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

EN BANC BRIEF OF *AMICI CURIAE* 38 MEMBERS OF CONGRESS IN SUPPORT OF PLAINTIFFS–APPELLEES

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September 2, 2022

CERTIFICATE OF INTERESTED PERSONS

Amici Curiae certify that, in addition to those persons listed in the Parties' certificates of interested persons, the following is a complete supplemental list of interested persons as required by Federal Rule of Appellate Procedure 29(a)(4) and Fifth Circuit Rule 29.2:

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2. Arrington, Jodey
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5. Biggs, Andy
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9. Braun, Mike
10. Brooks, Mo
11. Budd, Ted
12. Burgess, Michael C.
13. Cammack, Kat
14. Cawthorn, Madison
15. Cloud, Michael

16. Clyde, Andrew
17. Cramer, Kevin
18. Cruz, Ted
19. Daines, Steve
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34. Hartzler, Vicky
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61. Scott, Rick

62. Sessions, Pete

63. Shackelford, Kelly J.

64. Simpson, Mike

65. Smith, Adrian

66. Smith, Jason

67. Stefanik, Elise

68. Steube, W. Gregory

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70. Thune, John

71. Walberg, Tim

72. Weber, Randy K.

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As required by Federal Rule of Appellate Procedure 26.1, *Amici Curiae* certify that no publicly traded company or corporation—aside from any that may be identified in the Parties' certificates of interested persons—has an interest in the outcome of this case or appeal.

Dated: September 2, 2022

Respectfully submitted,

/s/ Jordan E. Pratt
Jordan E. Pratt

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IDENTITY AND INTEREST OF *AMICI CURIAE* [1]

Amici Curiae are 38 Members of the United States Congress. The *Amici* from the U.S. Senate are: Ted Cruz; Kevin Cramer; Steve Daines; Bill Hagerty; James M. Inhofe; James Lankford; Mike Lee; Roger Marshall; Rick Scott; and John Thune.

The *Amici* from the U.S. House of Representatives are: Chip Roy (TX-21); Mike Johnson (LA-04); Jack Bergman (MI-01); Andy Biggs (AZ-05); Dan Bishop (NC-09); Lauren Boebert (CO-03); Mo Brooks (AL-05); Ted Budd (NC-13); Kat Cammack (FL-03); Michael Cloud (TX-27); Andrew S. Clyde (GA-09); Warren Davidson (OH-08); Byron Donalds (FL-19); Jeff Duncan (SC-03); Louie Gohmert (TX-01); Michael Guest (MS-03); Diana Harshbarger (TN-01); Vicky Hartzler (MO-04); Doug Lamborn (CO-05); Debbie Lesko (AZ-08); Mary E. Miller (IL-15); John R. Moolenaar (MI-04); Alex X. Mooney (WV-02); Markwayne Mullin (OK-02); Jason Smith (MO-08); Elise Stefanik (NY-21); W. Gregory Steube (FL-17); and Randy K. Weber (TX-14).

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[1] Counsel for *Amici Curiae* authored this brief in its entirety. No party's counsel authored this brief, in whole or in part. No party or party's counsel contributed any money that was intended to fund the preparation or submission of this brief. No person—other than *Amici Curiae*, their members, or their counsel—contributed money that was intended to fund the preparation or submission of this brief.

All Parties have consented to the filing of this brief, which is accompanied by a motion for leave of court to file the brief.

As elected federal legislators, *Amici* have a crucial interest in maintaining the Constitution's separation of powers and ensuring that the President does not make the law but instead faithfully executes it. Their interest in curbing Presidential intrusions into Congress' lawmaking power is especially strong where, as here, those intrusions threaten religious liberty.

Moreover, just as *Amici* have a strong interest in ensuring that the President does not assume Congress's role, they have an equally strong interest in ensuring that the courts don't, either. Congress has not chosen to insulate this pre-enforcement challenge from judicial review, and the President invites this Court to take a red pen to the carefully crafted structure that Congress enacted in the Civil Service Reform Act ("CSRA"). *Amici* have a crucial interest in ensuring that this Court rejects the President's invitation, adheres to the statutory text, and respects the policy choices that Congress made when it enacted the CSRA.

ARGUMENT

I. Congress Has Not Immunized the President's Government-Wide Federal Policies from Pre-Enforcement Judicial Review.

According to the President, he can promulgate an executive order requiring every federal employee in the country to take (or refrain from taking) an action, and no matter how dubious its legality, the order can be challenged in the first instance only before a panel of bureaucrats, rather than a federal judge. At issue in this case is an executive order requiring all federal employees to undergo a medical procedure that relates not to a workplace hazard, but rather a "hazard[ ] of daily life." *Nat'l Fed'n of Ind. Bus. v. OSHA*, 142 S. Ct. 661, 665 (2022). However, the President's far-reaching position would dictate the same outcome in any number of other scenarios. Suppose the President, under the guise of creating a "safer" federal workplace and as a condition of federal employment, ordered all federal employees to forfeit firearm ownership, submit to regular law enforcement searches of their residences, and hand over the log-in information for their social media accounts. The employees certainly would have very strong First, Second, and Fourth Amendment claims (among several others). But on the President's telling, those employees could bring their claims only before an administrative agency in Washington, D.C., rather than a federal court in the state where they live and work.

Why the lack of pre-enforcement judicial review? "Because Congress has said so," responds the President. That comes as news to these Members of Congress. To

be sure, the Civil Service Reform Act ("CSRA") established the Merit Systems Protection Board ("MSPB") and vested it with jurisdiction to consider challenges to certain adverse federal employment actions. But the CSRA generally applies only to adverse actions already taken against the affected individual employee. *See* 5 U.S.C. §§ 7502, 7512, 7542. It makes no provision for MSBP review of pre-enforcement challenges to government-wide federal policies.

The CSRA does govern certain proposed actions, but that narrow provision likewise does not apply here. Under the CSRA, an employee enjoys several rights when "an agency" has "proposed" certain actions against him. 5 U.S.C. § 7513. As Judge Barksdale recognized, this provision relates only to proposed actions by an *employing agency* against an *individual employee*, not by the President against the entire federal workforce, and it concerns only proposed actions for which the employee enjoys prior written notice, an opportunity to respond with the help of counsel, and a written decision explaining the agency's reasons. *See* 5 U.S.C. § 7513(b); *see also Feds for Med. Freedom v. Biden*, 30 F.4th 503, 513 (5th Cir. 2022) (Barksdale, J., dissenting), *vacated, reh'g en banc granted*, 37 F.4th 1093 (5th Cir. 2022). Moreover, review in the MSPB lies only once the proposed action "is taken." 5 U.S.C. § 7513(d). Yet again, this provision has no application to a pre-enforcement challenge to a government-wide presidential directive.

The President's argument not only ignores the CSRA's statutory text, but also makes a mess of this Court's and the Supreme Court's precedents. Contrary to his contention, *Elgin v. Department of Treasury*, 567 U.S. 1 (2012), does not "dictate[ ] the resolution of this case." Appellants' Br. 14. The *Elgin* plaintiffs sought to reverse an adverse action (termination) that their employing agency already had taken against them individually, and they sought individualized relief (reinstatement and backpay). 567 U.S. at 5, 22. They did not bring a pre-enforcement suit against an impending, executive-branch-wide policy issued in an executive order by the President. That distinction matters. As the *Elgin* Court expressly noted, the CSRA's "jurisdictional rule" turns, in part, "on the type of . . . the challenged employment action." *Id.* at 15. Indeed, *Elgin* correctly described CSRA-covered actions as "'personnel action *taken* against federal employees.'" *Id.* at 5 (quoting *United States v. Fausto*, 484 U.S. 439, 455 (1988)) (emphasis added). Nowhere did *Elgin* imply, much less hold, that the CSRA insulates the President's government-wide policies from pre-enforcement judicial review.

Moreover, this Court has correctly recognized that district courts have jurisdiction to adjudicate pre-enforcement challenges of the kind that Appellees raise here. When federal employees challenged the rejection of a union proposal under "a government-wide regulation," this Court acknowledged that they could "challeng[e] [the] regulations in district court." *Am. Fed'n of Gov't Employees v. Fed. Labor*

Relations Auth., 794 F.2d 1013, 1015–16 (5th Cir. 1986). And when federal employees challenged a presidential directive that they submit to drug tests, this Court adjudicated the case on the merits and noted that the employees could bring later suits to challenge "the individual [agency] plans implementing" the executive order. *Nat'l Treasury Employees Union v. Bush*, 891 F.2d 99, 102 (5th Cir. 1989). As Appellees explain, Appellees' Br. 24–25, these observations align with long-settled D.C. Circuit precedent.

The President's misreading of the CSRA doesn't just ignore the statutory text and distort judicial precedent; it would deprive federal employees of any meaningful opportunity to remedy irreparable, ongoing constitutional harms. Under his position, the federal courts could not entertain pre-enforcement challenges to executive orders directed at federal employees, no matter how blatantly unlawful. Should the President order federal workers to surrender their right to keep and bear arms, their right against unreasonable searches and seizures, and their right to speak as private citizens outside the workplace, they would have to endure the irreparable harm of a forced choice between their livelihoods and their constitutional rights until the MSPB issues a decision. *Cf. BST Holdings, LLC v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021) (holding the plaintiffs had suffered irreparable harm due to a coerced "choice between their job(s) and their jab(s)," and noting that "the loss of constitutional freedoms 'for even minimal periods of time . . . unquestionably

constitutes irreparable injury'" (quoting *Elrod v. Burns*, 427 U.S. 347, 737 (1976)). Then and only then—having already endured a prolonged period of coercion—could they seek redress in federal court.

One should not lightly assume that Congress would intend such an absurd result. *See United States v. Bittner*, 19 F.4th 734, 748 (5th Cir. 2021) ("Statutes generally should be construed to avoid an absurd result . . . ."). And indeed, as explained above, a faithful reading of the CSRA's text—as the law of this Circuit requires, *see In re Rogers*, 513 F.3d 212, 225–26 (5th Cir. 2008)—confirms that Congress has done no such thing.

Perhaps it comes as no surprise that in the same case where the President seeks to usurp Congress's authority by making the law, *see infra* Parts II & III, he invites the courts to do the same by re-writing it. This Court should decline the President's invitation to re-write the CSRA and should instead adhere to the text that Congress enacted by concluding that the district court had jurisdiction to issue the order under review.

II. Our Constitution Separates Power to Secure Individual Liberty.

In this case, the President of the United States claims the awesome—and heretofore unasserted—power to unilaterally compel a broad swath of American workers to undergo a medical procedure. No federal statute confers this claimed authority on the President. To the contrary, Congress has denied it. By limiting his

Section 3301 authority to "applicants" seeking "admission . . . into the civil service," 5 U.S.C. § 3301; by enumerating which "rules governing the competitive service" he may prescribe, 5 U.S.C. § 3302; and by empowering him to regulate only the "conduct" of federal employees, 5 U.S.C. § 7301, Congress implicitly has withheld from the President the novel authority that he now claims.

In short, this is a case where the President's power "is at its lowest ebb[.]" *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring in the judgment). Of course, the asserted power's novelty alone cloaks it with suspicion. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 549 (2012) (opinion of Roberts, C.J.) ("[S]ometimes the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent[.]" (cleaned up)). But that is particularly true where, as here, "the President takes measures incompatible with" Congress' enactments. *Youngstown Sheet & Tube Co.*, 343 U.S. at 637 (Jackson, J., concurring in the judgment). "Presidential claim to" such a power "must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Id.* at 638. In that equilibrium, the President executes the law; he does not make it. *See id.* at 587 (majority opinion) ("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."); *accord id.* at 633 (Douglas, J., concurring).

The President's sweeping claim to power in this case fails the cautious scrutiny that this Court must give it. Here, the President claims inherent power to coerce over two million Americans to undergo vaccination simply because they work for the federal government. Appellants' Br. 27–28. Were the problem at which he aims confined to the federal workplace, that argument might have superficial appeal. But the Supreme Court has held that COVID-19 is generally not a workplace hazard, but instead a "hazard[ ] of daily life." *Nat'l Fed'n of Ind. Bus.*, 142 S. Ct. at 665. And the President's Administration has finally and begrudgingly admitted that vaccination does not prevent the transmission of COVID-19, and there is no reason to treat vaccinated individuals differently from non-vaccinated individuals.[2] Whatever the reach of his Article II powers, they surely do not embrace an authority to dictate the "daily life" decisions of millions of Americans, much less through a policy that—according to the government's own scientists—cannot prevent the transmission of disease in the federal workplace.

[2] Centers for Disease Control and Prevention, *Morbidity and Mortality Weekly Report*, https://www.cdc.gov/mmwr/volumes/71/wr/mm7133e1.htm (Aug. 19, 2022) ("CDC's COVID-19 prevention recommendations no longer differentiate based on a person's vaccination status because breakthrough infections occur, though they are generally mild, and persons who have had COVID-19 but are not vaccinated have some degree of protection against severe illness from their previous infection." (footnotes omitted)).

Because the President lacks inherent power to issue his executive order, he cannot override the contrary policy decision that Congress has made. "The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times." *Youngstown Sheet & Tube Co.*, 343 U.S. at 589 (majority opinion). That choice comes at a cost. "A scheme of government like ours no doubt at times feels the lack of power to act with complete, all-embracing, swiftly moving authority." *Id.* at 613 (Frankfurter, J., concurring); *but cf. id.* at 652 (Jackson, J., concurring in the judgment) (noting Congress' authority to confer emergency powers by statute). But that cost is a calculated one. As the late Justice Scalia famously penned, "[w]hile the separation of powers may prevent us from righting every wrong, it does so in order to ensure that we do not lose liberty." *Morrison v. Olson*, 487 U.S. 654, 710 (1988) (Scalia, J., dissenting); *accord Youngstown Sheet & Tube Co.*, 343 U.S. at 629 (Frankfurter, J., concurring) ("The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency, but to preclude the exercise of arbitrary power." (cleaned up)).

In adjudicating this case—which pits a novel assertion of inherent Presidential power against Congressional statutes that implicitly withhold that power—this Court should resist the urge to "declare the existence of inherent powers *ex necessitate* to meet an emergency[.]" *Youngstown Sheet & Tube Co.*, 343 U.S. at 649 (Jackson, J., concurring in the judgment). Any other judicial response would provide "a ready

pretext for usurpation." *Id.* at 650. As the Supreme Court warned nearly seventy years ago, "[t]he accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority." *Id.* at 594 (majority opinion).

III. Executive Lawmaking Like the President's Vaccine Mandate Threatens Religious Liberty.

A. Executive lawmaking threatens many freedoms, including religious liberty. One need not search the distant past to discern that truth. Over just the past two years, at all levels of government, America has witnessed a flurry of novel executive actions that infringed religious freedom.

For example, in 2020, the mayor and city of Louisville "criminalized the communal celebration of Easter" by "order[ing] Christians not to attend Sunday services, even if they remained *in their cars* to worship—and even though it's *Easter*." *On Fire Christian Ctr., Inc. v. Fischer*, 453 F. Supp. 3d 901, 905 (W.D. Ky. 2020). These city officials coupled their threats against churches with a failure to impose similar restrictions on secular businesses, including liquor stores. *Id.* at 910. The court described the defendants' actions as "stunning" and held that they were, "beyond all reason, unconstitutional." *Id.* at 905 (cleaned up).

Statewide officials also rushed to restrict religious gatherings. New York's governor ordered "very severe restrictions on attendance at religious services" in

certain areas that "single out houses of worship for especially harsh treatment." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 65–66 (2020) (per curiam). Synagogues and churches remained empty while large crowds gathered in stores, transportation hubs, factories, and schools. *Id.* at 66–67. The Supreme Court enjoined the discriminatory restrictions, concluding that "[t]he applicants have made a strong showing that the challenged restrictions violate the minimum requirement of neutrality to religion." *Id.* at 66 (cleaned up). The Court repeatedly enjoined similar worship restrictions in California. *See Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (per curiam); *Gateway City Church v. Newsom*, 141 S. Ct. 1460 (2021); *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021).

B. Since 2021, the federal executive branch has responded to the COVID-19 pandemic with a novel policy of its own: vaccine mandates. Exec. Order 14042; Exec. Order 14043. As the Supreme Court has held, these mandates are "no everyday exercise of federal power," as they reach well beyond any arguable workplace hazard and into all "daily life." *See Nat'l Fed'n of Ind. Bus.*, 142 S. Ct. at 665 (cleaned up). And no less than worship restrictions, these mandates—including the one at issue in this case—pose a crisis of conscience for many religious Americans. *Sambrano v. United Airlines, Inc.*, 2022 WL 486610, *9 (5th Cir. Feb. 17, 2022) (noting that a directive to "violate [one's] religious convictions or lose all pay and benefits" is "an impossible choice"); *Sambrano v. United Airlines, Inc.*, 19 F.4th 839, 841–42 (5th

Cir. 2021) (Ho, J., dissenting) (describing the plaintiffs' "crisis of conscience"). This is especially true for those who received divine instruction against vaccination or who oppose the use of aborted fetal cell lines in vaccine development and testing.[3]

Of course, the President's executive orders announce the possibility of "exceptions." Exec. Order 14042, § 2(b); Exec. Order 14043, § 2. Presumably this would include religious accommodations required by the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb *et seq.* ("RFRA"), and Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e–16, 2000e(j), both of which reflect Congress' choice to accommodate the free exercise of religion in the federal

[3] The Johnson & Johnson COVID-19 vaccine used the PER.C6 cell line in its production process. That cell line derived from the retinal cells of an 18-week-old fetus aborted in 1985. In addition, the Moderna and Pfizer COVID-19 vaccines were tested with HEK-293, which derived from the kidney cells of a fetus aborted in the early 1970s. *See* Meredith Wadman, *Abortion Opponents Protest COVID-19 Vaccines' Use of Fetal Cells*, Science.org, https://www.science.org/content/article/abortion-opponents-protest-covid-19-vaccines-use-fetal-cells (June 5, 2020).

The use of aborted fetal cell lines in the production or testing of all three FDA-approved COVID-19 vaccines poses serious moral questions for those who believe, as a matter of religious faith, that abortion is the wrongful taking of human life. *See Dobbs v. Jackson Women's Health Org.* 142 S. Ct. 2228, 2240 (2022) ("Some believe fervently that a human person comes into being at conception and that abortion ends an innocent life."). To be sure, many believers have carefully considered those questions and concluded that COVID-19 vaccination is permissible. But others have reached a firm conviction that vaccination would constitute impermissible complicity in the act of abortion or would compromise their religious duty to speak out against abortion.

workplace. But for at least two reasons, there is ample basis to question whether the Administration has complied with this critical protection for Americans of faith.

First, even where the Administration has offered a religious accommodation process, it has been mere "theater." *U.S. Navy SEALs 1–26 v. Biden*, No. 4:21-CV-01236-O, 2022 WL 34443, at *1 (N.D. Tex. Jan. 3, 2022), *interlocutory appeal pending*, No. 22-10077 (5th Cir.), *partial stay granted*, 142 S. Ct. 1301 (2022).[4] Just a few months ago, the Northern District of Texas preliminarily enjoined the Navy and the Department of Defense from enforcing their vaccine mandate against 35 Naval Special Warfare servicemembers who have sincere religious objections to the COVID-19 vaccines. *Id.* at *14. In holding that the plaintiffs presented a justiciable challenge, the court found, in part, that "the denial of each [religious accommodation] request is predetermined." *Id.* at *4.

In support of its factual finding, the court pointed to Navy officials' public boasts that they had not granted a single religious vaccine accommodation request in the past seven years. *Id.* at *5. The court also pointed to a Navy memorandum that funnels requests through a 50-step system that evades the individualized review that

[4] While the Government had offered the declaration of a senior Navy official to bolster its request for a partial stay of the preliminary injunction, that same official has now admitted in deposition testimony that he lacks personal knowledge of many of the facts underlying his opinions. *See* Plaintiffs–Appellees' Motion to Supplement the Record, *U.S. Navy SEALs 1–26 v. Biden*, No. 22-10077 (5th Cir.) (filed August 16, 2022), *granted by court order* (August 18, 2022).

RFRA requires, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726 (2014) (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006)), and "merely rubber stamps each denial," *U.S. Navy SEALs 1–26*, 2022 WL 34443, at *1, 5–6. As the court found, "the Plaintiffs' requests are denied the moment they begin." *Id.* at *5. The court then held that the Navy's punishment of the plaintiffs—through immediate consequences like promotion freezes and withheld medical treatment,[5] and through impending consequences like involuntary separation and recoupment of exorbitant training expenses—likely violated the First Amendment and RFRA. *Id.* at *9–12.

Second, the Administration not only fails to seriously consider religious accommodation requests, but also takes down the names of those who submit them. As dozens of members of Congress have reported,[6] at least 19 federal agencies—including five Cabinet-level agencies—are creating lists to track federal employees

[5] "In one egregious example, Plaintiff Navy SEAL 26 was approved for a four-week program in Maryland to treat deployment-related traumatic brain injury. . . . His commanding officer told him he was not allowed to travel because he was unvaccinated. SEAL 26 missed the opportunity to receive treatment, despite his pending religious accommodation request." *U.S. Navy SEALs 1–26*, 2022 WL 34443, at *8.

[6] Letter from 41 Members of Congress to President Joseph R. Biden, Jr. (Jan. 24, 2022), *available at* https://biggs.house.gov/sites/evo-subsites/biggs.house.gov/files/evo-media-document/1.24%20FDA%20President%20Biden%20Letter.pdf.

who seek a religious accommodation to the vaccine mandate. This data collection "will have an immediate, chilling effect on an employee's exercise of his constitutionally protected right to freedom of religion."[7] And it casts further doubt on the Administration's compliance with federal-law religious liberty protections.

C. One might attribute all these threats against religious liberty to the policy preferences of the state and federal executives who imposed them. Politics certainly is an explanatory factor, but it isn't the only one. Insensitivity to religious conscience can result even from well-intentioned executive action, especially where it intrudes on the legislative power. The problem, in other words, is not just that some executive officials are insensitive to religious faith, but that they have strayed from the business of enforcing the law to the business of creating it.

Executive power has its advantages within its proper sphere, of course. "The President can act more quickly than the Congress." *Youngstown Sheet & Tube Co.*, 343 U.S. at 629 (Douglas, J., concurring). "Legislative power, by contrast, is slower to exercise. There must be delay while the ponderous machinery of committees, hearings, and debates is put into motion." *Id.*

But where lawmaking is concerned, the Executive's virtues become vices. Public, parliamentary deliberation and "ponderous machinery" do not aid the waging

[7] *Id.*

of war. *See* U.S. Const. art. II, § 2. But they are critical tools in the crafting of just legislation. *See generally* U.S. Const. art. I. This is particularly true of legislation that respects religious conscience, as burdens on the free exercise of religion may result even from neutral rules of general applicability. *See* 42 U.S.C. § 2000bb–1(a).

In short, the characteristics of executive power that make it so well suited to its domain—dispatch, discretion, and decisiveness—often render it ill-suited to make the sort of careful judgments needed to protect religious conscience for a nation of diverse faiths. It therefore comes as little surprise that so many pandemic-related religious freedom violations have sprung from a quick stroke of the executive pen, rather than prolonged legislative deliberation. This certainly would not surprise the Framers. "With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations." *Youngstown Sheet & Tube Co.*, 343 U.S. at 655 (Jackson, J., concurring in the judgment).

* * *

If the President believes that a large swath of the American workforce should be ordered to undergo vaccination or lose their jobs, he should ask Congress to enact his policy goals into law. Perhaps because he knows the People's representatives in Congress do not share his view, the President has chosen a different path—a statute clothed as an executive order. But our Constitution places the President under the

law, not above it. *Amici Curiae* respectfully ask this Court to enforce the Constitution's separation of powers in this case, and thereby preserve our freedom—including our religious liberty.

CONCLUSION

This Court should affirm the District Court's preliminary injunction.

Dated: September 2, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) because this brief contains 4,153 words, excluding the parts of this brief exempted by Fed. R. App. P. 32(f).

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) because it has been prepared in a proportionately spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: September 2, 2022

/s/ Jordan E. Pratt

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on September 2, 2022. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: September 2, 2022

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