

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JASON PAYNE,

Plaintiff,

v.

JOSEPH R. BIDEN, et al,

Defendants.

Case No.: 1:21-cv-03077-JEB

MEMORANDUM OF POINTS AND AUTHORITIES SUPPORTING
PLAINTIFF JASON PAYNE'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Unsatisfied with the disruptive effects of COVID-19 on the economy and the federal workforce, the President of the United States issued an extraordinary Executive Order mandating COVID-19 vaccinations for all federal civilian employees. Federal departments and agencies have acted to implement that Executive Order. But the Constitution does not empower the President unilaterally to take such unprecedented action, nor does any duly enacted law passed by Congress. And the President's dissatisfaction with the existence of a problem—no matter how severe—does not provide an independent source of authority upon which he can act.

Even if the President *did* have the authority to issue the federal vaccine mandate, he did not narrowly tailor his mandate to avoid intruding on the fundamental rights of federal employees who have natural immunity from COVID-

19, such as the plaintiff in this case. And neither the President, nor his departments and agencies, may impose an unlawful condition on public employment.

The outcome of this case does not depend on a balancing of interests or evaluating competing scientific conclusions. The President simply lacked authority to issue this vaccine mandate. And for that reason, this Court should grant Mr. Payne's motion for summary judgment, declare Executive Orders 13,991 and 14,043 *ultra vires* and unlawful, and permanently enjoin the defendants' vaccine mandate.

BACKGROUND

President Biden issued Executive Order 13,991 on January 20, 2021. It created the Safer Federal Workforce Task Force (the "Task Force"). See Exhibit 1.

President Biden issued Executive Order 14,043 on September 9, 2021. It mandated COVID-19 vaccination for all federal civilian employees and directed the Task Force to issue "guidance" within seven days "on agency implementation." See Exhibit 2.

The defendant Task Force issued guidance in the form of "Safety Principles" on September 13, 2021, setting November 22, 2021, as the deadline for all federal civilian employees to be "fully vaccinated" except "in limited circumstances where an employee is legally entitled to a reasonable accommodation." See Exhibit 3.

The Office of Personnel Management (the "OPM") issued hiring guidance on October 1, 2021, specifying a vaccination schedule for existing federal civilian employees, and requiring vaccination to be described in job opportunities as a

condition of federal employment. It cited Executive Order 14,043 and the Task Force guidance as legal authority for these actions. *See* Exhibit 4.

The OPM also issued “enforcement guidance” on October 1, 2021, to “assist agencies in implementing” Executive Order 14,043. The OPM directed agencies to advise workers that failure to comply with the vaccination mandate “will result in disciplinary action” because refusing “is an act of misconduct.” If “the individual continues to refuse to comply, the agency should pursue disciplinary measures, up to and including removal or termination from Federal service.” *See* Exhibit 5.

Citing Executive Order 14,043, the defendant Department of Defense (the “DOD”) issued a memorandum on October 1, 2021, mandating vaccination by November 22, 2021. It specified that individuals who had suffered a previous COVID-19 infection would not be considered “fully vaccinated” and would require injection. *See* Exhibit 6. However, the evidence strongly suggests previously infected individuals’ immunity “is, at least, equivalent to the protection afforded by full vaccination of COVID-naïve populations.” ECF No. 1 ¶¶ 7, 55 (citations omitted).

Also citing Executive Order 14,043 and the Task Force’s guidance, the DOD issued vaccine mandate guidance on October 18, 2021. This memo reiterated that individuals who had suffered a previous COVID-19 infection would not be considered “fully vaccinated” and would require injection. It further pledged (as the OPM directed) that employees who refused to be vaccinated or to provide proof of vaccination “are subject to disciplinary measures, up to and including removal from Federal service” for failure to obey a direct order. *See* Exhibit 7.

On October 29, 2021, the DOD issued supplemental guidance, still citing Executive Order 14,043, the Task Force guidance, and its October 1, 2021, memorandum. Once more, it reaffirmed individuals who had suffered a previous COVID-19 infection would not be considered “fully vaccinated” and would require injection. In conformity with Executive Order 14,043, the Task Force guidance and the OPM hiring and enforcement guidance, the DOD’s supplemental guidance explicitly specified all DOD civilian employees must be vaccinated “as a condition of employment,” subject only to exemptions “in limited circumstances” for religious and medical reasons (other than prior COVID-19 infection). *See* Exhibit 8.

Citing Executive Order 14,043, the Task Force guidance, and the DOD memoranda, the defendant Department of the Navy issued a separate but substantively identical injection mandate to its civilian employees on November 5, 2021. *See* Exhibit 9.

The plaintiff, Jason Payne, is a full-time federal civilian employee, working for the Department of the Navy. *See* Affidavit of Jason Payne (“Payne Aff.”) ¶ 4. He has worked in the federal service for over twenty years. *Id.* He contracted COVID-19 in September 2020 and has since fully recovered. *Id.* ¶ 5. He has not complied with the vaccine mandate and has not claimed an exemption based on religious conscience or medical condition. *Id.* ¶ 12; ECF No. 1 ¶¶ 53-54. Accordingly, the defendants have promised that Mr. Payne will suffer progressive discipline, including counseling, suspension without pay, and termination from the Federal service for refusing injection. *Id.* ¶ 15; ECF No. 1 ¶¶ 50-52; ECF Nos. 1-3, 1-4, 1-5, 1.6, 1-7, 1-8, 1-9. As a

result, Mr. Payne has suffered injuries and harm including stigma, burdensome masking and travel requirements, reputational injury, the violation of his privacy rights, and mental distress. Payne Aff. ¶¶ 13-17.

STANDING AND RIPENESS

Mr. Payne has standing to bring this case, and it is ripe for adjudication.

Article III standing requires that the plaintiff have (1) suffered an injury in fact “that is concrete, particularized, and actual or imminent,” *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021), (2) that is “fairly traceable” to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). “When the suit is one challenging the legality of government action” and the plaintiff is himself an object of the action, “there is ordinarily little question” that the action has caused him injury, and that a judgment preventing the action will redress it. *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 561-62 (1992).

Mr. Payne has suffered “concrete” and “particularized” injury that is “imminent” or “actual,” especially now that the November 22 compliance deadline has passed. His injuries are “fairly traceable” to the defendants’ challenged conduct. It is “sufficient” that a party “sustains injury from an executive act that allegedly exceeds the official’s authority.” *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2196 (2020) (internal quotation marks and citation omitted). Finally, Mr. Payne’s injury is redressable. The defendants might argue that this Court cannot issue relief against defendant Biden for an unlawful order. *See Chamber of Com. v. Reich*, 74

F.3d 1322, 1331 n.4 (D.C. Cir. 1995). However, there is also a long-established history of vindicating claims directed at a subordinate executive official. *Id.*; *see also Nat'l Treasury Emps. Union v. Nixon*, 492 F.2d 587, 602 (D.C. Cir. 1974); *TikTok Inc. v. Trump*, 507 F. Supp. 3d 92, 96 (D.D.C. 2020); *Gomez v. Trump*, 485 F. Supp. 3d 145, 165, 205 (D.D.C. 2020). And courts have repeatedly approved judgments against the President. *Clinton v. City of New York*, 524 U.S. 417, 425 n.9 (1998); *National Treasury Employees Union v. Nixon*, 492 F.2d 587, 616 (D.C. Cir. 1974); *CREW v. Trump*, 302 F. Supp. 3d 127, 139 n.5 (D.D.C. 2018). No federal official, from the highest to the lowest, is above the law. *United States v. Nixon*, 418 U.S. 683, 715 (1974); *United States v. Lee*, 106 U.S. 196, 220 (1882).

This case is ripe. Mr. Payne has alleged both existing and imminent injuries-in-fact. *See Payne Aff.* at ¶¶ 12-17; *Am. Petroleum Inst. v. E.P.A.*, 683 F.3d 382, 386 (D.C. Cir. 2012). As the Supreme Court said, “We normally do not require plaintiffs to ‘bet the farm ... by taking the violative action’ before ‘testing the validity of the law’, and we do not consider this a ‘meaningful avenue of relief.’” *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 490-91 (2010).

STANDARD OF REVIEW

A court grants summary judgment if the moving party “shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). A “material” fact is one with potential to change the substantive outcome of the litigation. *See id.* at 248; *Holcomb v. Powell*, 433 F.3d 889,

895 (D.C. Cir. 2006). A dispute is “genuine” if a reasonable jury could determine that the evidence warrants a verdict for the nonmoving party. *See Liberty Lobby*, 477 U.S. at 248; *Holcomb*, 433 F.3d at 895; *Novartis Pharm. Corp. v. Espinosa, et al.*, 2021 WL 5161783, at *5 (D.D.C. Nov. 5, 2021).

For cases alleging *ultra vires* Executive action, courts should start with the plain text of the statutes in which delegated authority is said to reside, construed in accord with the ordinary public meaning of the terms at the time of enactment. *See Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1738 (2020); *Home Depot U. S. A., Inc. v. Jackson*, 139 S. Ct. 1743, 1748 (2019); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). Authority must be clearly delegated, for Congress does not hide elephants in mouseholes. *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001); *Banks v. Booth*, 3 F.4th 445, 449 (D.C. Cir. 2021). Finally, statutes must be construed as written, and in context, even if some other approach might be good policy. *Yates v. United States*, 574 U.S. 528, 537-38 (2015); *English v. Trump*, 279 F. Supp. 3d 307, 311 (D.D.C. 2018).

Mr. Payne’s Due Process claims arise from the defendants’ alleged infringement of his fundamental rights and liberties. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Rochin v. California*, 342 U.S. 165, 172 (1952); *Planned Parenthood of Southeast Pennsylvania v. Casey*, 505 U.S. 833, 849 (1992); *Roe v. Wade*, 410 U.S. 113, 153 (1973); *Abigail All. for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 702 (D.C. Cir. 2007) (citations omitted). Strict

scrutiny thus applies. The defendants therefore must demonstrate that denying him an accommodation or exception based on natural immunity advances factually specific governmental “interests of the highest order” and is narrowly tailored to achieve those interests. *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 1881 (2021); *Reno v. Flores*, 507 U.S. 292, 301–02 (1993).

ARGUMENT

I. THE VACCINE MANDATE VIOLATES THE SEPARATION OF POWERS AND IS *ULTRA VIRES*

The Constitution of the United States “divide[s] the federal government’s powers into “three defined categories, Legislative, Executive, and Judicial.” *INS v. Chadha*, 462 U.S. 919, 951 (1983). The President’s power, if any, to issue an order must stem either from an act of Congress or from the Constitution itself. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). President Biden may recommend laws he thinks wise and veto laws he thinks bad. But the opening section of Article I leaves no doubt that “All legislative Powers herein granted shall be vested in a Congress of the United States”. U.S. Const. art I, § 1; *Youngstown Sheet & Tube Co.* 343 U.S. at 587-88.

Although courts sometimes defer to the President, judicial skepticism is high where, as here, the President claims to exercise some vast, newly discovered power to compel or regulate based on a cryptic delegation of authority. *See Alabama Ass’n of Realtors*, 141 S. Ct. at 2489; *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 324 (2014); *Brown & Williamson*, 529 U.S. at 160 (citations omitted). There is no express constitutional language granting President Biden the authority he has claimed in

this case. Therefore, the federal civilian worker vaccine mandate, a matter of very great economic, political, and Constitutional significance,¹ must be supported by a clear and direct Congressional authorization. *See* U.S. Const. art. I, § 1; *Alabama Assoc. of Realtors*, 141 S. Ct. at 2489; *Util. Air Regul. Grp.*, 573 U.S. at 324; *Youngstown Sheet & Tube*, 343 U.S. at 585; *BST Holdings, L.L.C. v. Occupational Safety & Health Admin., United States Dep't of Lab.*, ___ F.4th ___, 2021 WL 5279381 (5th Cir. Nov. 12, 2021).

Executive Order 14,043 claims 5 U.S.C. §§ 3301, 3302, and 7301 as authority for the vaccine mandate. Executive Order 13,991 claims 5 U.S.C. § 7902(c) as authority for the Task Force. The statutory text, however, does not support these claims. Rather, the President and his agencies have unlawfully jammed the broadest Executive power imaginable - the power to compel federal civilian workers to choose between unwanted injections and their careers and livelihoods - into the very smallest of statutory mouseholes. The defendants have exceeded their lawful authority. *See Whitman*, 531 U.S. at 468; *Banks*, 3 F.4th at 449; *see also BST Holdings, L.L.C.*, ___ F.4th at ___. 2021 WL 5279381 at *8 (separation of powers principles “case doubt” over the OSHA vaccine mandate) (citations omitted).

¹ The vaccine mandate is economically significant. Julie Jennings & Jared C. Nagel, *Federal Workforce Statistics Sources: OPM and OMB*, Cong. Research Serv., at 1 (June 24, 2021) (the OPM estimates that the federal civilian workforce includes 2.1 million employees); ECF No. 1 ¶ 63. It is politically significant. ECF No. 1 ¶¶ 47-48. And it affects federal civilian employees’ constitutionally protected property right in their jobs and pensions. “Our precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property.” *United States Forest Service v. Cowpasture River Preservation Assn.*, 140 S. Ct. 1837, 1850 (2020).

A. The Executive Order 14,043 Vaccine Mandate Is *Ultra Vires*

Executive Order 14,043 cites 5 U.S.C. §§ 3301, 3302, and 7301 as authority for the vaccine mandate. Section 3301, titled “Civil Service; generally”, provides:

The President may—(1) prescribe such *regulations for the admission of individuals into the civil service* in the executive branch as will best promote the efficiency of that service; (2) ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought; and (3) appoint and prescribe the duties of individuals to make inquiries for the purpose of this section.

5 U.S.C. § 3301 (emphasis added).

Section 3302, titled “Competitive service; rules”, provides:

The President may *prescribe rules governing the competitive service*. The rules shall provide, as nearly as conditions of good administration warrant, for—(1) necessary exceptions of positions from the competitive service; and (2) necessary exceptions from the provisions of sections 2951, 3304(a), 3321, 7202, and 7203 of this title. Each officer and individual employed in an agency to which the rules apply shall aid in *carrying out the rules*.

5 U.S.C. § 3302 (emphasis added).

Section 7301, titled “Presidential regulations,” provides “The President may prescribe *regulations* for the *conduct* of employees in the executive branch.” 5 U.S.C. § 7301 (emphasis added).

These statutes do not expressly authorize the President to decree and impose a vaccine mandate on all federal civilian workers. Nor do they allow such a power to be fairly implied. *Accord Alabama Assoc. of Realtors*, 141 S. Ct. at 2489; *Youngstown Sheet & Tube*, 343 U.S. at 585. Indeed, no President has ever before claimed to have such power.

Congress knows how to delegate the President lawful authority to make vaccination a condition of federal civilian employment. *See* 10 U.S.C. § 1580a (delegating the Secretary of Defense the power to “prescribe regulations” for a civilian employee anthrax vaccine mandate). Congress has legislated repeatedly and extensively on COVID-19, yet it has not seen fit to delegate the President similar authority for the COVID-19 vaccine. Therefore, Executive Order 14,043 is *ultra vires* and unconstitutional.

B. The Task Force is *Ultra Vires* and Violates the Separation of Powers

Executive Order 13,991 created the Safer Federal Workforce Task Force, citing only Section 7902(c), Title 5, United States Code, 5 U.S.C. § 7902(c), as authority. Executive Order 14,043 directed the Task Force to issue the vaccine mandate guidance used by the OPM, the DOD, and the Navy, to direct, justify, and shape their actions in this case. *See* ECF No. 1 ¶¶ 31, 39, 41-46, 49-52. But the Task Force was unlawfully constituted, and, even if of lawful origin, it lacked legal authority to issue vaccine mandate guidance.

Section 7902(c) has two subparagraphs. Section 7902(c)(1) authorizes the President to “establish by Executive Order a safety council composed of representatives of the agencies and of labor organizations representing employees to serve as an advisory body to the Secretary in furtherance of the safety program carried out by the Secretary under subsection (b) of this section.” 5 U.S.C. § 7902(c)(1). Section 7902(c)(2) authorizes the President to “undertake such other measures as he considers proper to prevent injuries and accidents to employees of the agencies.”

Section 7902(c)(1) cannot be lawful authority for the Task Force's formation or for its binding vaccine mandate guidance. First, a safety council must include "representatives of the agencies and of labor organizations representing employees." The Task Force here includes only agency heads.

Second, a safety council serves only "as an advisory body to the Secretary [of Labor] in furtherance of the safety program carried out by the Secretary under subsection (b) of this section." Section 7902(b), provides "The Secretary of Labor shall carry out a safety program under section 941(b)(1) of title 33 covering the employment of each employee of an agency." Section 941 of title 33, 33 U.S.C. § 941, titled "Safety rules and regulations", provides:

The Secretary, in enforcing and administering the provisions of this section, is authorized in addition to such other powers and duties as are conferred upon him-(1) to make studies and investigations with respect to safety provisions and the causes and prevention of injuries in employments covered by this chapter, and in making such studies and investigations to cooperate with any agency of the United States or with any State agency engaged in similar work
....

33 U.S.C. § 941(b)(1). The phrase "employments covered by this chapter" refers to chapter 18, title 33 of the United States Code, titled "Longshore and Harbor Workers Compensation". The Task Force, however, provides "ongoing guidance to heads of agencies on the operation of the Federal Government, the safety of its employees, and the continuity of Government functions during the COVID-19 pandemic." Exhibit 1, § 4(e). This is outside the statute's bounds.

Section 7902(c)(2) also cannot be lawful authority for the Task Force's formation or for its binding vaccine mandate guidance. First, it authorizes the President to "undertake such other measures as he considers proper to prevent

injuries and accidents to employees of the agencies.” (Emphasis added.) But a virus is neither an “injury” nor an “accident.” See *Bostock*, 140 S. Ct. at 1738; *BST Holdings, L.L.C.*, ___ F.4th at ___, 2021 WL 5279381 at *4-5.

Second, whatever power the President may have is cabined by statutory context. *Yates*, 574 U.S. at 537-38, 543. Here, that is § 7902(b)’s directive for “safety programs” carried out by the Secretary of Labor, perhaps supported by the “safety council” authorized under § 7902(c)(1), and § 7902(d)’s directive that “The head of each agency shall develop and support organized safety promotion to reduce accidents and injuries among employees of his agency, encourage safe practices, and eliminate work hazards and health risks.” A vaccine mandate is not “organized safety promotion.” *Bostock*, 140 S. Ct. at 1738; *Brown & Williamson*, 529 U.S. at 160; *Youngstown Sheet & Tube*, 343 U.S. at 585; see also *BST Holdings, L.L.C.*, ___ F.4th at ___, 2021 WL 5279381 at *4-5.

Section 7902(c)(2) does not expressly or impliedly authorize the President to empanel the Task Force or to order that it formulate and issue vaccine mandate guidance. Consequently, the road from § 7902(c)(2) to the Task Force, and then from the Task Force to the vaccine mandate, is a dead end.

II. THE DEFENDANTS HAVE VIOLATED MR. PAYNE’S DUE PROCESS RIGHTS

Mr. Payne’s fundamental liberty interests include personal privacy and bodily integrity. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Rochin v. California*, 342 U.S. 165, 172 (1952); *Planned Parenthood of Southeast Pennsylvania v. Casey*, 505 U.S. 833, 849 (1992); *Roe v. Wade*, 410 U.S. 113, 153 (1973); *Abigail All. for Better*

Access to Developmental Drugs v. von Eschenbach, 495 F.3d 695, 702 (D.C. Cir. 2007) (citations omitted). Coerced COVID-19 vaccination infringes them. *Washington v. Harper*, 494 U.S. 210, 229 (1990) (“The forcible injection of medication into a nonconsenting person’s body represents a substantial interference with that person’s liberty.”); *Cruzan v. Dir., Missouri Dep’t of Health*, 497 U.S. 261, 278 (1990) (“a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment”).

Government actions burdening the exercise of fundamental rights or liberty interests are subject to strict scrutiny and will be upheld only when they are narrowly tailored to a compelling governmental interest. *Glucksberg*, 521 U.S. at 720. The defendants must prove that their vaccine mandate advances federal interests of the highest order² and is narrowly tailored to achieve those interests, to impose it on Mr. Payne. *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 1881 (2021); see also *Reno v. Flores*, 507 U.S. 292, 301-02 (1993). Put another way, so long as the defendants can achieve their interests in a manner that does not burden Mr. Payne’s fundamental liberty interests, they must do so. *Fulton*, 141 S. Ct. at 1881.

The sole question here is whether the defendants can show that they have they have a compelling interest in a “one-size-fits-all sledgehammer” mandate that makes no attempt to account for differences in federal workers or workplaces. *Accord BST Holdings, L.L.C.*, ___ F.4th at ___, 2021 WL 5279381 at *4. To date, the defendants

²As noted *supra*, defendants’ claim of expansive authority over the personal medical decisions of federal civilian workers is unprecedented. See e.g., *Alabama Assoc. of Realtors*, 141 S. Ct. at 2489.

have not explained their compelling interest in forcing Mr. Payne, who has infection-acquired immunity, to choose between giving up his rights to privacy and bodily integrity and losing his federal civil service job, or in denying him the same rights and privileges as any vaccinated employee, much less non-vaccinated employees who will be granted religious exemptions or medical exceptions. *See* ECF No. 1 ¶ 47.³ Since the defendants allow injection exemptions or exceptions for religious beliefs and medical conditions *other* than infection-acquired immunity, they obviously do not believe the vaccine mandate “can brook no departures.” *Fulton*, 141 S. Ct. at 1882. Accordingly, the vaccine mandate fails strict scrutiny.

Jacobson v. Massachusetts, 197 U.S. 11 (1905) is not to the contrary. First, the Court held a vaccination mandate may not “contravene the Constitution of the United States, nor infringe any right granted or secured by that instrument.” *Id.* at 25. Second, the case involved a state-mandated vaccine for smallpox, not a federal vaccine mandate for a coronavirus. In *Jacobson*, individuals could submit to the state, pay a fine, or identify a basis for exemption. *Id.* at 12, 14, 25. The defendants have

³ There is research suggesting COVID-19 infection-acquired immunity is least as robust, durable, and long-lasting as that achieved through vaccination. *See* ECF No. 1 ¶¶ 7, 55; Nabin K. Shrestha, et al., *Necessity of COVID-19 Vaccination in Previously Infected Individuals*, MEDRXIV (June 5th, 2021), available at <https://bit.ly/2TFBGcA> (last visited Oct. 29, 2021). But the point now is not that there is conflicting science, it is that mandatory vaccination infringes fundamental Constitutional rights and liberty interests, and the defendants have failed to explain how they have tailored their mandate or why tailoring is impractical and constitutionally unnecessary.

left Mr. Payne with a clear binary choice: Submit or be removed from the federal civil service.⁴ This violates Due Process.

III. THE VACCINE MANDATE IS AN UNCONSTITUTIONAL CONDITION

The defendants' vaccine mandate is invalid because it imposes an unconstitutional condition, specifically, termination of federal employment, because Mr. Payne is exercising his constitutional rights to privacy and bodily integrity. *See Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 545 (1983). The unconstitutional condition doctrine safeguards these rights "by preventing the government from coercing people into giving them up." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013). "What cannot be done directly cannot be done indirectly." *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1866). Since the defendants cannot force Mr. Payne (and other similarly situated federal employees) to be vaccinated against their will, they cannot use the promise of termination from the federal service to achieve the same result.

In *United Public Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75 (1947), the Supreme Court sustained the Hatch Act against a challenge by federal civil service employees and their union. But in concluding that federal employees could be precluded from partisan activities, the Court took pains to stress the limits of that

⁴ In any event, *Jacobson* is not controlling or persuasive precedent. One hundred sixteen years have passed since the decision was issued and the Supreme Court has replaced the unguided consideration of a law's reasonableness with the modern tiers-of-scrutiny framework. For example, a vaccine mandate exception to the fundamental rights of privacy and bodily integrity cannot be honestly squared with the Court's current abortion authorities. *See Casey*, 505 U.S. at 849; *Roe*, 410 U.S. at 153.

authority. It affirmed that “federal employees are protected by the Bill of Rights and that Congress may not enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.” *Id.* at 100. Later decisions have followed suit, concluding that the government may not condition public opinion on an employee’s abandonment of a constitutional right. *See, e.g., Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

First Amendment rights of free speech and expression have been protected against unconstitutional conditions. *See Perry*, 408 U.S. at 597 (the government “may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech”). So have the rights to the free exercise of religion, *Sherbert v. Verner*, 374 U.S. 398, 404 (1963), and to just compensation for private property taken for public use. *Koontz*, 570 U.S. at 604-05.

The Fifth Amendment guarantees protection of Mr. Payne’s fundamental privacy and bodily integrity rights and liberty interests, *see Glucksberg*, 521 U.S. at 720, including the freedom from the forcible injection of medication, *see Harper*, 494 U.S. at 229. These fundamental rights and liberty interests deserve the same protection as rights to freedom of speech and of religion.

Executive Order 14,043, and all the guidance and memoranda it has spawned, promise Mr. Payne that he will suffer discipline, including removal from federal service, unless he submits to injection. ECF No. 1 ¶¶ 38-39, 41-46, 49-52; ECF No. 1-1, 1-3, 1-4, 1-5, 1-6, 1-7, 1-8. As explained in Section II, *supra*, however, the

defendants have neither offered nor shown a compelling interest in denying Mr. Payne the same rights and privileges as any vaccinated employee, much less non-vaccinated employees who will be granted religious exemptions or medical exceptions. Therefore, the defendants' vaccine mandate is an unconstitutional condition.

CONCLUSION

This court should grant Mr. Payne's motion for summary judgment, declare Executive Orders 13,991 and 14,043 *ultra vires* and unlawful, and permanently enjoin the defendants' vaccine mandate.

November 24, 2021

Respectfully submitted,

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