IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FEDS FOR MEDICAL FREEDOM, *et al.*,

Plaintiffs-Appellees,

v. No. 22-40043

JOSEPH R. BIDEN, JR., in his official capacity as President of the United States, *et al.*,

Defendants-Appellants.

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Amici Curiae America's Future, Inc., Center for Medical Freedom, U.S. Constitutional Rights Legal Defense Fund, Leadership Institute, Conservative Legal Defense and Education Fund, Eagle Forum Foundation, Eagle Forum, Fitzgerald Griffin Foundation, Downsize DC Foundation, DownsizeDC.org, and Virginia Delegate Dave LaRock hereby move for leave to file a brief *amicus curiae* in support of Plaintiffs-Appellees. It is hereby stated as follows:

1. All parties consent to the filing of this *amicus* brief.

2. As stated more fully in the attached brief, *amici curiae* have extensive experience with respect to the issues presented by this case, and have an significant interest in the outcome of this case. These *amici* have filed other

amicus curiae briefs in cases involving government mandates of COVID vaccines, including one in the U.S. Supreme Court in *NFIB v. OSHA* in support of a stay of request for a stay,[1] and another in support of a petition for certiorari in *Missouri v. Biden*, involving a multi-state challenge to a COVID vaccine mandate by the Center for Medicare and Medicaid Services on a broad variety of healthcare facilities.[2] *Amici* believe that this brief will be of assistance to the Court in its consideration of this case.

3. This *amicus* brief is timely, as it is being filed within seven days of Plaintiffs-Appellees' supplemental brief. Thus, it is believed that no party will be prejudiced by the filing of this brief.

WHEREFORE, we respectfully request that this Court grant leave to file an *amicus curiae* brief in support of Plaintiffs-Appellees.

Respectfully submitted,

/s/ William J. Olson

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[1] Brief *Amicus Curiae* of Center for Medical Freedom, *et al*., *NFIB v. Dept. of Labor*, U.S. Supreme Court, Nos. 21A244 & 21A247 (Dec. 30, 2021).

[2] Brief *Amicus* Curiae of America's Future, *et al.*, *Missouri v. Biden*, U.S. Supreme Court, No. 21-1463 (June 21, 2022).

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September 2, 2022

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CERTIFICATE OF COMPLIANCE WITH RULE 32(g)

IT IS HEREBY CERTIFIED:

1. That the foregoing Motion for Leave to File Brief *Amici Curiae* complies with the type-volume limitation of Rule 27(d)(2)(A), Federal Rules of Appellate Procedure, because this motion contains 299 words, excluding the parts of the motion exempted by Rule 32(f).

2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using WordPerfect in 14-point Times New Roman.

/s/ William J. Olson
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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Motion for Leave to File Brief *Amici Curiae*, was made, this 2nd day of September 2022, by the Court's Case Management/ Electronic Case Files system upon the attorneys for the parties.

/s/ William J. Olson
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No. 22-40043

In the
United States Court of Appeals for the Fifth Circuit

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

v.

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

On Appeal from the United States District Court
for the Southern District of Texas
No. 3:21-cv-356
Hon. Jeffrey Vincent Brown, Judge

Brief *Amicus Curiae* of America's Future, Center for Medical Freedom, U.S. Constitutional Rights Legal Defense Fund, Leadership Institute, Conservative Legal Defense and Education Fund, Eagle Forum Foundation, Eagle Forum, Fitzgerald Griffin Foundation, Downsize DC Foundation, DownsizeDC.org, and Virginia Delegate Dave LaRock in Support of Plaintiffs-Appellees on Rehearing *En Banc*

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September 2, 2022

Case No. 22-40043

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FEDS FOR MEDICAL FREEDOM, *et al.*

Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, JR., *et al.*,

Defendants-Appellants,

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Feds for Medical Freedom, *et al.*, Plaintiffs-Appellees

Joseph R. Biden, Jr., *et al.*, Defendants-Appellants

America's Future, Center for Medical Freedom, U.S. Constitutional Rights Legal Defense Fund, Leadership Institute, Conservative Legal Defense and Education Fund, Eagle Forum Foundation, Eagle Forum, Fitzgerald Griffin Foundation, Downsize DC Foundation, DownsizeDC.org, Virginia Delegate Dave LaRock, *Amici Curiae*.

William J. Olson, Jeremiah L. Morgan, and Robert J. Olson, Rick Boyer, Kerry L. Morgan, Gerald R. Thompson, Patrick McSweeney counsel for *Amici Curiae*.

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), and 5th Circuit Rule 28.2.1, it is hereby certified that *amici curiae* America's Future, U.S. Constitutional Rights Legal Defense Fund, Leadership Institute, Conservative Legal Defense and Education Fund, Eagle Forum Foundation, Eagle Forum, Fitzgerald Griffin Foundation, Downsize DC Foundation, and DownsizeDC.org, are non-stock, nonprofit corporations, have no parent companies, and no person or entity owns them or any part of them.

/s/ William J. Olson
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INTEREST OF *AMICI CURIAE*[1]

America's Future, U.S. Constitutional Rights Legal Defense Fund, Leadership Institute, Conservative Legal Defense and Education Fund ("CLDEF"), Eagle Forum Foundation, Eagle Forum, Fitzgerald Griffin Foundation, Downsize DC Foundation, and DownsizeDC.org, are nonprofit organizations which work to defend constitutional rights and protect liberties. Center for Medical Freedom is a project of CLDEF. Virginia Delegate Dave LaRock is a member of the Virginia House of Delegates.

Some of these *amici* filed *amicus* briefs in two earlier challenges to COVID-19 shot mandates:

- Brief *Amicus Curiae* of Center for Medical Freedom, *et al.* (Dec. 30, 2021), in *National Federation of Independent Business v. Department of Labor*, 142 S. Ct. 661 (2022); and

- Brief *Amicus Curiae* of America's Future, *et al.* (June 21, 2022), in *Missouri v. Biden*, U.S. Supreme Court, No. 21-1463, in support of Petition for Certiorari (pending).

[1] All parties have consented to the filing of this brief. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money intended to fund preparing or submitting the brief. No person other than *amici*, their members or their counsel contributed money intended to fund preparing or submitting this brief.

STATEMENT OF THE CASE

Plaintiffs-Appellees include individual federal employees and two groups of federal employees. Defendants-Appellants include President Joseph Biden and numerous senior federal departments officials. *Feds for Medical Freedom v. Biden*, 2022 U.S. Dist. LEXIS 11145 at *7 (S.D. Tex. 2022) ("*Feds v. Biden*").

Plaintiffs filed suit in the U.S. District Court for the Southern District of Texas on December 21, 2021 (*id.*) to block enforcement of Executive Order 14043, "a presidential mandate that all federal employees consent to vaccination against COVID-19 or lose their jobs." *Id.* at *5. EO 14043 was later codified at 86 *Fed. Reg.* 50989 ("Mandate").

On January 21, 2022, the district court issued a nationwide injunction against enforcement of the COVID injection mandate. *Feds v. Biden* at *22. The court explained its understanding of the state of the law: "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." *Id.* at *16-*17.

On appeal by the government, a panel of this court reversed and dissolved the district court injunction. The court never reached the issue of whether

President had authority to issue a nationwide COVID injection mandate for all federal employees. Rather, it ruled that the Civil Service Reform Act of 1978 ("CSRA"), 5 U.S.C. § 1101, *et seq.*, established the only avenue for federal employees to seek redress of employment-related grievances, and under the CSRA, federal employees must appeal adverse agency employment determinations to the Merit Systems Protection Board ("MSPB"), whose decision may be reviewed only in the U.S. Court of Appeals for the Federal Circuit. *Feds for Med. Freedom v. Biden,* 30 F.4th 503, 507 (Apr. 7, 2022) (vacated) (*Feds v. Biden II*). *Id.* According to the panel decision, no other federal courts have jurisdiction to adjudicate employment determinations of federal agencies, which included the President's Mandate. *Id.* at 511. On June 27, 2022, this Court granted rehearing *en banc*. *Feds for Med. Freedom v. Biden*, 37 F.4th 1093 (5th Cir. 2022).

STATEMENT

When Executive Order 14043 was issued on September 9, 2021 — nearly a full year ago — President Biden explained his reasons for his unprecedented mandate requiring that all federal executive branch employees receive dangerous and unproven medical treatment — the COVID-19 "vaccine" injection — or be

terminated. He explained it was based on "the best available data and science-based health measures," "a rapid rise in cases and hospitalization," a "nationwide public health emergency," and CDC findings. Executive Order 14043, sec. 1 (Sept. 9, 2021). Now, almost a full year later, we know one of two things is true: either the "science" relied on by President Biden was in grave error, or circumstances have changed radically. Even the Centers for Disease Control and Prevention ("CDC") has finally admitted that the COVID "vaccine" prevents neither infection with nor transmission of the virus. "CDC's COVID-19 prevention recommendations no longer differentiate based on a person's vaccination status because breakthrough infections occur … and persons who have had COVID-19 but are not vaccinated have some degree of protection against severe illness from their previous infection."[2] The "vaccine" provides only "a lesser degree of protection against asymptomatic and mild infection." *Id.* And any positive health effects are only temporary. "Being up to date with vaccination provides a transient period of increased protection against infection

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[2] Centers for Disease Control and Prevention, "Summary of Guidance for Minimizing the Impact of COVID-19 on Individual Persons, Communities, and Health Care Systems — United States, August 2022."

and transmission after the most recent dose, although protection can wane over time." *Id*.

In fact, just last night, on September 1, 2022, the author of the Executive Order, President Biden declared: "**today, COVID no longer controls our lives**."[3] But the Biden Executive Order mandating the COVID vaccine still controls the lives of federal workers.

These *amici* do not urge this Court affirm the district court's conclusion that the Executive Order is now unlawful because of changed circumstances, but rather because it was void *ab initio*. However, unlike some of the earlier judicial evaluations which sanctioned some "vaccine" mandates, this review will occur when crisis, fear, and emotion do not cloud reason. If emergencies, pandemics, and epidemics did not cloud the judgment of government officials, Justice Gorsuch would not have needed to remind us that: "Government is not free to disregard" constitutional rights in times of crisis. *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 69 (2020) (Gorsuch, J., concurring).

As the crisis has faded,"vaccine" mandates which once were deferred to have come under dispassionate scrutiny by the courts.

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[3] "Remarks by President Biden on the Continued Battle for the Soul of the Nation," *The White House* (Sept. 1, 2022).

In January 2022, the U.S. Supreme Court invalidated the Biden Administration's attempt to impose mandatory COVID "vaccinations" through the Occupational Safety and Health Administration ("the OSHA Mandate"). "It is telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind — addressing a threat that is untethered, in any causal sense, from the workplace. This 'lack of historical precedent,' coupled with the breadth of authority that the Secretary now claims, is a 'telling indication' that the mandate extends beyond the agency's legitimate reach." *Nat'l Fed'n of Indep. Bus. v. DOL, OSHA,* 142 S. Ct. 661, 666 (Jan. 13, 2022). The same is true in this case, for federal workers.

In February 2022, this Court granted an injunction against the U.S. Navy's denial of religious exemptions to the COVID "vaccine" requirement. *U.S. Navy Seals 1-26 v. Biden*, 27 F.4th 336 (5th Cir. Feb. 28, 2022). This Court found that the Navy had failed to show a compelling interest in forcible injections sufficient to override the plaintiffs' free exercise of religion. *Id*. at 352. "'[I]njunctions protecting First Amendment freedoms are always in the public interest.'" *Id*. at 353 (quoting *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 539 (5th Cir. 2013)).

In March 2022, an Ohio district court enjoined the Air Force from taking adverse employment action against religious objectors to the "vaccine." The court found that "[n]one of Defendants' stated interests constitute compelling interests justifying the substantial burden on Plaintiffs' religious liberties." *Doster v. Kendall*, 2022 U.S. Dist. LEXIS 59381 at *36 (S.D. Ohio, Mar. 31, 2022). The court further noted that "'it is always in the public interest to prevent the violations of a party's constitutional rights." *Id.* at 47 (quoting *Dahl v. Bd. of Trs. of Western Mich. Univ.*, 15 F.4th 728 (6th Cir., Oct. 7, 2021). On August 19, 2022 the court denied the government's motion for a stay pending appeal. *Doster v. Kendall*, 2022 U.S. Dist. LEXIS 149799 (S.D. Ohio Aug. 19, 2022).

In July 2022, in *Doe 1, et al. v. NorthShore University HealthSystem*, Case No. 1:21-cv-05683 in the Northern District of Illinois, the plaintiffs "reached a $10.3 million settlement with the Chicago-based NorthShore University HealthSystem after the hospital system fired hundreds of workers who claimed religious liberty exemptions....." C. Pandolfo, "Illinois hospital system to pay $10.3 million in settlement with workers over COVID-19 vaccine mandate," *TheBlaze.com* (Aug. 1, 2022).

Just a few days ago, the Superior Court of the District of Columbia rejected Mayor Muriel Bowser's vaccine mandate for government workers,

explaining: "The Supreme Court's ruling did not turn on whether the regulations imposed involved a private business or government employees. Instead, the Supreme Court emphasized the 'crucial distinction' between occupational risks and universal risks." *Fraternal Order of Police v. District of Columbia*, Case No. 2022 CA 000584 B, slip opinion at 12-13 (D.C. Super. Ct. Aug. 25, 2022) (emphasis added). The court held that mandating vaccines for COVID relates to a "general public health law," not an employment hazard, and that the executive could not impose it without express legislative authorization. "The power to issue a vaccine mandate must come from a legislative body." *Id.* at 13. The court ruled that "[w]orkplace safety and health standards can only address occupation-specific risks and hazards that employees face at work," not generalized public health risks faced by everyone. *Id.*

Increasingly, Americans have come to understood that they have been manipulated by the pharmaceutical industry and the government, as the COVID-19 "vaccines" are not really vaccines at all. For a century, vaccines have involved the administration of a dead or attenuated pathogen to trigger the body to develop an immunity. However, in 2021, both the dictionary and CDC definition of "vaccine" was changed to include the experimental gene therapy

used in all three COVID-19 shots to "sell" the COVID-19 shots to the public. Stefan Oelrich, President of Pharmaceuticals at Bayer, explained this rhetorical device at the World Health Summit:

> Ultimately, the mRNA vaccines are … gene therapy. I always like to say, if we had surveyed, two years ago, in the public, "would you be willing to take gene or cell therapy and inject it into your body?" we probably would have had a 95 per cent refusal rate. ["Bayer President: The mRNA Vaccines Are Gene Therapy," *Armstrong Economics* (Mar. 5, 2022).]

For this reason, these *amici* put the word "vaccine" in quotation marks or refer to it as a COVID-19 "shot." If healthcare facilities had been compelled to impose experimental "gene therapy" or a "drug" on their employees, there would be an even greater outcry — but this is exactly what the Biden Executive Order is requiring. These *amici* do not believe that even a true vaccine can be compelled by any government, but it would be a mistake for court to assume the COVID-19 shot is just another "vaccine."

ARGUMENT

I. THE CIVIL SERVICE REFORM ACT PRESENTS NO BAR TO PLAINTIFF'S SUIT.

There is no indication in the text of CSRA that the rules it establishes to apply to adverse actions taken against individual employees would apply to a constitutional challenge to the Biden Mandate applicable to all federal workers. CSRA establishes a system under which individual federal employees are to be evaluated based on their individual performance. "Employees should be retained on the basis of the adequacy of their performance." 5 U.S.C. § 2301(6). CSRA defines "unacceptable performance" on the basis of each employees doing his job. "'Unacceptable performance' means performance of an employee which fails to meet established performance standards in one or more critical elements of such employee's position." 5 U.S.C. § 4301(3). Refusal to be vaccinated is not a violation of any established performance standard.

A summary of the CSRA's purposes was entered into the Congressional Record when CSRA was introduced in the Senate. Among its purposes was to "provide greater employee protections" (124 *Cong. Rec.* 5477) not to eliminate protections. Executive branch agencies would be prohibited from, *inter alia*: "a. Discriminating against any employee" and "b. using official authority to coerce

political actions … or to retaliate for refusal….” 124 *Cong. Rec.* 5477. The procedural protections afforded federal employees under the CSRA were designed to be used in the context of individual employees facing discrete disputes with their agency. *See* 5 U.S.C. § 7513(b).

For purposes of everyday agency practice, the CSRA created a Merit Systems Protection Board (“MSPB”). 5 U.S.C. § 7513(d). “Once an employing agency finalizes an adverse action … the aggrieved employee may appeal to the Merit Systems Protection Board (‘MSPB’). *Id.* § 7513(d).” *Feds v. Biden II.* Adverse decisions of the MSPB were made eligible for judicial review by the Federal Circuit. 5 U.S.C. § 7703. However, nothing in the CSRA precludes judicial review of an unconstitutional, government-wide order by the President.

As the district court observed, no previous President ever asserted any power as extraordinary as mandating injections into the bodies of unwilling workers. Indeed, prior to 2021, “no arm of the federal government has ever asserted such power.” *Feds v. Biden* at *17.

The vacated panel opinion viewed this case as barred because the CSRA allows review of MSPB decisions only by the Federal Circuit. If a petitioner refused the mandate and was punished, and if back pay and reinstatement were

the only concerns, the Federal Circuit could grant relief. But many employees who take the COVID shot under coercion suffer the loss of their constitutional rights and possible injury or death — for which there can be no adequate monetary remedy. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

The vacated panel opinion placed great weight on *Elgin v. Dep't of the Treasury*, 567 U.S. 1 (2012). It noted that the Supreme Court stated "it is fairly discernible that Congress intended to deny [federal] employees an additional avenue of review in district court," and 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." *Feds v Biden II* (quoting *Elgin*, 567 U.S. at 12, 5).

But this case is dramatically different from *Elgin*, which dealt with employees challenging adverse employment actions **after** their imposition by an individual agency. Here, Petitioners challenged the President's order before any adverse action had occurred.

Second, the Petitioners in *Elgin* were challenging the constitutionality of a statute. The Court held that the CSRA preempted review of the statute's constitutionality outside of the Federal Circuit. Here, no statute is challenged. Instead, it is unilateral, unauthorized action by the President, in violation of the constitutional separation of powers.

Third, as Judge Barksdale pointed out in her dissent from the panel decision in this Court, 5 U.S.C. § 7513, covering "proposed" action against an employee by an agency (which can include "removal" from an employment position under the preceding Section 7512), deals with action against "an employee" by "an agency." The plain language of the statute simply cannot be read to cover imposition of mass employment requirements, or sanctions, by a presidential executive order. The statute clearly relates to individualized actions against individualized employees.

> 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. [*Feds v. Biden II* at 513 (Barksdale, J., dissenting).]

Finally, as the Supreme Court noted in *Elgin*, the Court recognizes a "presum[ption] that Congress does not intend to limit [district court] 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.'" *Elgin* at 15 (quoting *Free Enter. Fund v. Pub. Co Accounting Oversight Bd.*, 561 U. S. 477, 489 (2010)).

Unlike *Elgin*, all three of those elements are present here. If any Petitioners accepted the mandated injection to ensure they would not lose their jobs, there could be no meaningful relief.

Further, the suit is wholly collateral to any "statute's review provisions." No statute or agency determination is challenged in this suit. The entire focus of the suit is the request for an injunction against the seizure of Congress' legislative authority by a President. It is not the substantive process of the CSRA that Petitioners challenge, but the President's structural lack of authority to impose the Mandate at all.

Likewise, the constitutional claim at issue here is outside not only the expertise, but any authority, of any agency. Federal agencies are subordinate to the President, and have no ability to declare his actions unconstitutional or unenforceable.

The "comprehensive scheme" of the CSRA only makes this clearer. Section 7513(b) states:

> An employee against whom an action is proposed is entitled to … at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action[, and] a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer…. [5 U.S.C. § 7513(b).]

If an Executive Order is unilaterally imposed upon all covered federal workers, there is no "affidavit or documentary evidence" that could furnish a defense. The statutory language only clarifies that the CSRA is intended as a way for individualized disciplinary actions for agencies, and individualized defenses for individual employees. The question of a President's authority to impose employment conditions or punishments on all federal employees is "wholly collateral" to any termination action taken by an agency against an employee, and the CSRA framework is wholly inadequate to provide meaningful review.

II. THE PRESIDENT HAD NO AUTHORITY TO IMPOSE THE MANDATE.

In issuing Executive Order 14043 (86 *Fed. Reg.* 50989), President Biden cited three statutes as the sources of his authority to issue the Mandate: 5 U.S.C. §§ 3301, 3302 and 7301.

> "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…." 5 U.S.C.§ 3301.
>
> "The President may prescribe rules governing the competitive service." 5 U.S.C. § 3302.
>
> "The President may prescribe regulations for the conduct of employees in the executive branch." 5 U.S.C. § 7301.

The district court clearly explained why none of these statutes grants to the President the authority he claims. *See Feds v. Biden* at *13-14. Moreover, the Supreme Court has already determined that OSHA statutes governing the private workforce only refer to that workplace, not to unrelated public health requirements. *See Nat'l Fed'n of Indep. Bus.* at 665 ("The question, then, is whether the Act plainly authorizes the Secretary's mandate. It does not. The Act empowers the Secretary to set workplace safety standards, not broad public health measures.") The rule should be the same for the federal workplace. If the President can impose a requirement federal employees take this medical treatment, what could he not do, particularly since "[t]he government has offered

… no limiting principle to the reach of the power they insist the President enjoys.” *Feds v. Biden* at *18.

The district court posed a rhetorical question which deserves a brief comment. The court asked if “the President indeed has the authority over the conduct of civilian federal employees in general — in and out of the workplace … [i]s it a ‘*de facto* police power.’” *Id.* (citation omitted). The obvious answer to that rhetorical question is, of course, “no.”

This has been true for the history of our Republic. In 1824, Chief Justice John Marshall wrote for the Court that “[i]nspection laws, quarantine laws, health laws of every description,” are a part of “that immense mass of legislation, which embraces every thing within the territory of a State, **not surrendered to the general government**: all which can be most advantageously exercised by the States themselves.” *Gibbons v. Ogden*, 22 U.S. 1, 203 (1824) (emphasis added).

In 2014, Justice Thomas similarly explained:

> in our federal system … [t]he States have broad authority to enact legislation for the public good — what we have often called a “police power.” *United States v. Lopez*, 514 U.S. 549, 567, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995). The Federal Government, by contrast, has no such authority and “can exercise only the powers granted to it,” *McCulloch v. Maryland*, 17 U.S. 316, 4 Wheat. 316, 405, 4 L. Ed. 579 (1819)….” [*Bond v. United States*, 572 U.S. 844, 854 (2014).]

Devoid of any police power, as the Supreme Court long ago made clear, "[t]he President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad." *Id.* at 587. Nothing in the any act of Congress or in the text of the Constitution gives the President the right to interfere with the decision of any American — employee or not — to refuse medical treatment.

III. THE "UNCONSTITUTIONAL CONDITIONS DOCTRINE" BARS THE MANDATE.

"[The Supreme] Court has made clear that … even though the government may deny [a citizen a governmental] benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests.… This would allow the government to produce a result which [it] could not command directly. Such interference with constitutional rights is

impermissible." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (internal quotation omitted).

The government may not deny a benefit to a person on a basis that infringes on that person's constitutionally protected freedom. *U.S. v. American Library Ass'n, Inc.*, 539 U.S. 194, 210 (2003). Here, the government has unconstitutionally denied an employment benefit by conditioning that benefit on the surrender of the employee's Free Exercise of Religion. The First Amendment embodies James Madison's revolutionary vision that government has no jurisdiction or authority over, or right to control, matters of religion, often described as encompasing matters of conscience." The decision to take into one's body a substance that could alter its DNA — as designed by God — is among the most religiously offensive types of medical treatment that could be postulated.[4] *See* Section IV, *infra*.

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[4] A second aspect of DNA vaccines — their **gene-altering properties** — is even more troubling and remains unresolved. DNA vaccines, by definition, come with the risk of "integration of exogenous DNA into the host genome, which may cause severe mutagenesis and induced new diseases…." The permanent incorporation of synthetic genes into the recipient's DNA essentially **produces a genetically modified human being**, with unknown long-term effects. "COVID: Spearpoint for Rolling Out a "New Era" of High-Risk, Genetically Engineered Vaccines," *Children's Health Defense* (May 7, 2020).

The Court has enunciated a long list of constitutional freedoms that government cannot undermine through adverse employment actions against federal employees' religion and speech,[5] freedom of association,[6] the right against self-incrimination,[7] or racial or political party classifications.[8]

In addition, the Supreme Court has repeatedly held that government cannot strip a citizen of a property right in government employment without due process of law. "[C]onstitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." *Cramp v. Board of Public Instruction*, 368 U.S. 278, 288 (1961) (internal quotation omitted). "We have described 'the root requirement' of the Due Process Clause as being 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (internal citation omitted). "The right to

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[5] *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) (exercise of freedoms of religion of speech).

[6] *U.S. v. Robel*, 389 U.S. 258 (1967) (Communist party affiliation).

[7] *Lefkowitz v. Turley*, 414 U.S. 70 (1973) (refusal to waive the right against self-incrimination).

[8] *United Public Workers v. Mitchell*, 330 U.S. 75 (1947) (racial or political classifications).

due process is conferred, not by legislative grace, but **by constitutional guarantee.** While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." *Id*. at 541 (internal quotation omitted) (emphasis added). The government urges this Court to recognize no procedural safeguard from dismissal, and only a woefully inadequate review once an employee has been terminated.

IV. THE BIDEN EXECUTIVE ORDER VIOLATES THE LAW OF NATURE.

These *amici* challenge the assumption that government at any level — federal, state, or local — has the authority to mandate that anyone — including its employees — can be compelled to accept medical treatment or procedure of any and every kind. Thus, even if this court were to conclude that the President of the United States has the statutory authority to impose such a mandate, that authority would violate a jurisdictional limit on the power of any civil government to abridge the unalienable right to refuse medical intervention.

The Declaration of Independence, our Nation's Charter, sets out one of the most important limitations on the power of government — that "all men … are endowed by their Creator with certain unalienable Rights, that among these are

Life, Liberty and the pursuit of Happiness." From this simple statement we learn that the specified individual rights come from God, not government, rendering government powerless to alienate them. Those specified individual rights of "Life," "Liberty," and "the Pursuit of Happiness" are all violated by a mandate as to what goes into one's body. Especially when that medical product carries with it exactly what millions have long suspected — a horrific risk of death and serious bodily injury.[9]

The Declaration then makes clear the role of government with respect to those rights: "That to secure these rights, Governments are institute among Men, deriving their just powers from the consent of the government." Here, the Biden

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[9] The federal government's Vaccine Adverse Event Reporting System ("VAERS") data released by CDC "show 1,268,008 reports of adverse events from all age groups following COVID-19 vaccines, including **28,141 deaths** and **230,364 serious injuries** between Dec. 14, 2020, and May 13, 2022." M. Redshaw, "VAERS Data Show New Deaths, Injuries After COVID Vaccines," *Your News* (May 26, 2022) (emphasis added). The "vaccination mandate will not reliably protect the health of our …forces.… Instead, this mandate has the potential to generate both short and long-term incapacitating side effects within the age group that typifies Special Operations soldiers and contractors. Alternatively, it may increase the severity of COVID-19 in some fully vaccinated personnel who are later infected.…" Steven J. Hatfill, M.D., "COVID-18 Vaccine Mandates and the U.S. Military," *Journal of American Physicians and Surgeons*, vol. 27, no. 2 (Summer 2022). *See* O. Ionze & M. Guglin, "Myocarditis following COVID-19 vaccination in adolescents and adults: a cumulative experience of 2021," *Springer* (April 14, 2022) for the occurrence of myocarditis after COVID-19 vaccination in young men and women.

Executive Order works to deny God-given rights, not to secure them. The Executive Order is shameless and illegitimate exercise of arbitrary government intruding in an area of life completely outside the jurisdiction of government.

The law of nature is revealed in Holy Writ, which explains that the Creator God who made us charged each person with the duty of self-government. *Genesis* 2. The most basic unit of society is the individual, each a special creation of God (*see Psalm* 139:13-16) who is born with a mind and a conscience (*see Romans* 1:18-20; 2:14-15), and is therefore a separate decision-making unit of society (*see Deuteronomy* 24:16). Accordingly, self-government is the foundational unit of government. Each person, made in the image of God (*see Genesis* 1:27), is ultimately responsible for his own individual behavior. We all stand condemned or forgiven based on our own choice — no one else can do it for another. *See 2 Corinthians* 5:10.

To be sure, no person is being compelled by force of law to accept the Biden-mandated shot, as the employee is free to resign from employment to escape the Mandate. However, the legitimacy of the Mandate is not based on whether it can be avoided, but rather whether it is lawful according to the law of

nature. Because enforcement of the Mandate tramples that liberty of self-government, its enforcement is an arbitrary act of tyranny.

All natural rights, and all natural freedoms, are bestowed on individuals. There are no group rights or corporate freedoms, and no collective salvation. We each stand alone before God as a moral agent — and God fully expects us to govern ourselves accordingly, *i.e.*, as responsible moral agents. *See 1 Corinthians* 3:11-15; *Revelation* 20:12-15. This responsibility to God extends not only to matters of the mind (*e.g.*, religion and speech), but also extends to matters concerning our bodies and our health, including physical self-care and medical decisions.[10]

In the tradition of the American founding, all individual duties to God are exercised through rights that cannot be alienated. In the words of James Madison, "It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in

[10] *See* H.W. Titus, "Medical Licensure: Rendering to Caesar What is God's?", *Journal of Biblical Ethics in Medicine*, vol. 9, no. 1 (1996) ("One of those things [which did not belong to the king] was the practice of medicine, because medicine rightfully understood was intimately and inextricably intertwined with the spiritual life of man.").

order of time and in degree of obligation, to the claims of Civil Society."[11] It is self-evident that personal medical decisions are no different from freedom of the mind, in this respect, that is, as a natural right of all individuals as against any societal interests.

President Biden, in ordering "vaccine" mandates, opined, "This is not about freedom or personal choice,"[12] when of course that is exactly what this is all about. He also promised to "follow the science," but as the leader of a constitutional republic defined as "a government of laws and not of men," he should have followed the law instead. Our nation is neither founded on science, nor governed by science. Instead, it is founded on and governed by laws, including the laws of nature and nature's God.

In ordering "vaccine" mandates, the Executive Order defies that individuals are capable of self-government and responsible before God. Rather, it subjects people to a do-or-die type mandate: that is, "conform or be cast off"

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[11] J. Madison, "Memorial and Remonstrance" to the Honorable the General Assembly of the Commonwealth of Virginia (June 20, 1785), reprinted in 5 The Founders' Constitution at 82 (item # 43) (P. Kurland & R. Lerner, eds., U. of Chi.: 1987)

[12] Remarks by President Biden on Fighting the COVID-19 Pandemic (Sept. 9, 2021).

— "comply or be denied a livelihood." By a contrivance, that is, the purported "privilege" of being employed by the federal government, those employees have effectively been declared wards of the federal government. Thus, the age-old doctrine of *parens patriae* is taken to an absurd extreme, whereby the federal government deems itself entitled to act as the parent of government employees, as if they were small children.

Implicitly, a federal vaccine mandate assumes that employees lack the capacity to make their own healthcare decisions, to govern their own affairs, and to choose what is best for their personal health and medical care. It also assumes that the President, solely by virtue of that status, intrinsically knows best, what is medically sound and in the best medical interests of each person. Like a child or a ward of the government, individual consent is unnecessary, for the putative parent has full authority to make such medical decisions for them as though by decree based on the class they are in — without notice, hearing, or a showing of cause, and without any knowledge of the individual employee's medical history.

The Biden Executive Order puts our constitutional republic on a slippery legal slope. Under that rationale, who knows but that in the future, federal officials may desire to coerce the use of contraceptives or impose forced

sterilizations[13] for the "protection" and "benefit" of the federal welfare? How would such actions be sufficiently distinguished from forced "vaccinations," which are often deadly?[14]

The federal government is a government of limited and enumerated powers. Nothing in Article II extends power to the president to mandate a person either improve or degrade the health of their own body. Even if it were otherwise, nothing in the law of nature — upon which the Constitution is explicitly built and by which it is animated — extends to any civil official, any power to force a citizen to act contrary to either their faith or their natural rights.

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. [*W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).]

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[13] The U.S. Supreme Court has never overruled its decision in *Buck v. Bell*, 274 U.S. 200 (1927), upholding a state statute permitting compulsory sterilization of certain persons.

[14] Next, will the mere "privilege" of living under the protection of the government be sufficient to declare federal officials as the parents of us all?

V. THE BIDEN EXECUTIVE ORDER VIOLATES THE NUREMBERG CODE.

After World War II, the U.S. Military prosecuted German physician and SS officer Karl Brandt and 19 other medical doctors as war criminals for crimes against humanity in conducting medical experiments with prisoners, sentencing Brandt to death by hanging, which was carried out on June 2, 1948. *See United States v. Karl Brandt, et al.* (1946-47) (the "Doctors' Trial").[15] That Court's decision established what came to be called the Nuremberg Code: 10 principles governing medical experimentation on human subjects.

Although the legal force of this Code may be subject to debate, the Court should be aware that the Biden Executive Order violates these principles. Federal employees being directed to take the COVID-19 shot upon pain of dismissal cannot be said to have given their voluntary consent. Nor can they be said to have given informed consent when information about the dangers of the vaccine has been hidden from them, and the public.[16]

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[15] *See* documents at U.S. Holocaust Memorial Museum.

[16] *See* Dr. Naomi Wolf, "Dear Friends, Sorry to Announce a Genocide," Outspoken with Dr. Naomi Wolf (May 29, 2022). Data demonstrating the dangers of the "vaccines" broke through the "social media" ban on "disinformation" when the Mandate was being imposed. A. Berenson, "Vaccinated English adults under 60 are dying at twice the rate of unvaccinated

How could the Biden Mandate on federal employees be seen as valid under this Nuremberg Principle requiring voluntary consent?

> The **voluntary consent** of the human subject is absolutely essential. This means that the person involved should have legal capacity to give consent; should be so situated as to be able to exercise **free power of choice**, without the intervention of any element of force, fraud, deceit, **duress**, over-reaching, or other ulterior form of constraint or **coercion**; and should have **sufficient knowledge and comprehension** of the elements of the subject matter involved, as to enable him to make an **understanding and enlightened decision**. [*Id*. (emphasis added).]

The United States has a long and sad history of conducting experiments on its people, including the "Tuskegee Study of Untreated Syphilis in the Negro Male," conducted between 1932 and 1972 by the U.S. Public Health Service.

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people the same age," *The Burning Platform* (Nov. 20, 2021); D. Archibald, "UK Covid Vaccine Fatality Rates," *The Wentworth Report* (Nov. 26, 2021); D. Archibald, "The Alarming Result of the UK Vaccination Experiment," The Wentworth Report (Oct. 26, 2021). Increasingly, the Biden Administration's concealment of the risks of the "vaccine" are being revealed. *See, e.g.*, M. Makary, "The CDC — which is withholding information — has a hidden agenda," *New York Post* (Feb. 27, 2022) ("After the Food and Drug Administration inexplicably bypassed its expert advisory committee to authorize boosters for all young people, the CDC director overruled her own experts' down vote of the boosters-for-all proposal. That's the magic of a call from the White House. Two top FDA officials, including the agency's vaccine center head, **quit over White House pressure** to authorize boosters for the young. But after the **FDA and CDC** rammed through the recommendation, they **made sure the public wouldn't see the real-world data**. Despite repeated pleas to release all its data, the CDC only posted stats on boosters in people over age 50." (emphasis added).)

Another case came to light in *United States v. Stanley*, 483 U.S. 669 (1987), where the Supreme Court determined that a U.S. serviceman given LSD without his consent could not sue the U.S. Army for damages, but he was later awarded over $400,000 by Congress. *See* Private L. No. 103-8 (Oct. 25, 1994) (103d Cong.). The dissenting opinion of Justice O'Connor stated:

> No judicially crafted rule should insulate from liability the involuntary and unknowing **human experimentation** alleged to have occurred in this case … the United States military played an instrumental role in the criminal prosecution of Nazi officials who experimented with human subjects during the Second World War … and **the standards that the Nuremberg Military Tribunals developed** to judge the behavior of the defendants stated that the "**voluntary consent** of the human subject is absolutely essential…." [*Stanley* at 709-10 (O'Connor, J., dissenting) (emphasis added).]

President Biden's Mandate on federal employees constitutes economic coercion — the polar opposite of voluntary consent which the Nuremberg Principles were enshrined to protect.

CONCLUSION

For the reasons stated above, the district court injunction should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of America's Future, *et al.* in Support of Plaintiffs-Appellees on, was made, this 2nd day of September, 2022, by the Court's Case Management/ Electronic Case Files system upon the attorneys for the parties.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief *Amicus Curiae* of America's Future, *et al.* in Support of Plaintiffs-Appellees complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 6,396 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), as well as Circuit Rule 32.1, because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 18.0.0.200 in 14-point Times New Roman.

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