-2815, --- F. Supp. 3d ---, 2021 WL 5179215 (D.D.C. Nov. 8, 2021); *Smith v. Biden*, No. 21-cv-19457, 2021 WL 5195688 (D.N.J. Nov. 8, 2021); *Foley v. Biden*, No. 21-cv-1098, 2021 WL 5750271, ECF No. 18 (N.D. Tex. Oct. 6, 2021); *see also Feds for Med. Freedom v. Biden* (“*Feds for Med. Freedom II*”), 25 F.4th 354, 355 (5th Cir. 2022) (Higginson, J., dissenting) (“[A] dozen district courts have rejected requests to enjoin this order.”).

therefore enjoined enforcement of Executive Order 14043 nationwide.

The Government appealed. Meanwhile, the Government moved the district court for a stay of its order, which the district court eventually denied. While that motion remained pending in the district court, the Government separately moved this court for a stay. A divided panel carried the Government's motion with the case and expedited this appeal. *Feds for Med. Freedom v. Biden* (“*Feds for Med. Freedom II*”), 25 F.4th 354, 355 (5th Cir. 2022).

II. STANDARD OF REVIEW

“This court reviews the grant or denial of a preliminary injunction for abuse of discretion, with any underlying legal determinations reviewed *de novo* and factual findings for clear error.” *Topletz v. Skinner*, 7 F.4th 284, 293 (5th Cir. 2021).

III. DISCUSSION

The Government argues that the district court erroneously granted the plaintiffs preliminary relief from Executive Order 14043. “A preliminary injunction is an extraordinary remedy.” *La Union Del Pueblo Entero v. Fed. Emergency Mgmt. Agency*, 608 F.3d 217, 219 (5th Cir. 2010). A court should issue one only if the movant establishes the following: “(1) a substantial likelihood of prevailing on the merits; (2) a substantial threat of irreparable injury if the injunction is not granted; (3) the threatened injury outweighs any harm that will result to the non-movant if the injunction is granted; and (4) the injunction will not disserve the public interest.” *Id.*

A. Jurisdiction

We first consider the Government’s argument that the CSRA precluded the district court’s subject matter jurisdiction. “When courts lack subject matter jurisdiction over a case, they lack the power to adjudicate the case.” *Nat’l Football League Players Ass’n v. Nat’l Football League*, 874 F.3d 222, 225 (5th Cir. 2017). Accordingly, this court examines “jurisdiction whenever subject matter jurisdiction appears ‘fairly in doubt.’” *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 671 (2009)).

i. Background on the CSRA

The CSRA established “the comprehensive and exclusive procedures for settling work-related controversies between federal civil-service employees and the federal government.” *Rollins v. Marsh*, 937 F.2d 134, 139 (5th Cir. 1991). Before the CSRA, administrative and judicial review under the civil service system was “haphazard,” resulting from the “outdated patchwork of statutes and rules built up over almost a century.” *United States v. Fausto*, 484 U.S. 439, 444 (1988) (quoting S. REP. NO. 95-969, at 3 (1978)). This pre-existing system drew “widespread” criticism, including that it produced inconsistent judicial decisions on similar matters due to the “concurrent jurisdiction, under various bases of jurisdiction, of district courts in all Circuits and the Court of Claims.” *Id.* at 445. In response, Congress enacted the CSRA, which imposed “an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration.” *Id.*

“Under the [CSRA], certain federal employees may obtain administrative and judicial review of specified adverse employment actions.” *Elgin v. Dep’t of Treasury*, 567 U.S. 1, 5 (2012). “Subchapter II of Chapter 75 governs review of major adverse actions taken against employees ‘for such cause as will promote the efficiency of the service.’” *Id.* (quoting 5 U.S.C. §§ 7503(a), 7513(a)). These provisions apply to employees in the competitive service and to certain excepted service employees.² 5 U.S.C. § 7511(a)(1). They provide procedural protections when eligible employees face major adverse actions, which includes removals, suspensions for more than fourteen days, pay or grade reductions, and furloughs lasting thirty days or less. *Id.* § 7512.

The CSRA distinguishes between employees facing “proposed” adverse action and those who have already suffered adverse action. *See* 5 U.S.C. § 7513(b), (d). Employees facing “proposed” action are entitled to notice, an opportunity to respond, legal representation, and written reasons supporting the employing agency’s decision. *Id.* § 7513(b). Once an employing agency fi-

² The CSRA provides three general categories of civil service employees: Senior Executive Service employees, competitive service employees, and excepted service employees. *Elgin*, 567 U.S. at 5 n.1. Senior Executive Service employees are high ranking employees who do not require Presidential appointment or Senate confirmation. *Id.* “Competitive service employees . . . are all other Executive Branch employees whose nomination by the President and confirmation by the Senate are not required and who are not specifically excepted from the competitive service by statute,” along with certain other included employees. *Id.* (alteration omitted) (citing 5 U.S.C. § 2102(a)(1)). Employees “who are not in the Senior Executive Service or in the competitive service” are excepted service employees. *Id.* (citing 5 U.S.C. § 2103(a)).

nalizes an adverse action, however, the aggrieved employee may appeal to the Merit Systems Protection Board (“MSPB”). *Id.* § 7513(d). If the employee prevails on appeal, the MSPB can order the agency to comply with its decision and award “reinstatement, backpay, and attorney’s fees.” *Elgin*, 567 U.S. at 6 (citing 5 U.S.C. §§ 1204(a)(2), 7701(g)). “An employee who is dissatisfied with the MSPB’s decision is entitled to judicial review in the United States Court of Appeals for the Federal Circuit” under § 7703. *Id.* at 6. The Federal Circuit’s jurisdiction over such appeals is “exclusive.” 28 U.S.C. § 1295(a)(9). If an employee appeals to the Federal Circuit, then that court must “review the record and hold unlawful and set aside any agency action, findings, or conclusions” that are “(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence.” 5 U.S.C. § 7703(c)(1)-(3).

This remedial scheme is “elaborate,” establishing “in great detail the protections and remedies applicable to” adverse personnel actions against federal employees, “including the availability of administrative and judicial review.” *Fausto*, 484 U.S. at 443. The Supreme Court has thus explained that, “[g]iven 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.” *Elgin*, 567 U.S. at 11-12.

In *Elgin*, the Court considered an attempt by former federal employees to “carve out an exception to CSRA

exclusivity for facial or as-applied constitutional challenges to federal statutes.” *Id.* at 12. In rejecting that attempt, the Court emphasized that the CSRA’s text and structure demonstrated that “[t]he availability of administrative and judicial review under the CSRA generally turns on the type of civil service employee and adverse employment action at issue,” not whether a challenged action is constitutionally authorized. *Id.* at 12-13. The CSRA’s purpose—to “creat[e] an integrated scheme of review”—further confirmed that “the statutory review scheme is exclusive.” *Id.* at 13. Thus, the Court concluded 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.” *Id.* at 5. This court has also recognized that the CSRA precludes district court adjudication of federal statutory and constitutional claims.³

³ See, e.g., *Gremillion v. Chivatero*, 749 F.2d 276, 279 (5th Cir. 1985) (dismissing an IRS employee’s *Bivens* suit because the employee had access to a comprehensive administrative remedial system established by the CSRA); *Palermo v. Rorex*, 806 F.2d 1266, 1270-71 (5th Cir. 1987) (holding that a federal employee cannot seek damages for an unconstitutional adverse personnel action, even though the administrative review system would not allow plaintiff complete recovery); *Rollins v. Marsh*, 937 F.2d 134, 139 (5th Cir. 1991) (holding that a federal employee’s FTCA claims were precluded by the CSRA); *Morales v. Dep’t of the Army*, 947 F.2d 766, 769 (5th Cir. 1991) (dismissing an employee’s suit because all of the employee’s claims were personnel decisions arising out of his relationship with the federal government and were therefore controlled by *Bush v. Lucas*, 462 U.S. 367 (1983), and *Rollins*, 937 F.3d at 139); *Grisham v. United States*, 103 F.3d 24, 26 (5th Cir. 1997) (holding that a federal employee’s First Amendment and FTCA claims were precluded by the CSRA); *Tubesing v. United*

ii. Application of the CSRA

The Government contends that, under *Elgin*, the district court erroneously held that the CSRA does not apply until the plaintiffs suffer an adverse employment action. It urges that adopting the district court’s logic would allow federal employees to circumvent the CSRA by filing suit before their employer disciplines or discharges them, thereby “gut[ting] the statutory scheme.” This, it argues, would be inconsistent with Congress’s intent to limit judicial review through the CSRA. *See id.* at 11. The Government acknowledges that the *Elgin* plaintiffs, unlike the current plaintiffs, had already suffered an adverse employment action—termination—when they filed suit. But it disputes that *Elgin* “turned on that distinction.” Meanwhile, the plaintiffs, like the district court, attempt to distinguish *Elgin* and other cases applying the CSRA’s jurisdictional provisions by arguing that those cases concerned challenges to individual adverse employment actions.

The CSRA’s “text, structure, and purpose” support the Government’s position. *See id.* at 10. Starting with the text and structure, the CSRA guarantees an MSPB appeal to only “[a]n employee against whom an action is taken.” 5 U.S.C. § 7513(d). In contrast, “[a]n employee against whom an action is proposed is entitled to” the protections listed above. *Id.* § 7513(b). The Supreme Court recognized as much in *Elgin* when it observed that the CSRA offers an employee the right

States, 810 F.3d 330, 332 (5th Cir. 2016) (holding that a federal employee’s FTCA claims were precluded by the CSRA); *Griener v. United States*, 900 F.3d 700, 702 (5th Cir. 2016) (holding that a part-time federal employee’s FTCA claim was precluded by the CSRA).

to a hearing before the MSPB “[i]f the agency takes final adverse action against the employee” and that the statute separately “sets out the procedures due an employee prior to final agency action.” *Elgin*, 567 U.S. at 6, 11. Critically, in this case, any adverse action against the plaintiffs remains “proposed.” They are thus entitled to “notice, representation by counsel, an opportunity to respond, and a written, reasoned decision from the agency” under § 7513(b), not administrative review under § 7513(d). *Id.* at 6. In other words, the plaintiffs are “employees to whom the CSRA *denies* statutory review.” *Id.* at 11 (emphasis in original). Congress intended “to entirely foreclose judicial review to” such employees. *Id.*; *Griener*, 900 F.3d at 703.

This construction is consonant with Congress’s purpose in enacting the CSRA, which was to establish “an integrated scheme of review.” *Elgin*, 567 U.S. at 14. As the facts of this case reveal, granting the plaintiffs extra-statutory review would “seriously undermine[]” that goal. *See id.* Allegedly, the plaintiffs who are not pursuing exception requests are “threatened with imminent discipline unless they give in and get vaccinated.” The district court concluded that those plaintiffs had ripe claims because they “face an inevitable firing.” *Feds for Med. Freedom I*,—F. Supp. 3d at—, 2022 WL 188329, at *3. It added that “[m]any of these plaintiffs already have received letters from their employer agencies suggesting that suspension or termination is imminent, have received letters of reprimand, or have faced other negative consequences.” *Id.* Accordingly, these plaintiffs’ terminations were “actual and imminent, not conjectural or hypothetical.” *Id.* (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)). That finding, which the Government does not

dispute, underscores that by filing this suit on the eve of receiving discipline, the plaintiffs seek to circumvent the CSRA's exclusive review scheme. Permitting them to do so would "reintroduce the very potential for inconsistent decisionmaking and duplicative judicial review that the CSRA was designed to avoid." *Elgin*, 567 U.S. at 14. We therefore decline their invitation.

Next, the plaintiffs contend that, even if Congress intended to limit judicial review through the CSRA, Congress did not intend to limit review of their claims. Specifically, they suggest that this court should "presume that Congress [did] not intend to limit jurisdiction" here because (1) "a finding of preclusion could foreclose all meaningful judicial review," (2) their suit is "wholly collateral to [the CSRA's] review provisions," and (3) their "claims are outside the agency's expertise." See *Cochran v. U.S. Sec. & Exch. Comm'n*, 20 F.4th 194, 206 (5th Cir. 2021) (en banc) (quotation omitted). The district court agreed, holding that "[t]o deny the plaintiffs the ability to challenge the mandate pre-enforcement, in district court, is to deny them meaningful review." *Feds for Med. Freedom I*, — F. Supp. 3d at —, 2022 WL 188329, at *3. On appeal, the Government maintains that these arguments are meritless.

We agree with the Government. The plaintiffs assert that district court review is necessary because proceeding through the CSRA's remedial scheme could foreclose all meaningful review. But the CSRA "merely directs the judicial review . . . shall occur in the Federal Circuit," which is "fully capable of providing meaningful review." *Elgin*, 567 U.S. at 10. In *Elgin*, the Supreme Court held that "even if [the MSPB] was incapable of adjudicating a constitutional

claim, meaningful judicial review was still available in the court of appeals.” *Cochran*, 20 F.4th at 208. That was because the plaintiffs “sought substantive relief”—reinstatement, backpay, and attorney’s fees—that “would have . . . fully redressed” the harm they suffered. *Id.* at 208-09. In contrast, where a plaintiff asserts a claim for “structural relief” from a remedial scheme, that scheme will be declared inadequate. *Id.* at 208 (citing *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 490 (2010)). The plaintiffs here seek to avoid discipline for failing to comply with Executive Order 14043. That is a claim for substantive, not structural, relief. Indeed, the MSPB can order reinstatement and backpay to any nonexempt plaintiffs who are disciplined for refusing to receive a COVID-19 vaccine. *Elgin*, 567 U.S. at 6 (citing 5 U.S.C. §§ 1204(a)(2), 7701(g)). And “[r]emedies for discharge under the federal civil service laws are . . . an adequate remedy for individual wrongful discharge after the fact of discharge.” *Garcia v. United States*, 680 F.2d 29, 31 (5th Cir. 1982).

The plaintiffs also argue that the CSRA will deny meaningful review to any of them who comply with Executive Order 14043 because they will never suffer an adverse employment action. However, the plaintiffs could have challenged an agency’s proposed action against them before filing this suit and certainly before getting vaccinated. Specifically, they could have filed a complaint with the Office of Special Counsel (“OSC”), an independent agency, *see* 5 U.S.C. § 1211, asserting that Executive Order 14043 constitutes a “prohibited personnel practice” affecting a “significant change in

duties, responsibilities, or working conditions.”⁴ *Id.* § 2302(a)(1), (a)(2)(A)(xii). The CSRA prohibits agencies from taking any “personnel action” that treats employees “without . . . proper regard for their privacy and constitutional rights.” *Id.* §§ 2301(b)(2), 2302(b)(12). If OSC receives a complaint and determines that a “prohibited personnel practice has occurred,” it is authorized to report that finding and to petition the MSPB for corrective action. *Id.* § 1214(b)(2)(B)-(C). An employee who is harmed by the MSPB’s disposition of the petition can appeal to the Federal Circuit. *Id.* §§ 1214(c), 7703(b)-(c). There is no dispute that the plaintiffs have not attempted to avail themselves of this potential CSRA remedy, which could provide meaningful review.

We also reject the plaintiffs’ argument that their claims are wholly collateral to the CSRA scheme. “[W]hether a claim is collateral to the relevant statutory-review scheme depends on whether that scheme is intended to provide the sort of relief sought by the plain-

⁴ Although the CSRA does not define “working conditions,” the district court concluded that the “term would not encompass a requirement that employees subject themselves to an unwanted vaccination.” *Feds for Med. Freedom I*, — F. Supp. 3d at —, 2022 WL 188329, at *2 (citing *Turner v. U.S. Agency for Glob. Media*, 502 F. Supp. 3d 333, 367 (D.D.C. 2020)). But, in construing Title VII of the CSRA, the Supreme Court has stated that the term “‘working conditions’ . . . naturally refers . . . to the ‘circumstances’ or ‘state of affairs’ attendant to one’s performance of a job.” *Fort Stewart Schs. v. Fed. Lab. Rels. Auth.*, 495 U.S. 641, 645 (1990). Executive Order 14043 qualifies as a significant change to the circumstances attending the job performance of federal employees. Indeed, the Order is explicit that whether an employee has received a COVID-19 vaccine affects “the efficiency of the civil service.” 86 Fed. Reg. at 50,989.

tiff.” *Cochran*, 20 F.4th at 207. The plaintiffs emphasize that they are not challenging any individual employment actions or prior discipline, which they say is “water under the bridge.” Instead, the plaintiffs purportedly request only to have Executive Order 14043 declared void. But although the plaintiffs are not attempting to reverse any previous discipline, their challenge “ultimately [seeks] to avoid compliance with”—and discipline for violating—the Order. *Id.* at 207. Put differently, this case is “the vehicle by which they seek to” avoid imminent “adverse employment action,” which “is precisely the type of personnel action regularly adjudicated by the MSPB and the Federal Circuit within the CSRA scheme.” *Elgin*, 567 U.S. at 22. At bottom, the relief the plaintiffs seek is, in effect, to avoid discharge for refusing to comply with Executive Order 14043. This sort of employment-related relief is “precisely the kind[] of relief that the CSRA empowers the MSPB and the Federal Circuit to provide.” *Id.*

Finally, the plaintiffs’ claims do not exceed the MSPB’s expertise. To show otherwise, the plaintiffs state only that their claims involve constitutional issues and “questions of administrative law, which the courts are at no disadvantage in answering.” *See Cochran*, 20 F.4th at 207-08 (quoting *Free Enter. Fund*, 561 U.S. at 491). But the Supreme Court has recognized that “many threshold questions . . . may accompany a constitutional claim” and that “the MSPB can apply its expertise” to those questions. *Elgin*, 567 U.S. at 22. Further, there are often “preliminary questions unique to the employment context [that could] obviate the need to address the constitutional challenge.” *Id.* at 22-23. For example, an employing agency may only take an adverse action against an employee “for such cause as

will promote the efficiency of the service.” 5 U.S.C. §§ 7503(a), 7513(a). If the MSPB, reviewing an employee’s appeal, determines that the employee suffered adverse action inconsistent with that requirement, it could order corrective action on that basis and avoid any other issues. Additionally, “an employee’s appeal may involve other statutory or constitutional claims that the MSPB routinely considers,” any of which “might fully dispose of the case” if the employee receives a favorable decision from the MSPB. *Elgin*, 567 U.S. at 23. The MSPB thus has expertise that it can “br[ing] to bear” on the plaintiffs’ claims, and “we see no reason to conclude that Congress intended to exempt such claims from exclusive review before the MSPB and the Federal Circuit.” *See id.*

* * *

We conclude that the CSRA precluded the district court’s jurisdiction. Accordingly, the plaintiffs’ claim for preliminary injunctive relief fails because they have not shown a substantial likelihood of success on the merits. We do not reach the parties’ arguments regarding the other requirements for a preliminary injunction.

IV. CONCLUSION

For the foregoing reasons, we VACATE the district court’s preliminary injunction and REMAND to the district court with instructions to DISMISS the case.

RHESA HAWKINS BARKSDALE, *Circuit Judge*, dissenting:

My esteemed colleagues hold: The Civil Service Reform Act (CSRA), 5 U.S.C. § 1101 *et seq.*, precludes the district court’s having subject-matter jurisdiction for this action challenging Executive Order 14043 (EO), which mandates COVID-19 vaccination for all federal civilian employees. I respectfully dissent.

I.

In September 2021, President Biden promulgated the EO, mandating vaccination for federal civilian employees. Pursuant to the EO, “[e]ach agency shall implement, to the extent consistent with applicable law, a program to require COVID-19 vaccination for all of its Federal employees, with exceptions only as required by law”. Exec. Order No. 14043, 86 Fed. Reg. 50,989 (9 Sept. 2021). President Biden based issuance of the EO on “the authority vested in [him] as President by the Constitution and the laws of the United States of America, including sections 3301, 3302, and 7301 of title 5, United States Code”. *Id.*

Accordingly, the Safer Federal Workforce Task Force issued agencies guidance on evaluating religious and medical exceptions to the mandate. *Vaccinations*, SAFER FEDERAL WORKFORCE, <https://www.saferfederalworkforce.gov/faq/vaccinations/> (last visited 6 April 2022). Non-exempt employees were required to be vaccinated by 22 November 2021 (later postponed to 2022). *Id.* Non-exempt employees who fail to get vaccinated or fully disclose vaccination status face disciplinary procedures, including counseling, suspension, and termination. *Id.*

On 21 December 2021, Feds for Medical Freedom, a 6,000-member organization, challenged the EO in federal court, claiming, *inter alia*, the EO is a violation of Article I of the Constitution. After plaintiffs' requested nationwide preliminary injunction was granted on 21 January 2022, the Government appealed and moved for a stay pending appeal. Our court ordered the motion carried with the case and expedited the appeal. *Feds for Med. Freedom v. Biden*, 25 F.4th 354, 355 (5th Cir. 2022). Oral argument was held on 8 March.

II.

CSRA, enacted in 1978, “comprehensively overhauled the civil service system creating an elaborate new framework for evaluating adverse personnel actions against [federal employees]”. *United States v. Fausto*, 484 U.S. 439, 443 (1988) (alteration in original) (citation omitted). Prior to CSRA’s enactment, review of personnel actions was “haphazard”, “lengthy”, and “outdated” to the point that “managers [in the civil service] often avoid[ed] taking disciplinary action against employees even when it was clearly warranted”. *Id.* at 444-45 (alteration in original) (citation omitted). Congress responded with CSRA, which created “an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration”. *Id.* at 445.

Title 5 of the United States Code governs Government Organization and Employees and contains CSRA. Part III, 5 U.S.C. § 2101 *et seq.*, governs Employees, and Subpart F of Part III, 5 U.S.C. § 7101 *et seq.*, covers Labor-Management and Employee Relations. As dis-

cussed in *Fausto*, three sections within CSRA govern “personnel actions”: Chapter 43, 5 U.S.C. § 4301 *et seq.*, “governs personnel actions based on unacceptable job performance”; Chapter 23, 5 U.S.C. § 2301 *et seq.*, “establishes the principles of the merit system of employment”; and Chapter 75, 5 U.S.C. § 7501 *et seq.*, “governs adverse action taken against employees for the efficiency of the service”. *Fausto*, 484 U.S. at 446-47 (citation omitted).

Chapter 75, in Subpart F, includes, *inter alia*, adverse actions: suspension for 14 days or less; removal; suspension for more than 14 days; reduction in grade or pay; and furlough for 30 days or less. 5 U.S.C. §§ 7501-43. Along that line, Subchapters 1, 2, and 5 include an “actions covered” section. 5 U.S.C. §§ 7502, 7512, 7542. Chapter 75 Subchapter 2, 5 U.S.C. §§ 7511-15, is pertinent to this case. It “governs . . . major adverse actions taken against employees”. *Elgin v. Dep’t of Treasury*, 567 U.S. 1, 5 (2012). The covered adverse actions are: removal; suspension for more than 14 days; reduction in grade or pay; and furlough for 30 days or less. 5 U.S.C. § 7512.

The EO’s *enactment*, however, does not constitute an adverse action subject to CSRA. The case at hand is instead a pre-enforcement challenge to a government-wide policy, imposed by the President, that would affect the 2.1 million federal civilian workers, including the 6,000 members of Feds for Medical Freedom. Relief plaintiffs seek does not fall within the purpose of CSRA. Enacting the EO and then requiring federal civilian employees who may later receive adverse action to seek relief now through CSRA would result in the very type of

lengthy and haphazard results CSRA was enacted to prevent.

Seeking to rely upon *Elgin*—the primary opinion by which the majority attempts to find supporting authority—the majority holds at 9: CSRA’s “text, structure, and purpose” support the Government’s position. But, as noted by the majority at 9, plaintiffs in *Elgin* had already received adverse action (termination) when they filed suit. *Elgin*, 567 U.S. at 7. Further, plaintiffs in *Elgin* were terminated for violating the Military Selective Service Act, requiring certain male citizens to register for the Selective Service. *Id.* at 6-7. *Elgin*, therefore, pertains only to plaintiffs whose employment was terminated after they knowingly violated a statute, whereas here, plaintiffs have not received adverse action, but are instead being told they could be, *inter alia*, terminated if they do not get vaccinated as required by the EO.

The majority at 9 also states: In *Elgin*, the Court recognized that employees “against whom an action is proposed” still fall under CSRA, focusing on the language that it, “sets out the procedures due an employee prior to final agency action”. *Elgin*, 567 U.S. at 11 (citing 5 U.S.C. § 7513). But, the Court in *Elgin* also noted: “When an *employing agency* proposes a covered action against a covered employee, . . . CSRA gives the employee the right to notice, representation by counsel, an opportunity to respond, and a written reasoned decision from the agency”. *Id.* at 6 (emphasis added) (citing 5 U.S.C. § 7513(b)).

Section 7513 does not apply to plaintiffs. First, it applies to federal employees facing proposed actions by “an employing agency”. 5 U.S.C. § 7513. CSRA’s lan-

guage, which the majority references at 9, also refers to action taken by an “agency”. *See id.* Here, there is no agency action. Rather, the President is attempting to impose a sweeping mandate against the federal civilian workforce. Again, no adverse action has been proposed or taken by an agency. In short, *Elgin* does not control the case at hand.

Section 7513 references individual employees; here, the President seeks to require an entire class of employees to be vaccinated or be subject to an adverse action. Simply put, CSRA does not cover pre-enforcement employment actions, especially concerning 2.1 million federal civilian employees. The district court, therefore, had subject-matter jurisdiction to hear plaintiffs’ claims.

III.

For the foregoing reasons, I respectfully dissent.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22-40043

FEDS FOR MEDICAL FREEDOM; LOCAL 918, AMERICAN
FEDERATION OF GOVERNMENT EMPLOYEES;
HIGHLAND ENGINEERING, INCORPORATED; RAYMOND
A. BEEBE, JR.; JOHN ARBRUST; 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

[Filed: Feb. 9, 2022]

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 3:21-CV-356

Before SMITH, HIGGINSON, and WILLETT, *Circuit
Judges.* PER CURIAM:

IT IS ORDERED that Appellants' opposed motion to
stay the injunction pending appeal is CARRIED WITH
THE CASE. This matter is expedited to the next

available randomly designated regular oral argument panel. The Clerk is directed to issue a schedule for expedited briefing. The merits panel, once identified, will be free, in its discretion, to rule immediately on the motion to stay or await oral argument.

STEPHEN A. HIGGINSON, *Circuit Judge*, dissenting:

In September 2021, President Biden issued Executive Order No. 14043, which, subject to legally required exemptions, directs federal agencies to require their employees to be immunized against COVID-19, a disease that has killed nearly one million people in the United States and over five million worldwide. Though a dozen district courts have rejected requests to enjoin this order,¹ a single district judge in the Southern District of Texas, in a 20-page opinion,² issued a nationwide preliminary injunction against the President's exercise of authority over Article II employees. Because I would grant the Government's motion to stay that injunction pending appeal, I respectfully dissent from the

¹ See *Brnovich v. Biden*, No. CV-21-1568, 2022 WL 252396 (D. Ariz. Jan. 27, 2022); *Oklahoma v. Biden*, No. CIV-21-1136, 2021 WL 6126230 (W.D. Okla. Dec. 28, 2021); *Brass v. Biden*, No. 21-cv-2778, 2021 WL 6498143 (D. Colo. Dec. 23, 2021) (report and recommendation), *adopted*, 2022 WL 136903 (D. Colo. Jan. 14, 2022); *AFGE Local 501 v. Biden*, No. 21-23828-CIV, 2021 WL 6551602 (S.D. Fla. Dec. 22, 2021); *Donovan v. Vance*, No. 21-CV-5148, 2021 WL 5979250 (E.D. Wash. Dec. 17, 2021); *McCray v. Biden*, No. 21-2882, 2021 WL 5823801 (D.D.C. Dec. 7, 2021); *Navy Seal 1 v. Biden*, No. 21-cv-2429, 2021 WL 5448970 (M.D. Fla. Nov. 22, 2021); *Rydie v. Biden*, No. 21-2696, 2021 WL 5416545 (D. Md. Nov. 19, 2021); *Altschuld v. Raimondo*, No. 21-cv-2779, 2021 WL 6113563 (D.D.C. Nov. 8, 2021); *Church v. Biden*, No. 21-2815, 2021 WL 5179215 (D.D.C. Nov. 8, 2021); *Smith v. Biden*, No. 21-cv-19457, 2021 WL 5195688 (D.N.J. Nov. 8, 2021); *Foley v. Biden*, No. 21-cv-1098, ECF No. 18 (N.D. Tex. Oct. 6, 2021).

² *Feds for Med. Freedom v. Biden*, No. 3:21-CV-356, 2022 WL 188329 (S.D. Tex. Jan. 21, 2022).

majority's decision not to resolve this emergency matter.³

I.

When considering whether to grant a stay, “a court considers four factors: ‘(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.’” *Nken v. Holder*, 556 U.S. 418, 426 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). In this case, all four factors favor granting a stay.

II.

The Government has made a strong showing that it is likely to succeed on the merits, for at least three independent reasons.

A.

As a threshold matter, the Government is likely to succeed in demonstrating on appeal that the district court lacks jurisdiction over this case. Congress requires covered federal employees to raise their work-

³ The district court issued its preliminary injunction on January 21. The Government moved to stay that order on January 28. The district court refused to rule on that motion. The Government, presumably with Solicitor General approval, then moved this court for a stay on February 4. Today, our court too refuses to rule. Thus, a presidential order affecting millions of federal employees has been enjoined nationwide, yet two separate federal courts have failed to rule on the Government's emergency request for a stay. The only court that can now provide timely relief is the Supreme Court.

place grievances through the administrative procedures set forth in the Civil Service Reform Act (CSRA). As the Supreme Court has explained, “[g]iven 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.” *Elgin v. Dep’t of Treasury*, 567 U.S. 1, 11-12 (2012); *see also Rollins v. Marsh*, 937 F.2d 134, 139 (5th Cir. 1991) (describing the CSRA as establishing “the comprehensive and exclusive procedures for settling work-related controversies between federal civil-service employees and the federal government”); 5 U.S.C. §§ 7512, 7513(d), 7703(b)(1) (making certain adverse employment actions against federal employees reviewable by Merit Systems Protection Board and Federal Circuit); *id.* §§ 1214(a)(3), 2302 (review scheme for less severe “prohibited personnel practice[s]”). For this reason alone, I would grant the stay.⁴

B.

Even if we were to ultimately determine that the district court has jurisdiction to hear this case, the Government is likely to succeed in showing that the President

⁴ Though the district court stated that the D.C. Circuit permits “pre-enforcement challenges to government-wide policies,” the cases cited for this proposition all significantly pre-date *Elgin*. Allowing pre-enforcement challenges in district courts while requiring employees who experience actual employment actions to challenge those actions under the CSRA “would reintroduce the very potential for inconsistent decisionmaking and duplicative judicial review that the CSRA was designed to avoid.” *Elgin*, 567 U.S. at 14.

has authority to promulgate this executive order pertaining to the federal executive 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. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191 (2020) (quoting U.S. CONST. art. II, § 1, cl. 1; *id.* § 3). The President’s executive power has long been understood to include “general administrative control of those executing the laws.” *Id.* at 2197-98 (quoting *Myers v. United States*, 272 U.S. 52, 163-64 (1926)). Accordingly, the President “has the right to prescribe the qualifications of [Executive Branch] employees and to attach conditions to their employment.” *Friedman v. Schwel-lenbach*, 159 F.2d 22, 24 (D.C. Cir. 1946); *see also Old Dominion Branch No. 496, Nat. Ass’n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 273 n.5 (1974) (noting “the President’s responsibility for the efficient operation of the Executive Branch”); *Crandon v. United States*, 494 U.S. 152, 180 (1990) (Scalia, J., concurring in the judgment) (describing “the President’s discretion-laden power” to regulate the Executive Branch under 5 U.S.C. § 7301); *Nat’l Treasury Emps. Union v. Bush*, 891 F.2d 99 (5th Cir. 1989) (upholding President Reagan’s executive order authorizing random drug testing of certain federal employees). Thus, the President, as head of the federal executive workforce, has authority to establish the same immunization requirement that many private employers have reasonably imposed to ensure workplace safety and prevent workplace disruptions caused by COVID-19.

The district court rejected the above argument as “a bridge too far,” given “the current state of the law as

just recently expressed by the Supreme Court” in *NFIB v. OSHA*, 142 S. Ct. 661 (2022), and *Biden v. Missouri*, 142 S. Ct. 647 (2022). However, the district court misapprehended the single, animating principle that all Justices embraced in these decisions. As Justice Gorsuch explained in his *NFIB* concurrence, “The central question we face today is: Who decides?” 142 S. Ct. at 667 (Gorsuch, J., concurring). In *NFIB*, the Court stayed an immunization requirement that unelected agency officials imposed on private employers that do not receive federal funding, explaining that “[a]dministrative agencies are creatures of statute” and that the Occupational Safety and Health Act does not “plainly authorize[] the Secretary’s [immunization or testing] mandate.” 142 S. Ct. at 665. Comparatively, in *Biden v. Missouri*, which involved an immunization requirement that unelected agency officials imposed on the staff of healthcare facilities receiving Medicare and Medicaid funding, the Court concluded that “the Secretary’s rule falls within the authorities that Congress has conferred upon him.” 142 S. Ct. at 652. Notably, even the dissenting Justices in that case acknowledged that “[v]accine mandates . . . fall squarely within a State’s police power.” *Id.* at 658 (Thomas, J., dissenting); see also *NFIB v. OSHA*, 142 S. Ct. at 667 (Gorsuch, J., concurring) (“There is no question that state and local authorities possess considerable power to regulate public health.”). Thus, in these two cases, the Court gave a consensus answer to Justice Gorsuch’s question: it is elected, democratically-accountable officials, including members of Congress⁵ and state legislators, who

⁵ Cf. 8 U.S.C. § 1182(a)(1)(A)(ii) (statutory requirement that any alien “who seeks admission as an immigrant” must “receive[] vac-

have authority to decide—and answer for—the infection-fighting measures that they impose, including immunization requirements, such as mandatory smallpox vaccination, that our country has utilized for centuries. *See Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (upholding the authority of states to enforce compulsory vaccination laws).⁶

The President is not an unelected administrator. He is instead the head of a co-equal branch of government and the most singularly accountable elected official in the country. This federal workplace safety order displaces no state police powers and coerces no private sector employers. Instead, consistent with his Article II duty to “take Care that the Laws be faithfully executed,” the President is performing his role as CEO of the federal workforce,⁷ taking executive action in or-

ination against vaccine-preventable diseases,” including “mumps, measles, rubella, polio, tetanus and diphtheria toxoids, pertussis, influenza type B and hepatitis B”).

⁶ Indeed, executive immunization requirements predate the birth of this country, with George Washington famously requiring members of the Continental Army to be inoculated against smallpox. *See* Letter from George Washington to William Shippen, Jr. (Feb. 6, 1777), in 8 THE PAPERS OF GEORGE WASHINGTON, REVOLUTIONARY WAR SERIES, 6 JANUARY 1777-27 MARCH 1777, 264 (Frank E. Grizzard, Jr., ed.) (1998) (“Finding the small pox to be spreading much and fearing that no precaution can prevent it from running thro’ the whole of our Army, I have determined that the troops shall be inoculated.”).

⁷ Notably, in a very recent survey of nearly 500 employers, the employee benefits consultancy Mercer “found 44% with a [vaccine] mandate currently in place and 6% planning to implement one, with another 9% still considering it.” Beth Umland and Mary Kay O’Neill, *Worksite Vaccine Requirements in the Wake of the OSHA*

der to keep open essential government buildings;⁸ to maintain the provision of vital government services, such as the Transportation Security Administration; and to prevent unvaccinated federal employees from infecting co-workers or members of the public who, whether because of age or infirmity, might be highly vulnerable to hospitalization and death.

Federal employees that disagree with the content of Executive Order 14043 retain the right to claim an exemption, to leave the government's employment, to collectively bargain, and to challenge the order through the CSRA. And, of course, any American that disagrees with the content of the order has the right to vote the President out of office. Thus, consistent with *NFIB v. OSHA* and *Biden v. Missouri*, accountability for the federal executive employee immunization requirement is open, obvious, and vested in one elected, democratically-accountable official. These two cases do not cast doubt on, but rather determinatively confirm, the President's power to issue Executive Order No. 14043.

C.

In addition to the issues discussed above, the government is also likely to succeed in showing that the plaintiffs have not met their burden for obtaining a preliminary injunction. A plaintiff seeking such an injunction must establish, among other requirements, "that he is

ETS (Jan. 27, 2022), <https://www.mercer.us/our-thinking/healthcare/worksite-vaccine-requirements-in-the-wake-of-the-osha-ets.html>.

⁸ In contrast to many of the essential services and executive agencies that the President oversees, Article III institutions such as this court and the Supreme Court can close our buildings to the public, allowing us to rely on other, less effective infection-fighting measures, such as mandatory mask-wearing and testing.

likely to suffer irreparable harm in the absence of preliminary relief.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). However, even if the plaintiffs were to lose their jobs as a result of this order,⁹ we have explained in a previous case involving “discharge under the federal civil service laws” that “[i]t is practically universal jurisprudence in labor relations in this country that there is an adequate remedy for individual wrongful discharge after the fact of discharge”: “reinstatement and back pay.” *Garcia v. United States*, 680 F.2d 29, 31-32 (5th Cir. 1982). The CSRA makes this remedy available to the plaintiffs. *See* 5 U.S.C. § 7118(a)(7)(C). Accordingly, the plaintiffs cannot show that they are likely to suffer irreparable harm in the absence of preliminary relief.

* * *

For these three independent reasons, the Government has made a strong showing that its appeal is likely to succeed on the merits.

III.

In addition to likelihood of success on the merits, the other factors for a stay are also met in this case. As stated above, a court considering whether to grant a stay must consider not only “(1) whether the stay applicant has made a strong showing that he is likely to suc-

⁹ Notably, the district court did not identify a single plaintiff employee who, at the time the complaint was filed, 1) worked for an agency that had implemented the President’s immunization requirement, 2) had been denied an exemption, and 3) faced imminent discipline or discharge. *Cf. Brnovich*, 2022 WL 252396, at *6-8 (concluding that a U.S. Marshal’s challenge to the federal employee immunization requirement was unripe).

ceed on the merits” but also “(2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Nken*, 556 U.S. at 426.

Looking at the second factor, the district court’s injunction places federal employees at a greater risk of hospitalization and death, not to mention being unable to work because of illness or the need to quarantine. As Jason Miller, the Deputy Director for Management at the Office of Management and Budget, explained in a comprehensive declaration submitted to the district court, the Government’s operational efficiency will be greatly impeded if this executive order cannot go into effect:

In sum, each day that the vaccination requirement for Federal employees is delayed requires agencies that provide critical support for U.S. foreign policy, global financial systems, American infrastructure, and the pandemic response to devote additional time and resources to ensuring the safety of the Federal workforce above and beyond the substantial time and resources already devoted to these efforts—time and resources that would otherwise be spent doing critical mission function to the benefit of the American people.

Thus, the Government will be irreparably injured absent a stay.

Regarding the third factor, the issuance of a stay will not substantially injure the other parties in this proceeding. Even assuming that this executive order injures any plaintiff—as previously noted, the district

court did not identify any particular plaintiff that faces imminent discipline or discharge—that injury can be remedied through reinstatement and backpay, for the reasons explained in *supra* Part II.C.

Finally, the public has an indisputable interest not only in the Government’s operational efficiency but also in stemming the spread through the federal executive workforce, and beyond, of a highly contagious, deadly disease. Immunization requirements have proven extremely effective in the private sector. For example, the CEO of Tyson Foods has explained that even though less than half of the company’s employees were vaccinated when Tyson announced its immunization requirement in early August, by late October “over 96% of our active team members [were] vaccinated—or nearly 60,000 more than when we made the announcement.”¹⁰ Similarly, according to the CEO of United Airlines, “[p]rior to our vaccine requirement, tragically, more than one United employee on average *per week* was dying from COVID,” but “we’ve now gone eight straight weeks with zero COVID-related deaths among our vaccinated employees.”¹¹ Though the district court asserted, without evidence or citation, that “there is no reason to believe that the public interest cannot be served via less restrictive measures than the mandate”

¹⁰ Tyson Foods to Require COVID-19 Vaccinations for its U.S. Workforce (August 3, 2021), <https://www.tysonfoods.com/news/news-releases/2021/8/tyson-foods-require-covid-19-vaccinations-its-us-workforce>; Over 96% of Tyson Foods’ Active Workforce is Vaccinated (October 26, 2021), <https://www.tysonfoods.com/news/news-over-96-tyson-foods-active-workforce-vaccinated>.

¹¹ A Letter to United Employees from CEO Scott Kirby (Jan. 11, 2022), <https://www.united.com/en/us/newsroom/announcements/scott-kirby-employee-note>.

and that “[s]topping the spread of COVID-19 will not be achieved by overbroad policies like the federal-worker mandate,” the public interest is not served by a single Article III district judge, lacking public health expertise and made unaccountable through life tenure, telling the President of the United States, in his capacity as CEO of the federal workforce, that he cannot take the same lifesaving workplace safety measures as these private sector CEOs.

IV.

For the foregoing reasons, I would grant the stay.

However, even if I were to conclude that the motion should be denied with respect to these plaintiffs, I would grant the Government’s motion insofar as the district court’s nationwide preliminary injunction applies to any person or entity that is not either a named plaintiff or an individual possessing, at the time the complaint was filed, bona fide indicia of membership in one of the plaintiff organizations. As we recently explained, nationwide injunctions “can constitute ‘rushed, high-stake, low-information decisions,’ while more limited equitable relief can be beneficial.” *Louisiana v. Becerra*, 20 F.4th 260, 264 (5th Cir. 2021) (quoting *Department of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring in the grant of a stay)); see also *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring) (observing that nationwide injunctions “are beginning to take a toll on the federal court system—preventing legal questions from percolating through the federal courts, encouraging forum shopping, and mak-

ing every case a national emergency for the courts and for the Executive Branch”).¹²

Cognizant of the separation of powers, as well as our judicial ignorance of the immense task of running the executive branch of government, for which the President, informed by public health experts, is solely accountable, I would not allow an unelected lower court to impose its Article III fiat on millions of Article II employees, above all when a dozen other lower courts have declined to enjoin the President’s order.

¹² See generally Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 421, 424 (2017) (arguing that nationwide injunctions lead to “forum shopping, worse decisionmaking, a risk of conflicting injunctions, and tension with other doctrines and practices of the federal courts” and that, in accordance with both equitable principles and the scope of the Article III judicial power, “federal courts should issue injunctions that control a federal defendant’s conduct only with respect to the plaintiff”).

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

Civil Action No. 3:21-CV-356
FEDS FOR MEDICAL FREEDOM, ET AL., PLAINTIFFS

v.

JOSEPH R. BIDEN, JR., ET AL., DEFENDANTS

[Entered: Feb. 11, 2022]

ORDER

Before the court is the defendants' motion to stay pending appeal the court's order of January 21, 2022, granting a preliminary injunction. Dkt. 40. In that motion, the defendants seek to essentially relitigate the issues the court already addressed in its original memorandum opinion and order. Dkt. 36. Having considered the parties' arguments and the applicable law, the court denies the motion.

Signed on Galveston Island this 11th day of Feb., 2022.

139a

/s/ JEFFREY VINCENT BROWN
JEFFREY VINCENT BROWN
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

No. 3:21-cv-356

FEDS FOR MEDICAL FREEDOM ET AL., PLAINTIFFS

v.

JOSEPH R. BIDEN, JR., ET AL., DEFENDANTS

[Entered: Jan. 21, 2022]

MEMORANDUM OPINION AND ORDER

JEFFREY VINCENT BROWN, *UNITED STATES DISTRICT JUDGE*:

The plaintiffs have moved the court to preliminarily enjoin the enforcement of two executive orders by the President. The first, Executive Order 14042, is already the subject of a nationwide injunction. Because that injunction protects the plaintiffs from imminent harm, the court declines to enjoin the first order. The second, Executive Order 14043, amounts to a presidential mandate that all federal employees consent to vaccination against COVID-19 or lose their jobs. Because the President's authority is not that broad, the court will enjoin the second order's enforcement.

The court notes at the outset that this case is not about whether folks should get vaccinated against

COVID-19—the court believes they should. It is not even about the federal government’s power, exercised properly, to mandate vaccination of its employees. It is instead about whether the President can, with the stroke of a pen and without the input of Congress, require millions of federal employees to undergo a medical procedure as a condition of their employment. That, under the current state of the law as just recently expressed by the Supreme Court, is a bridge too far.

I

Background

In response to the COVID-19 pandemic, the Biden Administration has put out four mandates requiring vaccination in various contexts. Earlier this month, the Supreme Court ruled on challenges to two of those mandates. For one, a rule issued by the Occupational Safety and Health Administration (OSHA) concerning businesses with 100 or more employees, the Court determined the plaintiffs would likely succeed on the merits and so granted preliminary relief. *See Nat’l Fed’n Indep. Bus. v. OSHA*, 595 U.S. ____ (2022) [hereinafter *NFIB*]. For the second, a rule issued by the Secretary of Health and Human Services concerning healthcare facilities receiving Medicare and Medicaid funding, the Court allowed the mandate to go into effect. *See Biden v. Missouri*, 595 U.S. ____ (2022).

In this case, the plaintiffs challenge the other two mandates. One compels each business contracting with the federal government to require its employees to be vaccinated or lose its contract. Exec. Order No. 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, 86 Fed. Reg. 50,985 (Sept. 9, 2021).

Because that order has been enjoined nationwide, *Georgia v. Biden*, No. 1:21-CV-163, 2021 WL 5779939, at *12 (S.D. Ga. Dec. 7, 2021), this court declines to grant any further preliminary relief. The other mandate requires that all federal employees be vaccinated—or obtain a religious or medical exemption—or else face termination. See Exec. Order No. 14043, Requiring Coronavirus Disease 2019 Vaccination for Federal Employees, 86 Fed. Reg. 50,989 (Sept. 9, 2021) [hereinafter federal-worker mandate].

The federal-worker mandate was issued last year on September 9. At first, federal agencies were to begin disciplining non-compliant employees at the end of November. But as that date approached, the government announced that agencies should wait until after the new year. See Rebecca Shabad, *Biden administration won't take action against unvaccinated federal workers until next year*, NBC News (Nov. 29, 2021).¹ The court understands that the disciplining of at least some non-compliant employees is now imminent.

Before this case, the federal-worker mandate had already been challenged in several courts across the country, including this one. See *Rodden v. Fauci*, No. 3:21-CV-317, 2021 WL 5545234 (S.D. Tex. Nov. 27, 2021). Most of those challenges have fallen short due to procedural missteps by the plaintiffs or a failure to show imminent harm. See, e.g., *McCray v. Biden*, No. CV 21-2882 (RDM), 2021 WL 5823801, at *5-9 (D.D.C. Dec. 7,

¹ Available at <https://www.nbcnews.com/politics/white-house/biden-administration-delay-enforcement-federal-worker-vaccine-mandate-until-next-n1284963>.

2021) (denied because plaintiff tried to directly enjoin the President and did not have a ripe claim).

This case was filed by Feds for Medical Freedom, Local 918, and various individual plaintiffs on December 21. Dkt. 1. The next day, the plaintiffs moved for a preliminary injunction against both mandates. *See* Dkt. 3. At a scheduling conference on January 4, the court announced it would not consider preliminary relief on Executive Order No. 14042 while the nationwide injunction was in effect. Dkt. 14, Hrg. Tr. 7:8-8:11. The court then convened a telephonic oral argument on January 13, shortly before the Supreme Court ruled on the OSHA and healthcare-worker mandates. *See* Dkt. 31. At that hearing, both sides agreed that the soonest any plaintiff might face discipline would be January 21. Dkt. 31, Hrg. Tr. 4:11-5:5.

II

Jurisdiction

The government² mounts two challenges to the court's jurisdiction: that the Civil Service Reform Act precludes review and that the plaintiffs' claims are not ripe.

1. Civil Service Reform Act

“Under the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. § 1101 *et seq.*, certain federal employees may obtain administrative and judicial review of specified adverse employment actions.” *Elgin v. Dep't of Treasury*, 567 U.S. 1, 5 (2012). The government maintains that the CSRA, by providing an exclusive means of relief, precludes the plaintiffs' claims in this case. Dkt.

² Throughout this memorandum opinion, the court will refer to all the defendants, collectively, as “the government.”

21 at 8-12. Specifically, the government argues that by challenging the vaccine mandate, the plaintiffs are disputing a “significant change in duties, responsibilities, or working conditions,” which is an issue exclusively within the province of the CSRA. *Id.* at 11 (quoting 5 U.S.C. § 2302(a)(2)(A)(xii)).

Unfortunately, the CSRA does not define “working conditions.” But the interpretation that courts have given that term would not encompass a requirement that employees subject themselves to an unwanted vaccination. Rather, “these courts have determined that the term ‘working conditions’ generally refers to the daily, concrete parameters of a job, for example, hours, discrete assignments, and the provision of necessary equipment and resources.” *Turner v. U.S. Agency for Glob. Media*, 502 F. Supp. 3d 333, 367 (D.D.C. 2020).

The government also argues that the CSRA applies “to hypothetical removals or suspensions.” Dkt. 21 at 11 (citing 5 U.S.C. § 7512). But, contrary to the government’s suggestion, the statute says nothing about “hypothetical” adverse employment actions. *See* 5 U.S.C. § 7512. Rather, it applies to actual discipline, whether that be firings, suspensions, reductions in pay, or furloughs. *See id.* Indeed, neither the Merit Systems Protection Board (the administrative body charged with implementing the CSRA) nor the Federal Circuit (which hears CSRA appeals) has jurisdiction until there is an actual adverse employment action.³ *Es-*

³ The government relies on two Fifth Circuit cases as support for its contention that the CSRA applies to the plaintiffs’ claims in this case. But in both of those cases, unlike this one, the plaintiffs had already suffered an adverse employment action and were not seeking prospective relief. *See Rollins v. Marsh*, 937 F.2d 134, 136

parraguera v. Dep't of the Army, 981 F.3d 1328, 1337-38 (Fed. Cir. 2020).

Finally, central to the Supreme Court's holding in *Elgin* was the idea that employees must be afforded, whether under the CSRA or otherwise, "meaningful review" of the discipline they endure. *Elgin*, 567 U.S. at 10. But requiring the plaintiffs to wait to be fired to challenge the mandate would compel them to "to bet the farm by taking the violative action before testing the validity of the law." *Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 490 (2010) (cleaned up). As the Fifth Circuit has held, the choice between one's "job(s) and their jab(s)" is an irreparable injury. *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021). To deny the plaintiffs the ability to challenge the mandate pre-enforcement, in district court, is to deny them meaningful review. The CSRA does not deprive the court of jurisdiction over these claims.

(5th Cir. 1991); *Broadway v. Block*, 694 F.2d 979, 980-81 (5th Cir. 1982). Moreover, the D.C. Circuit has held repeatedly that pre-enforcement challenges to government-wide policies—such as the mandates at issue here—do not fall within the scheme of the CSRA. See, e.g., *Nat'l Treasury Emps. Union v. Devine*, 733 F.2d 114, 117 n.8 (D.C. Cir. 1984) (allowing "preenforcement judicial review of rules" over CSRA objections); *Nat'l Fed'n of Fed. Emps. v. Weinberger*, 818 F.2d, 935, 940 n.6 (D.C. Cir. 1987) (discussing the right of federal employees to seek injunctive relief through the courts where agencies cannot act); *Nat'l Treasury Emps. Union v. Horner*, 854 F.2d 490, 497 (D.C. Cir. 1988) (allowing judicial review for employees who did not have access to the Merit Systems Protection Board).

2. Ripeness

The government also argues that the court lacks jurisdiction because none of the plaintiffs' claims are ripe. *See* Dkt. 21 at 12-14. Some of the plaintiffs' claims—those who have asserted a religious or medical exemption from the mandate—are indeed at least arguably unripe. *See Rodden*, 2021 WL 5545234, at *2 (the claims of plaintiffs whose exemption claims remain unresolved are as yet “too speculative”).⁴ But the government insists that even plaintiffs who have not claimed exemptions do not have ripe claims because “federal employees have ample opportunities to contest any proposed suspension or removal from employment through a multi-step administrative process.” Dkt. 21 at 13.

The government pushes the ripeness doctrine too far. Absent a valid exemption request, at least some plaintiffs face an inevitable firing. *See, e.g.*, Dkt. 35, Exhibit 39 at 4 (federal employer claiming that employee's failure to provide evidence that he is fully vaccinated “will not be tolerated”). The court does not have to speculate as to what the outcome of the administrative process will be. Many plaintiffs have not only declined to assert any exemption but have also submitted affidavits swearing they will not. The court takes them at their

⁴ There is some dispute as to whether some plaintiffs who have asked for an exemption are in danger of being disciplined even while their exemption requests are still pending. Though in *Rodden* this court ruled that plaintiffs who had claimed exemptions did not yet face imminent harm, that ruling was based largely on the specific representations of the agencies for which those plaintiffs worked that there would be no discipline before the exemption claims were resolved. But because there are plaintiffs here who have not claimed exemptions, the court need not sort out that dispute.

word. Many of these plaintiffs already have received letters from their employer agencies suggesting that suspension or termination is imminent, have received letters of reprimand, or have faced other negative consequences. Dkt. 3, Exhibits 15-18, 20), 26-27. To be ripe, the threat a plaintiff faces must be “actual and imminent, not conjectural or hypothetical.” *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). And in the context of preliminary relief, “a plaintiff must show that irreparable injury is not just possible, but likely.” *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2176 (2020) (Thomas, J., dissenting). Because at least some of the plaintiffs have met that burden, the government’s ripeness allegations are unfounded. The court has jurisdiction.

III

Injunctive Relief

A preliminary injunction is “an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Id.* at 20.

1. Threat of irreparable injury

Because injunctive relief is an extraordinary tool to be wielded sparingly, the court should be convinced the plaintiffs face irreparable harm before awarding it. *See Booth v. Galveston Cnty*, No. 3:18-CV-00104, 2019 WL 3714455, at *7 (S.D. Tex. Aug. 7, 2019), *R&R*

adopted as modified, 2019 WL 4305457 (Sept. 11, 2019). The court is so convinced.

As noted above, the Fifth Circuit has already determined that the Hobson’s choice employees face between “their job(s) and their jab(s)” amounts to irreparable harm. *OSHA*, 17 F.4th at 618. Regardless of what the conventional wisdom may be concerning vaccination, no legal remedy adequately protects the liberty interests of employees who must choose between violating a mandate of doubtful validity or consenting to an unwanted medical procedure that cannot be undone.

The Fifth Circuit has also held that the reputational injury and lost wages employees experience when they lose their jobs “do not necessarily constitute irreparable harm.” *Burgess v. Fed. Deposit Ins. Corp.*, 871 F.3d 297, 304 (5th Cir. 2017). But when an unlawful order bars those employees from significant employment opportunities in their chosen profession, the harm becomes irreparable. *Id.*

The plaintiffs have shown that in the absence of preliminary relief, they are likely to suffer irreparable harm.

2. Likelihood of success on the merits

The court does not decide today the ultimate issue of whether the federal-worker mandate is lawful. But to issue a preliminary injunction, it must address whether the claim is likely to succeed on the merits. The plaintiffs’ arguments fall into two categories: (1) that the President’s action was *ultra vires* as there is no statute authorizing him to issue the mandate and the inherent authority he enjoys under Article II is not sufficient, and (2) that the agencies’ implementation of his order vio-

lates the Administrative Procedures Act (APA).⁵ Each argument will be addressed in turn.

a. *Ultra vires*

• **Statutory authority**

The government points to three statutory sources for the President’s authority to issue the federal-worker mandate: 5 U.S.C. §§ 3301, 3302, and 7301. None of them, however, does the trick.

Section 3301, by its own terms, applies only to “applicants” seeking “admission . . . into the civil service.” 5 U.S.C. § 3301. The statutory text makes no reference to current federal employees (like the plaintiffs). And other courts have already held that whatever authority the provision does provide is not expansive enough to include a vaccine mandate. *See, e.g., Georgia*, 2021 WL 5779939, at *10; *Kentucky v. Biden*, No. 3:21-CV-55, 2021 WL 5587446, at *7 (E.D. Ky. Nov.

⁵ The government maintains that the plaintiffs cannot challenge the mandate as *ultra vires*, leaving the APA as their only vehicle to attack it. An action is not *ultra vires*, the government argues, unless the President “acts ‘without any authority whatever.’” Dkt. 21 at 25 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101-02 n.11 (1984) (cleaned up)). “Because the ‘business’ of the ‘sovereign’ certainly encompasses issuing [this] kind of directive,” the government contends, there is no room for *ultra vires* review. Dkt. 21 at 25-26. But the government’s argument misinterprets the law concerning judicial review of presidential action: executive orders are reviewable outside of the APA. *See Franklin v. Massachusetts*, 505 U.S. 788, 828 (1992) (Scalia, J., concurring) (“[r]eview of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President’s directive”); *see also Halderman*, 465 U.S. at 101 n.11 (“[A]n *ultra vires* claim rests on the officer’s lack of delegated power.”) (citation omitted).

30, 2021), *aff'd*, No. 21-6147, 2022 WL 43178 (6th Cir. Jan. 5, 2022).

Section 3302 provides that the “President may prescribe rules governing the competitive service.” 5 U.S.C. § 3302. That language sounds broad until one reads the next sentence: “The rules shall provide, as nearly as conditions of good administration warrant, for . . . (1) necessary exceptions of positions from the competitive service; and (2) necessary exceptions from the provisions of sections 2951, 3304(a), 3321, 7202, and 7203 of this title.” *Id.* When the cross-referenced provisions are checked, it becomes evident that the “rules” the President may prescribe under § 3302 are quite limited. For example, he may exempt certain employees from civil-service rules and from certain reports and examinations, and he may prohibit marital and disability discrimination within the civil service. But not even a generous reading of the text provides authority for a vaccine mandate.

The final statutory authority on which the government relies is § 7301, which provides in its entirety: “The President may prescribe regulations for the conduct of employees in the executive branch.” 5 U.S.C. § 7301. According to the government, “the act of becoming vaccinated” is “plainly ‘conduct’” within the meaning of the statute. Dkt. 21 at 27.

But the plaintiffs argue that rather than regulate “conduct,” the federal-worker mandate compels employees to assume a vaccinated “status,” and “one that is untethered to job requirements, no less.” Dkt. 3 at 12. Moreover, the plaintiffs contend, even if becoming vaccinated is “conduct,” it is not “workplace conduct,”

which is all that § 7301 reasonably authorizes the President to regulate. Dkt. 23 at 12.

Assuming that getting vaccinated is indeed “conduct,” the court agrees with the plaintiffs that under § 7301, it must be *workplace* conduct before the President may regulate it. Any broader reading would allow the President to prescribe, or proscribe, certain private behaviors by civilian federal workers outside the context of their employment. Neither the plain language of § 7301 nor any traditional notion of personal liberty would tolerate such a sweeping grant of power.

So, is submitting to a COVID-19 vaccine, particularly when required as a condition of one’s employment, workplace conduct? The answer to this question became a lot clearer after the Supreme Court’s ruling in *NFIB* earlier this month. There, the Court held that the Occupational Safety and Health Act of 1970, 29 U.S.C. § 15 *et seq.*, allows OSHA “to set workplace safety standards,” but “not broad public health measures.” *NFIB*, 595 U.S. ___ slip op. at 6. Similarly, as noted above, § 7301 authorizes the President to regulate the *workplace* conduct of executive-branch employees, but not their conduct in general. *See* 5 U.S.C. § 7301. And in *NFIB*, the Supreme Court specifically held that COVID-19 *is not* a workplace risk, but rather a “universal risk” that is “no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases.” *NFIB*, 595 U.S. — slip op. at 6. Accordingly, the Court held, requiring employees to get vaccinated against COVID-19 is outside OSHA’s ambit. *Id.* Applying that same logic to the President’s authority under § 7301 means he cannot re-

quire civilian federal employees to submit to the vaccine as a condition of employment.

The President certainly possesses “broad statutory authority to regulate executive branch employment policies.” *Serv. Emps. Int’l Union Loc. 200 United v. Trump*, 419 F. Supp. 3d 612, 621 (W.D.N.Y. 2019), *aff’d*, 975 F.3d 150 (2d Cir. 2020). But the Supreme Court has expressly held that a COVID-19 vaccine mandate is not an employment regulation. And that means the President was without statutory authority to issue the federal-worker mandate.

- **Constitutional authority**

Though the government argues §§ 3301, 3302, and 7301 evince the authority the President wields to regulate the federal workforce, it also contends that statutory authorization is wholly unnecessary. Dkt. 21 at 26-27. Article II, the government maintains, gives the President all the power he needs. *Id.* But the government points to no example of a previous chief executive invoking the power to impose medical procedures on civilian federal employees. As Chief Judge Sutton of the Sixth Circuit has noted, no arm of the federal government has ever asserted such power. *See In re MCP No. 165, OSHA Interim Final Rule: COVID-19 Vaccination & Testing*, 20 F.4th 264, 289 (6th Cir. 2021) (Sutton, C.J., dissenting from denial of initial rehearing en banc) (“A ‘lack of historical precedent’ tends to be the most ‘telling indication’ that no authority exists.”).

The government relies on *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010), but that case concerns certain “Officers of the United States who exercise significant authority pursu-

ant to the laws of the United States,” not federal employees in general. *Id.* at 486 (cleaned up). Moreover, the *Free Enterprise Fund Court* itself acknowledges that the power Article II gives the President over federal officials “is not without limit.” *Id.* at 483.

And what is that limit? As the court has already noted, Congress appears in § 7301 to have limited the President’s authority in this field to workplace conduct. But if the court is wrong and the President indeed has authority over the conduct of civilian federal employees in general—in or out of the workplace—“what is the logical stopping point of that power?” *Kentucky v. Biden*, No. 21-6147, 2022 WL 43178, at *15 (6th Cir. Jan. 5, 2022). Is it a “*de facto* police power”? *Id.* The government has offered no answer—no limiting principle to the reach of the power they insist the President enjoys. For its part, this court will say only this: however extensive that power is, the federal-worker mandate exceeds it.

b. APA review

The plaintiffs argue that even if the President had the authority to issue the federal-worker mandate, the agencies have violated the APA by arbitrarily and capriciously implementing it. Dkt. 3 at 16-25. While the court need not reach this question, as it has already determined the federal-worker mandate exceeds the President’s authority, the government correctly argues that, if the President had authority to issue this order, this case seems to present no reviewable agency action under the APA. The Supreme Court held in *Franklin v. Massachusetts* that executive orders are not reviewable under the APA. 505 U.S. 788, 800-01 (1992). But the plaintiffs seem to argue that *Franklin* no longer applies

once an agency implements an executive order—the order itself is then vulnerable to review. That is not the law. To hold otherwise would contravene the thrust of the Supreme Court’s holding in *Franklin* by subjecting almost every executive order to APA review.

The plaintiffs are right to argue that agency denials of religious or medical exemptions, additional vaccination requirements by agencies apart from the federal-worker mandate, or other discretionary additions to the executive order would likely be reviewable under the APA’s arbitrary-and-capricious standard. But the plaintiffs have not challenged any discretionary agency action—only the implementation of the federal-worker mandate itself.⁶ Accordingly, there is nothing for the court to review under the APA.

3. Balance of equities and the public interest

Finally, the court weighs the plaintiffs’ interest against that of the government and the public. When the government is the party against whom an injunction is sought, the consideration of its interest and that of the public merges. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

The government has an undeniable interest in protecting the public against COVID-19. Through the federal-worker mandate, the President hopes to slow the virus’s spread. But an overwhelming majority of the federal workforce is already vaccinated. According

⁶ The court is convinced that the best reading of the APA in light of *Franklin* is to allow APA review only when the challenged action is discretionary. See William Powell, *Policing Executive Teamwork: Rescuing the APA from Presidential Administration*, 85 Mo. L. REV. 71, 121 (2020).

to a White House press release, even for the federal agency with the lowest vaccination rate, the portion of employees who have received at least one COVID-19 vaccine dose exceeds 88 percent. OFF. OF MGMT. & BUDGET, *Update on Implementation of COVID-19 Vaccination Requirement for Federal Employees* (Dec. 9, 2021).⁷ The government has not shown that an injunction in this case will have any serious detrimental effect on its fight to stop COVID-19. Moreover, any harm to the public interest by allowing federal employees to remain unvaccinated must be balanced against the harm sure to come by terminating unvaccinated workers who provide vital services to the nation.

While vaccines are undoubtedly the best way to avoid serious illness from COVID-19, there is no reason to believe that the public interest cannot be served via less restrictive measures than the mandate, such as masking, social distancing, or part- or full-time remote work. The plaintiffs note, interestingly, that even full-time remote federal workers are not exempt from the mandate. Stopping the spread of COVID-19 will not be achieved by overbroad policies like the federal-worker mandate.

Additionally, as the Fifth Circuit has observed, “[t]he public interest is also served by maintaining our constitutional structure and maintaining the liberty of individuals to make intensely personal decisions according to their own convictions.” *OSHA*, 17 F.4th at 618. The court added that the government has no legitimate interest in enforcing “an unlawful” mandate. *Id.* All in all, this court has determined that the balance of the eq-

⁷ Available at <https://www.whitehouse.gov/omb/briefing-room/2021/12/09/update-on-implementation-of-covid-%e2%81%a019-vaccination-requirement-for-federal-employees/>.

unities tips in the plaintiffs' favor, and that enjoining the federal-worker mandate is in the public interest.

IV

Scope

The court is cognizant of the “equitable and constitutional questions raised by the rise of nationwide injunctions.” *Dep’t of Homeland Sec. v. New York*, 140 S. Ct. 599, 601 (2020) (Gorsuch, J., concurring); *see also Trump v. Hawaii*, 138 S. Ct. 2393, 2428-29 (2018) (Thomas, J., concurring). But it does not seem that tailoring relief is practical in this case. The lead plaintiff, Feds for Medical Freedom, has more than 6,000 members spread across every state and in nearly every federal agency, and is actively adding new members. The court fears that “limiting the relief to only those before [it] would prove unwieldy and would only cause more confusion.” *Georgia*, 2021 WL 5779939, at *12. So, “on the unique facts before it,” the court believes the best course is “to issue an injunction with nationwide applicability.” *Id.*

* * *

The court GRANTS IN PART and DENIES IN PART the plaintiffs' motion for a preliminary injunction. Dkt. 3. The motion is DENIED as to Executive Order 14042, as that order is already subject to a nationwide injunction. The motion is GRANTED as to Executive Order 14043. All the defendants, except the President, are thus enjoined from implementing or enforcing Executive Order 14043 until this case is resolved on the merits. The plaintiffs need not post a bond.

157a

Signed on Galveston Island this 21st day of Jan, 2022.

/s/ JEFFREY VINCENT BROWN
JEFFREY VINCENT BROWN
UNITED STATES DISTRICT JUDGE

158a

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22-40043

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

Filed: June 27, 2022

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 3:21-CV-356

ON PETITION FOR REHEARING EN BANC
(Opinion April 7, 2022, 5 CIR., 2022, 30 F.4th 503)

Before RICHMAN, *Chief Judge*, and JONES, SMITH,
STEWART, DENNIS, ELROD, SOUTHWICK, HAYNES,

GRAVES, HIGGINSON, COSTA, WILLETT, HO, DUNCAN,
ENGELHARDT, OLDHAM, and WILSON, *Circuit Judges*.

PER CURIAM:

A member of the court having requested a poll on the petition for rehearing en banc, and a majority of the circuit judges in regular active service and not disqualified having voted in favor,

IT IS ORDERED that this cause shall be reheard by the court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs. Pursuant to 5th Circuit Rule 41.3, the panel opinion dated April 7, 2022, is VACATED.

APPENDIX G

1. 5 U.S.C. 3301

Civil service; generally

The President may—

(1) 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;

(2) ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought; and

(3) appoint and prescribe the duties of individuals to make inquiries for the purpose of this section.

2. 5 U.S.C. 3302 provides:

Competitive service; rules

The President may prescribe rules governing the competitive service. The rules shall provide, as nearly as conditions of good administration warrant, for—

(1) necessary exceptions of positions from the competitive service; and

(2) necessary exceptions from the provisions of sections 2951, 3304(a), 3321, 7202, and 7203 of this title.

161a

3. 5 U.S.C. 7301 provides:

Presidential regulations

The President may prescribe regulations for the conduct of employees in the executive branch.