No. 22-40043

In the United States Court of Appeals for the Fifth Circuit

FEDS FOR MEDICAL FREEDOM, *ET AL.*, *Plaintiffs–Appellees*,

v.

JOSEPH R. BIDEN, JR., IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES, ET AL., *Defendants–Appellants*.

On Appeal from the United States District Court for the Southern District of Texas No. 3:21-CV-356

BRIEF OF *AMICI CURIAE* 45 MEMBERS OF CONGRESS IN SUPPORT OF PLAINTIFFS–APPELLEES

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February 9, 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:

1. Allen, Rick W.
2. Arrington, Jodey
3. Biggs, Andy
4. Blackburn, Marsha
5. Boebert, Lauren
6. Braun, Mike
7. Budd, Ted
8. Cramer, Kevin
9. Cruz, Ted
10. Daines, Steve
11. Duncan, Jeff
12. Gaetz, Matt
13. Gohmert, Louie
14. Green, Mark E.
15. Greene, Marjorie Taylor
16. Guest, Michael

17. Hacker, David J.
18. Hagerty, Bill
19. Harris, Andy
20. Hartzler, Vicky
21. Hern, Kevin
22. Higgins, Clay
23. Hoeven, John
24. Huizenga, Bill
25. Inhofe, James M.
26. Johnson, Mike
27. Lamborn, Doug
28. Lankford, James
29. Mateer, Jeffrey C.
30. McKinley, David B.
31. Miller, Mary E.
32. Mooney, Alex X.
33. Norman, Ralph
34. Perry, Scott
35. Posey, Bill
36. Pratt, Jordan E.
37. Rodgers, Cathy McMorris
38. Rouzer, David

39. Roy, Chip
40. Sasse, Ben
41. Scott, Rick
42. Shackelford, Kelly J.
43. Simpson, Mike
44. Smith, Adrian
45. Smith, Jason
46. Stefanik, Elise
47. Sullivan, Dan
48. Thune, John
49. Walberg, Tim

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: February 9, 2022

Respectfully submitted,

/s/ Jordan E. Pratt

Jordan E. Pratt

Counsel for Amici Curiae

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IDENTITY AND INTEREST OF *AMICI CURIAE* [1]

Amici Curiae are 45 Members of the United States Congress. The *amici* from the U.S. Senate are: Ted Cruz; Marsha Blackburn; Mike Braun; Kevin Cramer; Steve Daines; Bill Hagerty; John Hoeven; James M. Inhofe; James Lankford; Ben Sasse; Rick Scott; Dan Sullivan; and John Thune.

The *amici* from the U.S. House of Representatives are: Chip Roy (TX-21); Mike Johnson (LA-04); Rick W. Allen (GA-12); Jodey Arrington (TX-19); Andy Biggs (AZ-05); Lauren Boebert (CO-03); Ted Budd (NC-13); Jeff Duncan (SC-03); Matt Gaetz (FL-01); Louie Gohmert (TX-01); Mark E. Green, M.D. (TN-07); Marjorie Taylor Greene (GA-14); Michael Guest (MS-03); Andy Harris, M.D. (MD-01); Vicky Hartzler (MO-04); Kevin Hern (OK-01); Clay Higgins (LA-03); Bill Huizenga (MI-02); Doug Lamborn (CO-05); David B. McKinley, P.E. (WV-01); Mary E. Miller (IL-15); Alex X. Mooney (WV-02); Ralph Norman (SC-05); Scott Perry (PA-10); Bill Posey (FL-08); Cathy McMorris Rodgers (WA-05); David

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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.

Amici Curiae file this document as a proposed brief accompanying an unopposed motion for leave to file under Rule 27 of the Federal Rules of Appellate Procedure and Fifth Circuit Rule 27.1.

Rouzer (NC-07); Mike Simpson (ID-02); Adrian Smith (NE-03); Jason Smith (MO-08); Elise Stefanik (NY-21); and Tim Walberg (MI-07).

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.

ARGUMENT

I. 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 *workplace* 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 Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times." *Id.* 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 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).

II. 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); *South 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. 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. v. OSHA*, 142 S. Ct. 661, 665 (2022) (cleaned up); Exec. Order 14042;

Exec. Order 14043. And no less than worship restrictions, these mandates—including the ones at issue in this case—pose a crisis of conscience for many religious Americans. *Sambrano v. United Airlines, Inc.*, 19 F.4th 839, 841 (5th Cir. 2021) (Ho, J., dissenting). 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.[2]

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

[2] 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. 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.

Congress' choice to accommodate the free exercise of religion in the federal 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 filed*, No. 22-10077 (5th Cir.). Just a few weeks ago, the Northern District of Texas 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 RFRA requires, *Burwell v. Hobby Lobby*, 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,[3] 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,[4] at least 19 federal agencies—including five Cabinet-level agencies—are creating lists to track federal employees 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."[5] And it casts further doubt on the Administration's compliance with federal-law religious liberty protections.

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[3] "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.

[4] 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.

[5] *Id.*

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 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 deny Appellants' motion for a stay of the District Court's preliminary injunction.

Dated: February 9, 2022

Respectfully submitted,

/s/ Jordan E. Pratt

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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) and Fed. R. App. R. 27(d)(2) because this brief contains 2,534 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: February 9, 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 February 9, 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: February 9, 2022 */s/ Jordan E. Pratt*

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