UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

JAMES RODDEN, et al.

Plaintiffs,

v.

ANTHONY FAUCI, Chief COVID Response Director of the National Institute of Allergy and Infectious Diseases, et al.

Defendants.

Civil Action No. 3:21-cv-00317

PLAINTIFFS' OPPOSED MOTION TO LIFT STAY, CERTIFY CLASS, GRANT SUMMARY JUDGMENT, AND ISSUE PERMANENT INJUNCTION

TABLE OF CONTENTS

TABLE OF CONTENTS 2
TABLE OF AUTHORITIES 3
BACKGROUND 5
ARGUMENT 7
I. THE COURT SHOULD LIFT ITS STAY 7
II. THE COURT SHOULD CERTIFY THE CLASS 7
III. THE COURT SHOULD GRANT SUMMARY JUDGMENT ON COUNT V 9
IV. THE COURT SHOULD ISSUE A PERMANENT INJUNCTION 11
V. VOLUNTARY CESSATION DOES NOT MOOT THIS CASE 12
CONCLUSION 14
CERTIFICATE OF SERVICE 15

TABLE OF AUTHORITIES

Page(s)

Cases

Abraham v. Alpha Chi Omega,
708 F.3d 614 (5th Cir. 2013) 12

Berger v. Compaq Computer Corp.,
257 F.3d 475 (5th Cir. 2001) 8

Feds for Med. Freedom v. Biden,
581 F. Supp. 3d 826 (S.D. Tex. 2022) ....passim

Feds for Med. Freedom v. Biden,
63 F.4th 366 (5th Cir. 2023) (*en banc*) 5, 6, 9, 12

In re Monumental Life Ins. Co.,
365 F.3d 408 (5th Cir. 2004) 7

Louisiana v. Biden,
55 F.4th 1017 (5th Cir. 2022) 10, 11

Maldonado v. Ochsner Clinic Found.,
493 F.3d 521 (5th Cir. 2007) 9

Mertz v. Harris,
497 F. Supp. 1134 (S.D. Tex. 1980) 8

Mexican Gulf v. Dep't of Commerce,
60 F.4th 956 (5th Cir. 2023) 8

Mullin v. Treasure Chest Casino,
186 F.3d 620 (5th Cir. 1999) 8

Robinson v. California,
370 U.S. 660 (1962) 10

West Virginia v. EPA,
142 S. Ct. 2587 (2022) 12, 13

Yates v. United States,
574 U.S. 528 (2015) 10

Statutes

5 U.S.C. § 3301 9

5 U.S.C. § 3302 9

5 U.S.C. § 7301 ....9, 10, 11

Other Authorities

Brief for Amici Curiae James Rodden et al. in Support of Appellees,
Feds for Medical Freedom v. Biden, No. 22-40043, Doc. 005162338092 (5th Cir. June 1, 2022) 6

Brief for Amici Curiae James Rodden et al.,
Feds for Medical Freedom v. Biden, No. 22-40043, Doc. 00516209324 (5th Cir. Feb. 19, 2022) 6

Brief for Amici Curiae James Rodden et al.,
Feds for Medical Freedom v. Biden, No. 22-40043, Doc. 261-2 (5th Cir. Sept. 2, 2022) 6

CDC, *COVID Data Tracker: Daily and Total Trends*, https://covid.cdc.gov/covid-data-tracker/#trends_weeklydeaths_select_00 13

Joel Neel,
Most Americans have been infected with COVID-19 virus, the CDC reports, NPR (Apr. 26, 2022), available: https://www.npr.org/2022/04/26/1094817774/covid-19-infections-us-most-americans 8

The American Heritage Dictionary of the English Language (1969)...10

The CovidStates Project,
State of the Covid-19 Pandemic Report No. 96 (Dec. 28, 2022), available: https://www.covidstates.org/reports/state-of-the-covid-19-pandemic...8

Rules

Fed. R. Civ. P. 23 .... 7, 8

The *en banc* Fifth Circuit affirmed this Court's preliminary injunction against Executive Order 14,043 on March 23, 2023, agreeing with this Court that the Covid-19 federal-worker vaccine mandate in that executive order exceeds the President's authority. *Feds for Med. Freedom v. Biden*, 63 F.4th 366 (5th Cir. 2023) (*en banc*). The mandate in that case issued on May 15, 2023.

Plaintiffs request that this Court: (1) lift its stay in this case, which was entered pending the appeal of *Feds for Med. Freedom* in the Fifth Circuit; (2) certify the class; (3) grant summary judgment for Plaintiffs on Count V, which alleges that the President lacks authority to issue the federal-worker vaccine mandate; and (4) permanently enjoin enforcement of that mandate against the class. This relief is dictated by binding Fifth Circuit precedent agreeing with this Court that the federal-worker vaccine mandate is unlawful and causes irreparable harm. The government opposes this relief.

BACKGROUND

On December 28, 2021, Plaintiffs filed an amended class-action complaint seeking injunctive and declaratory relief against the Covid-19 vaccine in Executive Order 14,043 for federal employees. ECF 33-2 at 77-78. Count V of the amended complaint asserted that "the President does not have the asserted power under the statutes relied upon to mandate COVID-19 vaccines as a condition of employment in the federal workforce. *Id.* ¶ 280 (citing relevant statutes).

On January 21, 2022, in a related case, this Court issued a preliminary injunction against enforcement of Executive Order 14,043 because it concluded "the President was without statutory authority to issue the federal-worker mandate" and "the federal-worker mandate exceeds" constitutional limits of inherent Article II powers. *Feds for Med. Freedom v. Biden*, 581 F. Supp. 3d 826, 834-35 (S.D. Tex. 2022). The Court further held that the mandate would inflict irreparable injury against federal workers and that "enjoining the federal-worker mandate is in the public interest." *Id.* at 833, 836.

On February 10, 2022, the government requested the Court stay this case pending resolution of the government's appeal of *Feds for Medical Freedom* to the Fifth Circuit because that appeal would likely resolve issues in this case, including whether the Court has jurisdiction and whether the mandate exceeds the President's authority. ECF 44. On February 23, 2022, the Court granted the government's motion for a stay. ECF No. 48. Plaintiffs in this case have filed three *amicus* briefs in the Fifth Circuit in support of plaintiffs in *Feds for Medical Freedom*.[1]

The *en banc* Fifth Circuit on March 23, 2023, issued an opinion affirming this Court's preliminary injunction, holding that the Civil Service Reform Act does not bar a challenge against the federal-worker mandate and that this Court correctly concluded that the mandate exceeds the President's authority, would inflict irreparable harm, and that a nationwide injunction against it would serve the public interest. *Feds for Med. Freedom*, 63 F.4th 366.

President Biden has since announced that Executive Order 14,043 would be withdrawn effective at the end of May 11, 2023. *The Biden-Harris Administration Will End COVID-19 Vaccination Requirements for Federal Employees, Contractors, International Travelers, Head Start Educators, and CMS-Certified Facilities*, White House (May 1, 2023) (attached as Exhibit 1). He has also issued a new Executive Order withdrawing the federal-worker vaccine mandate. *Executive Order on Moving Beyond COVID-19 Vaccination Requirements for Federal Workers*, 88 Fed. Reg. 30,0891 (May 15, 2023) (Attached as Exhibit 2). Neither the announcement nor the new Executive Order disclaims the power to reissue the mandate, nor even acknowledges that this Court and the *en banc* Fifth Circuit found it unlawful. *See* Exs. 1-2. Rather, both documents vigorously defend the wisdom—and by implication, the legality—

[1] *See* Brief for Amici Curiae James Rodden et al., *Feds for Medical Freedom v. Biden*, No. 22-40043, Doc. 00516209324 (5th Cir. Feb. 19, 2022); Brief for Amici Curiae James Rodden et al., *Feds for Medical Freedom v. Biden*, No. 22-40043, Doc. 005162338092 (5th Cir. June 1, 2022); Brief for Amici Curiae James Rodden et al., *Feds for Medical Freedom v. Biden*, No. 22-40043, Doc. 261-2 (5th Cir. Sept. 2, 2022).

of imposing the federal-worker vaccine mandate, which strongly indicates that the government maintains it has power to reimpose the mandate in the future.

ARGUMENT

I. THE COURT SHOULD LIFT ITS STAY

This Court granted the government's request to stay this case because the then-pending appeal of the preliminary injunctions this Court issued in *Feds for Med. Freedom* would likely resolve the jurisdictional and excess-of-authority issues in this case. *See* ECF 44, 48. The *en banc* Fifth Circuit has now completed its review of that preliminary injunction, which resolved the jurisdictional and excess-of-authority issues. Plaintiffs request that this Court lift the stay.

II. THE COURT SHOULD CERTIFY THE CLASS

The First Amended Complaint was filed on behalf of the following putative class:

> All non-uniformed service federal employees within the meaning of 5 U.S.C. § 2105 employed by the United States government (ii) on or after October 8, 2021 (the deadline for the earliest of those employees to become vaccinated against COVID-19), including employees newly hired, whether or not they work at federal buildings or other facilities, at home, or both (iii) who have naturally acquired immunity demonstrable by antibody testing and where (iv) such employees have withheld their consent to taking such a vaccine.

ECF 33-2, ¶ 187

Class certification is appropriate where there is: (1) numerosity; (2) commonality of issues; (3) typicality of the class representatives' claims in relation to the class; and 4) adequacy of the class representatives and their counsel to represent the class. *In re Monumental Life Ins. Co.*, 365 F.3d 408, 414–15 (5th Cir. 2004); *see also* Fed. R. Civ. P. 23(a). All of the prerequisites are met in this case.

To start, while the exact size of the class is unknown, there are over 2 million federal civilian workers. Assuming they have recovered from Covid-19 at the same rate as the general population,

that means over half of them have acquired natural immunity.[2] Even if the desire to take a Covid-19 vaccine runs at 99 percent among federal workers with natural immunity, that leaves over 10,000 class members. The numerosity requirement is readily met. *See Mullin v. Treasure Chest Casino*, 186 F.3d 620, 624 (5th Cir. 1999) (approving a class of 100 to 150).

Next, many questions of law and fact are common to the class, including whether the federal-worker mandate exceeds the President's authority. The Named Plaintiffs are also typical of the class in that they are injured by the mandate in the same way and make the same excess-of-authority argument against it.

Finally, the Named Plaintiffs will adequately protect the class because their interests are aligned with the interests of other members of the class. Plaintiffs seek declaratory and injunctive relief that would benefit all class members. *Mertz v. Harris*, 497 F. Supp. 1134, 1139 (S.D. Tex. 1980) ("The basic elements of [adequate representation] are an absence of conflict between the representative and the class members and an assurance of vigorous prosecution by the representative."). They have also retained competent class counsel. When unchallenged, class counsel's competency can be presumed. *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 481 n.12 (5th Cir. 2001). In any event, lead counsel Mr. Vecchione is extremely familiar with class-action suits in this Circuit against *ultra vires* executive branch actions. *See, e.g., Mexican Gulf v. Dep't of Commerce*, 60 F.4th 956 (5th Cir. 2023) (representing class of charter-boat captains to vacate agency regulation).

Class certification for injunctive and declaratory relief is appropriate under Rule 23(b)(2) where "class members must have been harmed in essentially the same way, and injunctive relief must

---

[2] Joel Neel, *Most Americans have been infected with COVID-19 virus, the CDC reports*, NPR (April 26, 2022), available: https://www.npr.org/2022/04/26/1094817774/covid-19-infections-us-most-americans ("[T]he CDC's Dr. Kristie Clarke said so many people caught omicron over the winter that almost 60% of everyone in the U.S. now have antibodies to the virus in their blood."); *see also* The CovidStates Project, State of the Covid-19 Pandemic Report No. 96 (Dec. 28, 2022), available: https://www.covidstates.org/reports/state-of-the-covid-19-pandemic ("About half of American adults report having been infected with COVID-19 at some point[.]").

predominate over monetary damage claims." *Maldonado v. Ochsner Clinic Found.*, 493 F.3d 521, 524 (5th Cir. 2007). Plaintiffs do not seek *any* monetary damages, and injunctive relief respecting the class as a whole is warranted because the government sought to enforce the federal-worker mandate against the entire class.

III. THE COURT SHOULD GRANT SUMMARY JUDGMENT ON COUNT V

Because the Fifth Circuit has now agreed with this Court that Executive Order 14,043's federal-worker vaccine mandate is *ultra vires*, Plaintiffs move for summary judgment in their favor on Count V that "the President does not have the asserted power under the statutes relied upon to mandate COVID-19 vaccines as a condition of employment in the federal workforce." *Id.* ¶ 280 (citing 5 U.S.C. §§ 3301, 3302, and 7301).

This Court has already held that the President lacks authority to issue the federal-worker mandate, *Feds for Med. Freedom*, 581 F. Supp. 3d at 833-34, and the *en banc* Fifth Circuit "substantially agree[d]," *Feds for Med. Freedom*, 63 F.4th at 387. None of the three statutory sources invoked by the government—5 U.S.C. §§ 3301, 3302, and 7301—provides the President with the asserted power.

As this Court already explained, "Section 3301, by its own terms, applies only to 'applicants' seeking 'admission … into the civil service'" and "makes no reference to current employees (like the plaintiffs)." *Feds for Med. Freedom*, 581 F. Supp. 3d at 833 (quoting § 3301). And § 3302's authorization to "prescribe rules" must be interpreted in context of the entire statute, which demonstrates such authority is limited to subjects like "exempt[ing] certain employees from civil-service rules and from certain reports and examinations, and … prohibit[ing] marital and disability discrimination." *Ibid.* And as this Court already found, "not even a generous reading of the [§ 3302's] text provides authority for a vaccine mandate." *Id.* Moreover, both §§ 3301 and 3302 appear in a subchapter of Title 5 entitled "Examination, Certification, and Appointment," and in a chapter entitled "Examination, Selection, and Placement," which confirms these provisions have no bearing on whether *existing* employees can

keep their jobs. *See Yates v. United States*, 574 U.S. 528, 540 (2015) (headings "supply cues" to interpreting statutes).

Nor does § 7301's authorization to issue rules regarding "conduct" provide authority to mandate vaccination because being vaccinated is not "conduct." Conduct is commonly understood to mean "[t]he way a person acts" or one's "behavior." The American Heritage Dictionary of the English Language (1969). By contrast, a permanent and irreversible medical procedure results in a status, not conduct. *See Robinson v. California*, 370 U.S. 660, 666–67 (1962) (distinguishing status and conduct). Section 7301 does not authorize the regulation of federal workers' medical status.

This Court also correctly held that, even assuming the federal-worker vaccine mandate regulates conduct rather than status, it still would lack authorization because § 7301 merely authorizes regulation of *workplace* conduct, and "[a]ny broader reading would allow the President to prescribe, or proscribe, certain private behavior by civilian federal workers outside the context of their employment." *Feds for Med. Freedom*, 581 F. Supp. 3d at 834. Section 7301 expressly references conduct for those "in the executive branch," indicating a clear nexus requirement to conduct *in their executive branch jobs*.

Finally, in addition to the *en banc* Fifth Circuit in *Feds for Med. Freedom*, the binding reasoning in *Louisiana v. Biden*, 55 F.4th 1017 (5th Cir. 2022), reinforces this Court's conclusion that the federal-worker vaccine mandate exceeds the President's authority. While that case concerned a different vaccine mandate for federal *contractors*, its logic is directly applicable here. *Louisiana* held that "questions surrounding the vaccine and pandemic generally are undoubtedly of 'vast economic and political significance,'" *id.* at 1033, which applies equally to the federal-worker mandate, especially given the government's assertion of breathtaking power over the private lives of "*any and all* [federal] employees —*full-time or part-time*— … at any location," *id.* at 1032. The Major Questions Doctrine therefore requires clear statutory authority to support a federal-worker vaccine mandate, which is absent here.

Louisiana further held that "more than their conduct," such vaccine mandates "purport[] to govern [employees'] individual healthcare decisions." *Id.* at 1030. Such reasoning supports this Court's conclusion that the federal-worker mandate is *ultra vires* because 5 U.S.C. § 7301 does not authorize regulation of "private behavior by civilian federal workers outside the context of their employment." *Feds for Medical Freedom*, 581 F. Supp. 3d at 834.

Louisiana notably affirmed an injunction against enforcement of the contractor mandate even though "the Government has a much freer hand in dealing with *citizen employees and government contractors* than it does when it brings its sovereign power to bear on citizens at large." 55 F.4th at 1032 (cleaned up; emphasis added). Even acknowledging the government's freer hand with federal employees, there still is no authority to mandate that they be vaccinated against their will.

This case is not about "the federal *government*'s power, exercised properly, to mandate vaccination of its employees," but instead "whether the *President* can, with the stroke of a pen and without the input of Congress, require millions of federal employees to undergo a medical procedure." *Feds for Medical Freedom*, 581 F. Supp. 3d at 829. The Fifth Circuit has made clear—in two different published opinions, one of which was issued by the *en banc* Court—that the President cannot do so.

The Court should enter summary judgment in favor of Plaintiffs on Count V and declare—as it already has—that the federal-worker vaccine mandate exceeds the President's authority and therefore is unlawful.

IV. THE COURT SHOULD ISSUE A PERMANENT INJUNCTION

The Court should also enter permanent injunctive relief against the enforcement of the federal-worker vaccine mandate. To obtain a permanent injunction, a party must show "(1) that it has suffered an irreparable injury; (2) … monetary damages are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity

is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Abraham v. Alpha Chi Omega*, 708 F.3d 614, 627 (5th Cir. 2013).

The *en banc* Fifth Circuit agreed with this Court that each of these factors was satisfied as to the federal-worker mandate. *See Feds for Med. Freedom*, 63 F.4th at 387. Moreover, the government can no longer claim any inequity or harm to the public from a permanent injunction, given that this Court's preliminary injunction has been in place for over a year and the government has chosen to voluntarily withdraw the mandate, at least for the moment. The injunction should apply to all class members.

V. Voluntary Cessation Does Not Moot This Case

The government opposes the requested relief and argues this case is moot because the President voluntarily ceased the offending conduct by voluntarily withdrawing the federal-worker vaccine mandate, effective at the end of the day on May 11, 2023. *See* Exs. 1-2.

"'[V]oluntary cessation does not moot a case' unless it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *West Virginia v. EPA*, 142 S. Ct. 2587, 2607 (2022). This means the government bear the "heavy" burden to prove that it is "absolutely clear" there is no reasonable chance it will "reimpose" the federal-worker mandate. *Ibid.*

The government cannot make that extraordinarily strong showing. The federal defendant in *West Virginia* represented that it will not implement the challenged regulation while maintaining the legality of that regulation. *Ibid.* The Supreme Court made clear that courts "do not dismiss a case as moot in such circumstances." *Ibid.* Here, the President's announcement and new Executive Order withdrawing the federal-worker mandate provide even less assurance, because they do not state that the government will refrain from issuing a similar mandate in the future. *See* Exs.1-2. Nor do they disclaim the power to do so. *Ibid.* In fact, they do not even acknowledge that the mandate was found unlawful by this Court and the *en banc* Fifth Circuit, let alone signal acquiescence to or agreement with those rulings. To the contrary, the President's announcement boasted that "[o]ur Administration's

vaccination requirements helped ensure the safety of workers in critical workforces," Ex. 1, while his new Executive Order proclaimed that the federal-worker mandate was "necessary to protect the health and safety of critical workforces serving the American people and to advance the efficiency of Government services," Ex 2 at 30,981. The President thus provided no hint—let alone "absolute[]" confirmation—that the federal-worker vaccine mandate will never be "reimpose[d]." *West Virginia*, 142 S. Ct. at 2607. Rather, he is "vigorously defend[ing]" the wisdom—and by implication, the legality—of the federal-worker mandate, which strongly indicates that he (or his successor) can and will impose the same mandate under circumstances he deems appropriate. *Ibid.*

If, for example, a new and virulent variant of Covid-19 emerges—as has happened multiple times already over the past several years—the government could easily reimpose the federal-worker mandate with "the stroke of a pen." *Feds for Med. Freedom*, 581 F. Supp. 3d at 829. Indeed, the weekly Covid-19 fatality rate today is approximately the same as that of Summer 2021, right before a new strain emerged, and the President responded by imposing various vaccine mandates, including the one at issue in this case.[3] The government cannot somehow guarantee that no new Covid-19 strains will ever emerge that may cause the President to reimpose a federal-worker mandate that he continues to defend as good policy. Exs. 1 and 2.

Moreover, the mandate might be reimposed even without any major change in Covid-19's virulence. Notably, the Covid-19 fatality rate during the weeks leading up to the government's vigorous defense of the federal-worker mandate in September, 2022 before the *en banc* Fifth Circuit was approximately the same as (and in some cases lower than) the fatality rate in the weeks leading up to the White House's February, 2023 announcement that it would end the Covid-19 national emergency.[4]

[3] CDC, *COVID Data Tracker: Daily and Total Trends*, https://covid.cdc.gov/covid-data-tracker/#trends_weeklydeaths_select_00 (last visited May 31, 2023).

[4] *Ibid.* The *en banc* oral argument was held on September 13, 2022. The weekly Covid-19 fatality rate for the ten weeks leading up to that argument ranged from 2,584 to 3,395. The White House first

Indeed, the President declared on 60 Minutes that "[t]he pandemic is over" on September 19, 2022—less than a week after Defendants urged the *en banc* Fifth Circuit to reinstate the federal-worker mandate.[5] What changed was not Covid-19's virulence but rather court decisions and public opinion against vaccine mandates. The decisions to maintain the federal-worker mandate in September, 2022 and to withdraw it in February, 2023 thus do not appear to have been based on public-health realities but rather on *political* calculations, which can change again on a moment's notice.

Numerous jurisdictions, including the federal government, have relaxed and then reimposed Covid-19 restrictions even after lengthy pauses or withdrawals of prior restrictions. Merely withdrawing a mandate today hardly means it will never be reimposed down the road. The government cannot meet the exceedingly high bar for overcoming the voluntary-cessation doctrine.

CONCLUSION

The Court should lift its stay; certify the class; grant summary judgment in Plaintiffs' favor on Count V; and permanently enjoin enforcement of the federal-worker vaccine mandate as to the class.

Dated: May 31, 2023

Respectfully submitted,

/s/ John J. Vecchione
John J. Vecchione, *Admitted Pro Hac Vice*
Senior Litigation Counsel
Sheng Li
Litigation Counsel
NEW CIVIL LIBERTIES ALLIANCE
1225 19th Street NW, Suite 450
Washington, DC 20036
(202) 869-5210 (Telephone)
(202) 869-5238 (Fax)
John.Vecchione@ncla.legal

Robert Henneke
Texas Bar # 24046058
TEXAS PUBLIC POLICY FOUNDATION
901 Congress Avenue
Austin, TX 78701
(512) 472-2700 (Telephone)
(512) 472-2728 (Fax)
rhenneke@texaspolicy.com

announced it would end the Covid-19 national emergency on February 9, 2023. The weekly Covid-19 fatality rate for the ten weeks leading up to that announcement ranged from 2,604 to 3,831.

[5] CBS News, Biden says COVID-19 pandemic is 'over' in US, Sep. 19, 2022, https://www.cbsnews.com/video/president-biden-the-pandemic-is-over-60-minutes/ (last visited May 31, 2023).

CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2023, a true and correct copy of the above and foregoing document was electronically filed with the Clerk of the Court for the Southern District of Texas using the CM/ECF system, which will send notification of such filing to all registered counsel of record.

/s/ John J. Vecchione
John J. Vecchione