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 U.S. District Court for the Southern District of Texas, No. 3:21-cv-356, Hon. Jeffrey V. Brown presiding

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Consent Motion for Leave to File *Amicus Curiae* Brief and *Amicus Curiae* Brief of America's Frontline Doctors in Support of Plaintiffs/Appellees and for Affirmance of the District Court

Respectfully Submitted,

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September 2, 2022

CONSENT MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

INTEREST OF *AMICUS CURIAE*

Amicus Curiae is America's Frontline Doctors ("AFLDS"), a non-partisan, not-for-profit organization of hundreds of member physicians who come from across the country, representing a range of medical disciplines and practical experience on the front lines of medicine. AFLDS' programs focus on a number of critical issues including:

- Providing Americans with science-based facts about Covid-19;
- Protecting physician independence from government overreach;
- Combating Covid-19 with evidence-based approaches without compromising constitutional freedoms;
- Fighting medical cancel culture and media censorship;
- Advancing healthcare policies that protect the physician-patient relationship;
- Expanding Covid-19 treatment options for all Americans who need them; and
- Strengthening the voices of frontline doctors in the national healthcare conversation.

Each of AFLDS' member physicians is deeply committed to the guiding

principle of medicine: "FIRST, DO NO HARM." They gravely take their ethical obligations to their patients. It is axiomatic that a physician's duty is to his or her patient. AFLDS holds sacrosanct the relationship between doctor and patient where informed decisions are to be made, taking into consideration all of the factors relating to patient health, risks, co-morbidities, and circumstances.

For AFLDS member physicians, the practice of medicine is not simply a job. Neither is it merely a career. Rather, it is a sacred trust. It is a high calling that often requires a decade or more of highly focused sacrificial dedication to achieve.

A MATTER OF GREAT PUBLIC IMPORTANCE

America's Frontline Doctors ("Amicus" or "AFLDS") respectfully moves for leave to file the incorporated *amicus curiae* brief[1] with the United States Court of Appeals for the Fifth Circuit *en banc*, as *amicus curiae* in support of the plaintiffs' request for injunctive and declaratory relief in Feds for Medical Freedom et al v. Biden et al, 21-cv-00356, SDTX, filed on December 21, 2021. The United States Supreme Court accepted the filing of the *amicus* brief from AFLDS as well in *Nat'l Fed'n of Indep. Bus. v. OSHA,* 595 U.S.__, 142 S. Ct. 661 (2022). *See footnote 1*. Consent for the filing of this motion was sought from the parties on August 30th,

[1] This *amicus curiae* brief is largely drawn from the successful AFLDS *amicus curiae* brief recently filed in *Nat'l Fed'n of Indep. Bus. v. OSHA,* 595 U.S.__, 142 S. Ct. 661 (2022), authored by George R. Wentz, Jr. of the Davillier Law Group, New Orleans, Louisiana, and by Gregory J. Glaser, Copperopolis, California, which position prevailed in that case.

2022, and consent was courteously obtained on the same day from all parties in writing to a timely filed brief compliant with FRAP 29.

Permitting the filing of the proposed brief would offer an important perspective to this Court on a matter of great public importance: **It is the consensus of the medical community that the currently available experimental Covid-19 mRNA injections do not prevent the spread of SARS-CoV-2.** Relevant federal agencies have repeatedly acknowledged this consensus. Therefore, there is no scientific or legal justification for segregating injected and un-injected people. Indeed, since the Covid-19 injections do not confer immunity upon the recipients but are claimed to merely reduce the symptoms of the disease, they do not fall within the long-established definition of a vaccine at all. They are instead treatments and must be analyzed as such under the law.

Even if the President possessed the statutory and constitutional authority to issue the challenged provisions of the unconstitutional "Exec. Order No. 14043, Requiring Coronavirus Disease 2019 Vaccination for Federal Employees, 86 Fed. Reg. 50,989 (Sept. 9, 2021) [hereinafter federal employee mandate], now challenged before the Court, which the President does not, the substantive due process clauses of our federal Constitution would require the government to establish that the federal employee mandate is narrowly tailored to meet a compelling state interest. This is a standard it cannot meet. This is particularly true in light of the United States

Supreme Court's decision in *Nat'l Fed'n of Indep. Bus. v. OSHA,* 595 U.S.__, 142 S. Ct. 661 (2022), which struck down the OSHA's ETS vaccine mandate due to lack of legislative authorization. Similarly, the federal employee mandate also lacks legislative authorization, and therefore must fail as well under *Nat'l Fed'n of Indep. Bus. v. OSHA*.

Respectfully Submitted,

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Dated: September 2, 2022

CERTIFICATE OF SERVICE

I hereby certify that on September 2nd, 2022, I electronically filed the foregoing Consent Motion for Leave to File Amicus Curiae Brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit via the Court's CM/ECF system, which will automatically serve all counsel of record via CM/ECF notice.

s/ David A. Dalia
DAVID A. DALIA

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.,
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Amicus Curiae Brief of America's Frontline Doctors in Support of Plaintiffs/Appellees and for Affirmance of the District Court

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September 2, 2022

CORPORATE DISCLOSURE STATEMENT
CERTIFICATE OF INTERESTED PERSONS

Proposed *Amicus Curiae* is America's Frontline Doctors ("AFLDS"), a non-partisan, not-for-profit organization of hundreds of member physicians who come from across the country, representing a range of medical disciplines and practical experience on the front lines of medicine. AFLDS' programs focus on a number of critical issues discussed below. No publicly held company has a 10 percent or greater ownership interest in America's Frontline Doctors.

Pursuant to FRAP 26.1-1, counsel for proposed *Amicus Curiae* certifies that, to the best of their knowledge, the Certificate of Interested Persons filed by Plaintiffs-Appellees in their August 26TH, 2022 *En Banc* Brief for Appellees, contain a correct complete list of the people and entities that have an interest in the outcome of this appeal, other than the following additions from AFLDS:

Joey Gilbert

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SUMMARY OF ARGUMENT

It is the consensus of the medical community that the currently available experimental COVID-19 mRNA vaccine injections ("COVID-19 injections") do not prevent the spread of COVID-19. Relevant federal agencies have repeatedly acknowledged this consensus. Therefore, there is no scientific or legal justification for segregating injected and un-injected people.

Indeed, since the experimental COVID-19 mRNA injections do not confer immunity upon the recipients but are claimed to merely reduce the symptoms of the disease, they do not fall within the long-established definition of a vaccine. They are instead treatments and must be analyzed as such under the law.

Even if the President possessed the statutory and constitutional authority to issue the challenged provisions of the federal worker mandate now before the Court, which the President does not, the substantive due process clauses of our Constitution would require the government to establish that the federal employee mandate is narrowly tailored to meet a compelling state interest. This is a standard it cannot meet.

The challenged provisions of the federal employee mandate are completely unsupported by any local, state, or federal legislation or legislative action, as required by our Constitutions. Further, the challenged provisions of the federal employee mandate which seek to segregate the public based upon their private

medical histories violate the clear public accommodation provisions built into our Constitutions, which expressly prohibits discrimination in all public accommodations in our nation. The challenged provisions of the federal worker mandate are unconstitutional and illegal. There is no rational basis whatsoever for segregating injected and un-injected groups of people based on their private medical histories, where both groups can still acquire and transmit the virus. Such illegal segregation based on private medical history is completely pointless. As will be shown below, in addition to mounting serious mRNA-related adverse reaction injuries and deaths, the federal employee vaccine mandate violates express federal statutory law, 21 U.S. Code § 360bbb-3, implicates the Nuremberg Code as codified by 45 C.F.R. Part 46, and is a violation of the well established constitutional right to refuse medical treatment.

PRELIMINARY STATEMENT ON JURISDICTION

Plaintiffs/Appellees have submitted overwhelming jurisprudence showing that the Plaintiff employees should not be compelled to first exhaust their administrative remedies under the Civil Service Reform Act ("CSRA"), in response to an unconstitutional and, as shall be seen below, a dangerous "health mandate".

NFFE v. Weinberger, 818 F.2d 935, 940 (D.C. Cir. 1987), and *NTEU v. Devine*, 733 F.2d 114, 117 n.8 (D.C. Cir. 1984) are indeed controlling, and so *amicus* wholeheartedly adopts Plaintiffs/Appellees' well-founded arguments on

jurisdiction. This is indeed a powerful argument, as shown by the highly unusual granting of the rehearing *en banc* by this distinguished Court, and by the vacating of the panel opinion in this case.

This is particularly important when considering the adverse medical aspects of this "health mandate". Respectfully, this Honorable Court should consider that "time is of the essence" in this urgent medical matter, for both federal employers, and federal employees. CSRA procedures can be extensive and time-consuming. From the standpoint of a federal employer seeking to enforce mandatory experimental mRNA injections upon their employees, the employer wants the threshold constitutional issue resolved for everyone as quickly as possible, as the employer may believe (incorrectly, as will be seen), that the experimental mRNA injections will protect the workplace. And from the standpoint of the employee asserting his constitutional rights of bodily integrity, privacy, medical freedom of choice, and the right to refuse medical treatments, that employee wants the dangerous threat to his health and livelihood removed as quickly as possible, particularly where an employer's "vaccine deadline" might occur before the CSRA procedures might be completed. It is therefore good public policy and in everyone's best interests that this Honorable Court follow controlling authority and assert its inherent jurisdiction in this matter of vital public importance, as "time is of the essence". This is also consistent with FRCP 1, in securing "the just, speedy, and

inexpensive determination of every action and proceeding."

Furthermore, an examination of the 19th Century legislative histories of 5 U.S.C. §§ 3301, 3302, and 7301 fail to show any credible authority for Executive Order 14043. Courts "normally interpret[] a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020). Here, these appropriations laws upon which the executive order was based were enacted by Congress in 1872 and 1883. Congress first enacted the laws codified at 5 U.S.C. §§ 3301, 3302, and 7301 more than 140 years ago. Sections 3301 and § 7301 are based on § 9 of "An Act Making Appropriations for sundry civil Expenses of the Government for the fiscal Year ending June 30, eighteen hundred and seventy-two, and for other Purposes", 16 Stat. 495, 514, ch. 114. The genesis for §3302 is §2 of "An act to regulate and improve the civil service of the United States", 22 Stat. 403, ch. 27, enacted by Congress on January 16, 1883 (the Pendleton Civil Service Reform Act of 1883). See Senate Report 1380, 89th Congress, 2nd Session (Serial Set 12712-3).[1] There is absolutely no proof or indication that at that time Congress intended to authorize the President to impose vaccine mandates on any or all federal employees. Such a "vaccine mandate" is arguably outside of the scope of CSRA.

[1] https://ia903006.us.archive.org/5/items/PL89554V2/PL89554V2.pdf

ARGUMENT

A. Experimental COVID-19 mRNA injections do not create immunity. They are treatments, not vaccines.

The uncontroverted medical consensus is that existing COVID-19 injections do *not* prevent infection or transmission of the coronavirus, *i.e., they do not create immunity in the recipients.* This is admitted openly today, including by U.S. Health Agencies, which is why the CDC Director stated on CNN, "What the vaccines can't do anymore is prevent transmission." [2] Examples abound:

a. On August 11, 2022, the CDC surprised the nation when it announced that vaccinated persons and unvaccinated persons should now be treated the same, "regardless of vaccination status."[3] This recent action of the CDC motivated by new incoming data, underscores the intrusiveness and pointlessness of any "vaccine mandate".

b. NIAID Director Dr. Anthony Fauci to NPR: "We know now as a fact that [vaccinated people with Covid-19] are capable of transmitting the infection to someone else." [4]

c. Dr. Anthony Fauci on November 12, 2021, referring to the experience

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2 CNN. The Situation Room, interview with CDC Director Walensky. (August 5, 2021). https://twitter.com/CNNSitRoom/status/1423422301882748929

[3] https://www.cdc.gov/media/releases/2022/p0811-covid-guidance.html

[4] Stieg, C. "Dr. Fauci on CDC mask guidelines: 'We are dealing with a different virus now.'" (July 28, 2021). https://www.cnbc.com/2021/07/28/dr-fauci-on-why-cdc-changed-guidelines-delta-is-a-different-virus.html

of health officials regarding the injections:

> They are seeing a waning of immunity not only against infection but against hospitalization and to some extent death, which is starting to now involve all age groups. It isn't just the elderly. It's waning to the point that you're seeing more and more people getting breakthrough infections, and more and more of those people who are getting breakthrough infections are winding up in the hospital. [5]

d. WHO Chief Scientist Dr. Soumya Swaminathan: "At the moment I don't believe we have the evidence of any of the vaccines to be confident that it's going to prevent people from actually getting the infection and therefore being able to pass it on." [6]

e. Chief Medical Officer of Moderna Dr. Tal Zaks: "There's no hard evidence that it stops [the COVID-19 vaccinated] from carrying the virus transiently and potentially infecting others who haven't been vaccinated." [7]

f. The Surgeon General of the State of Florida, Dr. Joseph Ladapo, MD, PhD: "… the infections can still happen whether people are vaccinated or not. That's very obvious." [8]

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[5] Coleman, K (November 12, 2021). *Dr. Fauci Just Issued This Urgent Warning to Vaccinated People.* Yahoo News. https://www.yahoo.com/lifestyle/dr-fauci-just-issued-urgent-201846228.html

[6] Colson, T. "Top WHO scientist says vaccinated travelers should still quarantine, citing lack of evidence that COVID-19 vaccines prevent transmission." *Business Insider.* (December 29, 2020). https://www.businessinsider.com/who-says-no-evidence-coronavirus-vaccine-prevent-transmissions-2020-12?op=1

[7] Manskar, N. "Moderna boss says COVID-19 vaccine not proven to stop spread of virus." *New York Post*. (November 24, 2020). https://nypost.com/2020/11/24/moderna-boss-says-covid-shot-not-proven-to-stop-virus-spread/.

[8] WFLA News. "Desantis, Moody Speak Out Against Vaccine Mandates in Clearwater." Twitter Repost. (October 24, 2021). https://twitter.com/4patrick7/status/ 1452309002021388296?s=21

g. Professor Sir Andrew Pollard who led the Oxford vaccine team: "We don't have anything that will stop transmission, so I think we are in a situation where herd immunity is not a possibility and I suspect the virus will throw up a new variant that is *even better* at infecting vaccinated individuals." [9]

h. Dr. Jay Bhattacharya, MD, PhD, Professor of Health Policy, Stanford University: "Based on my analysis of the existing medical and scientific literature, any exemption policy that does not recognize natural immunity is irrational, arbitrary, and counterproductive to community health." [10]

i. 2008 Nobel Prize winner in Medicine Dr. Luc Montagnier (also winner of the French National Order of Merit and 20 other major international awards):

* The vaccines don't stop the virus, they do the opposite – they 'feed the virus,' and facilitate its development into stronger and more transmissible variants... [11]

j. A study of a COVID-19 outbreak in July 2021 published in *Eurosurveillance* observed that 100 percent of severe, critical, and fatal cases of COVID-19 occurred in injected individuals. The authors stated that the study

[9] Knapton, S. "Delta variant has wrecked hopes of herd immunity, warn scientists." *The Telegraph.* (October 8, 2021). https://www.msn.com/en-gb/health/medical/delta-variant-has-wrecked-hopes-of-herd-immunity-warn-scientists/ar-AAN9O4p

[10] Bhattacharya, J., *et al*. "The beauty of vaccines and natural immunity." *Smerconish Newsletter.* (June 4, 2021). https://www.smerconish.com/exclusive-content/the-beauty-of-vaccines-and-natural-immunity

[11] RAIR Foundation USA video with Nobel Laureate Luc Montagnier. (May 18, 2021). https://rairfoundation.com/bombshell-nobel-prize-winner-reveals-covid-vaccine-is-creating-variants/

"challenges the assumption that high universal vaccination rates will lead to herd immunity and prevent COVID-19 outbreaks." [12]

k. Dr. Martin Kulldorff, Professor of Medicine at Harvard Medical School: "The bottom line is that these vaccines do not prevent transmission." [13]

l. Dr. Sunetra Gupta, Infectious Disease Epidemiologist and Professor of Theoretical Epidemiology at the University of Oxford:

> [I]t is really not logical to use [these] vaccines to protect other people … I don't think they should be forced[]on the understanding simply because this vaccine does not prevent transmission. [14]

The Court may already be aware of the countless news reports of outbreaks on fully "vaccinated" sports teams [15,] and cruise ships [16,] and in the fully "vaccinated" White House. [17] There is simply no question that the COVID-19 injections do not create immunity. This was summed up by Moderna Chief Medical Officer Tal Zaks,

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[12] Pnina, S. *et al*. "Nosocomial outbreak caused by the SARS-CoV-2 Delta variant in a highly vaccinated population, Israel, July 2021." *EuroSurveill.* 26:39. (September 23, 2021). https://doi.org/10.2807/1560-7917.ES.2021.26.39.2100822

[13] Adams, P, *et al*. "Who Are These COVID-19 Vaccine Skeptics and What Do They Believe?"*EpochTimes*.(October 20,2021). https://www.theepochtimes.com/who-are-these-covid-19-vaccine-skeptics-and-what-do-they-believe_4043094.html

[14] Allen, R. "Oxford Scientist 'It's Illogical & Unethical To Force Jab On NHS Staff." The Richie Allen Radio Show.(September 9, 2021). https://richieallen.co.uk/oxford-scientist-its-illogical-unethical-to-force-jab-on-nhs-staff/

[15] Associated Press. "US sports leagues cope with COVID-19 outbreaks amid variants." (December 15, 2021). https://www.foxnews.com/sports/us-sports-leagues-cope-with-covid-19-outbreaks-amid-variants

[16] Lemos, G.*et al.* "17 Covid-19 cases identified on New Orleans-bound cruise ship." CNN. (December 5, 2021). https://www.cnn.com/2021/12/05/us/cruise-ship-norwegian-breakaway-covid-cases/index.html

[17] Chasmar, J. "Psaki doesn't deny White House COVID-19 outbreak." *Yahoo News*. (December 20, 2021). https://news.yahoo.com/psaki-doesn-apos-t-deny-210029232.html

who "warned that the trial results show that the vaccine can prevent someone from getting sick or 'severely sick,' from COVID-19, however, the results don't show that the vaccine prevents transmission of the virus." [18]

Recognition of this fact may explain why, in August of 2021, the CDC changed the definition of "vaccination" from "the act of introducing a vaccine into the body to produce immunity to a specific disease" to "the act of introducing a vaccine into the body to produce protection to a specific disease." [19]

However, this newly created CDC definition conflicts with the statutory criteria for a vaccine, which focuses solely upon immunity. In 1986, Congress passed 42 U.S.C. § 300aa-1, which established "a National Vaccine Program to achieve *optimal prevention of human infectious diseases through immunization*. . ." (emphasis added). Clearly, from both a public health standpoint as well as from a legal standpoint, immunization is the intended *sine qua non* of vaccination.

Since they do not create immunity but are claimed to merely reduce the symptoms of the disease, the so called COVID-19 vaccines are treatments, not

[18] Al-Arshani, S. "Moderna's chief medical officer says that vaccine trial results only show that they prevent people from getting sick–not necessarily that recipients won't still be able to transmit the virus." *BusinessInsider.* (November 2020) https://www.businessinsider.com/moderna-chief-medical-officer-vaccines-interview-2020-11

[19] Attkisson, S. "CDC changes definition of "vaccines" to fit Covid-19 vaccine limitations." (September 8,2021). https://sharylattkisson.com/2021/09/read-cdc-changes-definition-of-vaccines-to-fit-covid-19-vaccine-limitations/

vaccines. [20] Even the FDA has classified them as "CBER-Regulated Biologics" otherwise known as "therapeutics" which fall under the "Coronavirus Treatment Acceleration Program." [21]

B. The federal employee mandate is not narrowly tailored to meet a compelling state interest. There is no compelling state interest in mandating experimental COVID-19 mRNA injections that do not confer immunity.

The traditional public health justification for mandating a vaccine was set forth in *Jacobson, supra*. There the Court stated:

> [I]n every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, *under the pressure of great dangers*, be subjected to such restraint, to be enforced by reasonable regulations, *as the safety of the general public may demand*.

197 U.S. at 30 (emphasis added).

Thus, it is the safety of the general public that *Jacobson* cited to justify a vaccine mandate. The *Jacobson* Court also stated it in another manner, but again

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[20] *See, e.g.,* Moderna *Program Patents.*(December 2021). https://www.modernatx.com/patents United States Securities and Exchange Commission, *Moderna Form 10Q.* (August 6, 2020). https://www.sec.gov/Archives/edgar/data/1682852/000168285220000017/mrna-20200630.htm Nakagami, H. "Development of COVID-19 vaccines utilizing gene therapy technology." *IntImmunol*.33(10):521-527. (September 25, 2021). https://pubmed.ncbi.nlm.nih.gov/33772572/ FDA. "Comirnaty.Vaccines, Blood, and Biologics." (December 2021). https://www.fda.gov/vaccines-blood-biologics/comirnaty

[21] FDA. "Coronavirus (COVID-19) |CBER-Regulated Biologics." (2021). https://www.fda.gov/vaccines-blood-biologics/industry-biologics/coronavirus-covid-19-cber-regulated-biologic FDA. "Coronavirus Treatment Acceleration Program (CTAP)." (2021). https://www.fda.gov/drugs/coronavirus-covid-19-drugs/coronavirus-treatment-acceleration-program-ctap

emphasized the public safety underpinning of the policy: "There are manifold restraints to which every person is necessarily subject for the *common good*. On any other basis, organized society could not exist with *safety to its members*." 197 U.S. at 29 (emphasis added).

Jacobson, to the extent that it is still good law (a point neither contested nor conceded by *amicus* at this time), established that only in the protection of the public from harm does any possible legitimate state interest in compelling vaccines arise. However, since the injections at issue here do not confer immunity upon recipients, they in no way protect the public from acquiring the infection. Unlike in *Jacobson*, where the prevailing and long-held common belief was that the smallpox vaccine would confer immunity with an approximately 98% success rate, and prevent the public from being infected with a deadly disease from which approximately 30% of the infected would die, the experimental COVID-19 mRNA injections do nothing of the sort. As noted above, it is universally accepted that the COVID-19 injections do not stop the transmission or acquisition of the virus between persons [22] , and for those under 80 years of age - those generally in the workplace, the percent of infected persons who may die is readily acknowledged as far less than one percent. Accordingly, requiring COVID-19 "vaccination" serves no compelling

[22] Subramanian SV, et. al. Increases in COVID-19 are unrelated to levels of vaccination across 68 countries and 2947 counties in the United States. Eur J Epidemiol. 2021;1-4. (Sept. 30, 2021). https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8481107/

governmental interest at all, and fails the fundamental prong of the strict scrutiny test.

C. Similar vaccine, testing, and mask mandates are being invalidated nationwide by recent jurisprudence, emerging data, changing circumstances, and milder variants.

The United States Supreme Court recently decided *Nat'l Fed'n of Indep. Bus. v. OSHA,* 595 U.S., 142 S. Ct. 661 (2022), striking down the OSHA's ETS vaccine mandate due to lack of legislative authorization. Similarly, the federal worker mandate also lacks all legislative authorization, and therefore must fail under *Nat'l Fed'n of Indep. Bus. v. OSHA*.

Most recently, in an opinion handed down on the same day the Plaintiffs/Appellees filed their supplemental brief, in *The States of Georgia, Alabama, Idaho, et al v Biden, et al*, 21-cv-00163, 21-14269, CA11, the Eleventh Circuit upheld the District Court injunction against the federal contractor vaccine mandate, although they limited the injunction to the seven plaintiff states named in that case. The Court concluded that the plaintiffs were likely to prevail on their assertion that the mandate was outside the scope of the Procurement Act. This holding can be analogized to the argument that the federal employee vaccine mandate is outside of the scope of the Civil Service Reform Act, as shown by the 19th Century legislative history of CSRA discussed in the jurisdictional section

above.

Most recently, on August 25th, 2022 Judge Ross of the Superior Court of the District of Columbia granted the District of Columbia police plaintiffs a permanent injunction against any attempt to enforce Mayor Bowser's vaccine mandate against them, finding that the Mayor lacked all authority to issue such a mandate. See *Fraternal Order of Police, et al. v. District of Columbia, et al*, 2022-CA-000584 B, Superior Court, DC[23].

In a case consolidated with *Nat'l Fed'n of Indep. Bus v. OSHA*, namely, *Biden v. Missouri*, 142 S. Ct. 647 (2022), currently being relitigated, the United States Supreme Court allowed the CMS vaccine mandate for healthcare workers to stand, citing the urgency of addressing the Delta variant. However, the original fourteen states, led by Louisiana and joined by two new states, Tennessee and Virginia, are now relitigating *Biden v Missouri* in the related case of *The State of Louisiana, by and through its AG Jeff Landry, etc, et al v Becerra, etc, et al*, 21-cv-03970, WDLA.

Sixteen Attorney Generals in *The State of Louisiana, by and through its AG Jeff Landry, etc, et al v Becerra, etc, et al*, 21-cv-03970, WDLA, 21-30734, CA5 are relitigating the CMS mandate for healthcare workers in *Biden v Missouri* due to the

[23] COVID vaccine mandate for DC government workers is unlawful, judge rules https://www.washingtonexaminer.com/restoring-america/faith-freedom-self-reliance/covid-vaccine-mandate-for-dc-government-workers-is-unlawful-judge-rules

waning of the "Delta variant" and the rise of the more harmless "Omicron variant" by their filing on February 4, 2022, of their Second Amended and Supplemental Complaint:

> The President's scheme to federalize vaccination policy has hit the skids. The OSHA vaccine mandate was struck down for lack of authorization, *Nat'l Fed'n of Indep. Bus. v. OSHA,* 595 U.S.__, 142 S. Ct. 661 (2022), and the remnants shelved. See Stephen Dinan, OSHA cancels business vaccine mandate after Supreme Court loss, Wash. Times (Jan. 25, 2022 https://www.washingtontimes.com/news/2022/jan/25/. The federal contractor vaccine mandate is enjoined. see *Georgia v. Biden*, No. 1:21-cv-163 (S.D. Ga. Dec. 7, 2021); as is the federal employee vaccine mandate. see *Feds for Med. Freedom v. Biden*, No. 3:21-CV-356, F. Supp. 3d__, 2022 WL 188329 (S.D. Tex. Jan. 21, 2022). All that remains is the Interim Final Rule ("IFR") establishing the Centers for Medicare and Medicaid Services ("CMS") mandate ("Vaccine Mandate"), which survived certain challenges on appeal and was remanded.
>
> In recent weeks, federal authorities have begun to walk back prior claims about the efficacy of the three domestically available vaccines against the now dominant Omicron variant. CDC, *Omicron Variant: What You Need to Know* (Dec. 20, 2021), https://www.cdc.gov/coronavirus/2019-ncov/variants/omicron-variant.html. And that comes amid increasing warnings about the risks and side effects posed by the vaccines. *E.g.*, CDC, *Selected Adverse Events Reported after COVID-19 Vaccination* (Jan. 24, 2022), https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/adverse-events.html
> ("CDC has also identified nine deaths that have been caused by or were directly attributed to [thrombosis with thrombocytopenia syndrome] following J&J/Janssen COVID-19 vaccination."); Matthew E. Oster et al., *Myocarditis Cases Reported After mRNA-Based COVID-19 Vaccination in the US From December 2020 to August 2021*, 327(4) J. Am. Med. Ass'n 331 (Jan. 25, 2022), https://jamanetwork.com/journals/jama/fullarticle/2788346; Jennifer Couzin-Frankel & Gretchen Vogel, *In rare cases, coronavirus vaccines may cause Long Covid-like symptoms*, 375 Science 6579 (Jan. 20 2022),
> https://www.science.org/content/article/rare-cases-coronavirus-vaccines-may-cause-long-covid-symptoms. The IFR purports to address an emergency

> situation in emergency (and unprecedently heavy-handed) ways. But its rigid prescription—the Vaccine Mandate—utterly fails to account for the fact this emergency is continually evolving. And this structural defect renders the IFR arbitrary and capricious and otherwise unlawful under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551–559, in multiple ways.
>
> The CDC, under HHS, has recognized staffing shortages by issuing new guidance that permits Covid positive employees to return to work, even if they are still testing positive, while the IFR prohibits COVID-negative un-vaccinated individuals from working in covered facilities at all unless they obtain an exemption.
>
> Despite these changed circumstances, CMS is even now pushing the Vaccine Mandate further, revealing---that the burden to implement this labyrinth of irrational rules falls upon the States."
>
> *The State of Louisiana, by and through its AG Jeff Landry, etc, et al v Becerra, etc, et al*, 21-cv-03970, Second Amended and Supplemental Complaint, Paras 1-6, WDLA

The mandates are falling around the country. In addition to the federal mandates blocked above, as one example, the mandate affecting the city of Gainesville, Florida was ruled illegal in *Friend, et al v City of Gainesville*, 2021-CA-2412-8th-JC-Alachua-FL. Other mandates have been dropped voluntarily, such as Mayor Muriel Bowser dropping the vaccine mandate affecting restaurants and venues in the District of Columbia effective February 15, 2022.[24] Mayor LaToya Cantrell similarly lifted the New Orleans vaccine mandate on March 21st, 2022.[25]

[24] D.C. Mayor to Drop Indoor Vaccine Mandate for Businesses https://news.yahoo.com/d-c-mayor-drop-indoor-171618749.html

[25] https://www.wrkf.org/2022-03-21/no-more-new-orleans-vaccine-mandate-businesses-are-relieved-amid-decision-to-lift-covid-rules

D. It is not good public policy to mandate experimental injections in the face of rising adverse event reports, including mounting fatalities, by segregating injected from un-injected people based on private medical histories.

The plaintiffs herein note that there is an alarming and rising number of adverse events associated with these experimental mRNA injections, including over 10,000 fatalities clinically attributable to the mandated mRNA injections. Plaintiffs draw their data from the CDC's Vaccine Adverse Events Reporting System (VAERS). **In the past, a vaccine trial would have been halted, rather than mandated, after only a few deaths**.

For example, in 1976, after only 32 deaths were attributable to the swine flu vaccine, the U.S. government halted the mass vaccination campaign. [26] The New York Times reported on October 13, 1976, that the swine flu program was halted in nine states after only 3 deaths attributed to vaccine shots. [27]

Likewise, in *The State of Louisiana, by and through its AG Jeff Landry, etc, et al v Becerra, etc, et al*, 21-cv-03970, Second Amended and Supplemental Complaint, Paragraph 4, WDLA, above, the increased warnings about the risks, side

[26] CDC data signaling vaccine catastrophe It took only 32 deaths to halt 1976 shot campaign. Free Republic, 2/15/2022 https://freerepublic.com/focus/f-news/4038460/posts

[27] 'Swine Flu Program is Halted in Three States After Shots" https://www.nytimes.com/1976/10/13/archives/swine-flu-prograrm-is-halted-in-9-states-as-3-die-after-shots.html

effects, and deaths associated with the mRNA injections are identified as a significant factor.

The website openvaers.com compiles statistics directly from the CDC's VAERS reporting system. As of the date of this writing, openvaers.com is reporting 30,479 deaths in America alone associated with these experimental mRNA injections, along with thousands of other serious, non-fatal reactions such as 51,722 cases of myocarditis/pericarditis, 56,994 permanently disabled people, and 174,371 hospitalizations, among many others. [28]

Further, the National Health Federation (NHF) has compiled a comprehensive history, inventory, and analysis of the numerous adverse reactions, other serious health concerns, and research concerning these experimental mRNA injections. The 395-page NHF report entitled "*COVID-19: The Science We Should Know*" can be found here.[29]

We must ask, how can anyone in good conscience mandate anything that might kill you?

E. In addition to causing risks of serious injuries and deaths, the federal employee vaccine mandate violates express federal statutory law,

[28] Adverse event data summaries, openvaers.com, https://openvaers.com/covid-data/

[29] https://thenhf.com/resources/covid-19-the-science-we-should-know/

violates the Nuremberg Code as codified by federal regulations, constitutes practicing medicine without a license, and is an unconstitutional violation of the right to refuse medical treatment.

Federal statutory law expressly mandates that experimental drugs being used subject to an Emergency Use Agreement (EUA), such as these experimental mRNA injections, are strictly voluntary. Please see 21 U.S. Code § 360bbb-3.[30]

Further, the Nuremberg Code, an international treaty adopted in the aftermath of war crimes committed by the German Nazis during World War Two, was intended expressly to prohibit involuntary medical experimentation upon humans. The principles as expressed in the Nuremberg Code have been largely codified domestically through the adoption of 45 C.F.R. Part 46, entitled "Protection of Human Subjects."[31]

Furthermore, any non-doctor or non-physician's assistant or nurse practitioner, who presumes to dictate experimental medical therapies to anyone other than to himself or herself, such as a non-doctor agency head, is liable for practicing medicine without a license. This behavior has been made criminal in most jurisdictions, for the protection of the public including federal employees.

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[30] 21 U.S. Code § 360bbb-3 mandates that all "experimental use authorization ("EUA")" experimental biological agents are strictly voluntary, subject to informed consent, and with "the option to accept or refuse administration of the product".

[31] 45 C.F.R. Part 46, "Protection of Human Subjects", Subpart A, "Basic HHS Policy for Protection of Human Research Subjects".

Finally, courts have consistently upheld the patient's right to refuse unwanted medical treatments on constitutional grounds for decades. See *Mills v. Rogers*, 457 U.S. 291, 102 S.Ct. 2442, 73 L.Ed.2d 16 (1982), *Guardianship of Roe*, 383 Mass. 415, 421 N.E.2nd 40 (1981), *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 280 (1990), *Washington v. Harper*, 494 U.S. 210, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990), *Riggins v. Nevada*, 504 U.S. 127,112 S.Ct.1810, 118 L.Ed.2d 479 (1992), and *Sells v. United States,* 539 U.S. 166 (2003). Preservation of the absolute right of voluntary, informed patient consent and medical freedom is a paramount consideration here. Informed and voluntary consent to medical treatments can never be coerced under the threat of losing one's livelihood.

CONCLUSION

The plaintiffs' claims are well-founded. The challenged provisions of the federal worker mandate are unconstitutional, illegal, and irrational. These mandates do not accomplish their intended purpose in light of the now-accepted facts that these mRNA injections do not confer immunity and do not prevent the transmissibility of the virus. Therefore, there is no point in segregating injected and non-injected persons. Mandates are inherently coercive, and true informed consent to medical treatments can never be coerced. These mandates are ill-advised and bad public policy, in light of new data emerging about milder variants such as Omicron, as well as emerging data documenting the rising toll of tens of thousands of deaths and injuries attributable to these experimental mRNA injections. Plaintiffs are on the

right side of history and are entitled to the relief they seek.

Respectfully Submitted,

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Dated: September 2, 2022

CERTIFICATE OF COMPLIANCE WITH RULE 32(g)

I hereby certify that the foregoing brief complies with Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(a)(5) because it contains 4609 words, including the parts of the brief exempted by Fed. R. App. P. 32(f) and 5th Cir. R. 32-4.

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced font in Microsoft Word using 14-point Times New Roman.

s/ David A. Dalia
David A. Dalia

CERTIFICATE OF SERVICE

I hereby certify that on September 2nd, 2022, I electronically filed the foregoing Answer Brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit via the Court's CM/ECF system, which will automatically serve all counsel of record via CM/ECF notice for affirmance.

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