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, INC.; 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, Galveston, No. 3:21-cv-356

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, I hereby certify that I am aware of no persons or entities, besides those listed in the party briefs, that have a financial interest in the outcome of this litigation. In addition, I hereby certify that I am aware of no persons with any interest in the outcome of this litigation other than the signatories to this brief and their counsel, and those identified in the party and *amicus* briefs filed in this case.

Dated: August 3, 2022

/s/ Brianne J. Gorod
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC has an interest in ensuring that statutes, including 5 U.S.C. § 3301 and § 7301, are interpreted in a manner consistent with their text and history, and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The COVID-19 pandemic created a problem for which no employer had "a playbook," Mike Isaac, et al., *Workplace vs. Coronavirus: 'No One Has a Playbook for This'*, N.Y. Times, Mar. 5, 2020, at B1, and over the past two years, employers have been forced to adjust workplace policies in an effort to keep operating efficiently while protecting the health and safety of their workers, *see* Just Capital, *The COVID-19 Corporate Response Tracker*, https://justcapital.com/reports/the-covid-19-corporate-response-tracker-how-americas-largest-employers-are-treating-stakeholders-amid-the-coronavirus-crisis/ (last visited July 13, 2022).

As the nation's largest employer, the federal government has been no exception. *Federal Employers*, U.S. Dep't of Labor, https://www.dol.gov/agencies/odep/program-areas/employers/federal-employment (last visited July 13,

[1] *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to the brief's preparation or submission. All parties consent to the filing of this brief.

2022); *Nat'l Aeronautics & Space Admin. v. Nelson*, 562 U.S. 134, 138 (2011) (describing the government's role "as employer and proprietor in managing its internal operations"). The federal government sought to mitigate COVID-related staffing shortages and "promote the health and safety" of federal employees by, among other things, requiring civilian employees and applicants for employment to get the COVID-19 vaccine, subject to exceptions "as required by law." Exec. Order No. 14043 [hereinafter "the Order"], 86 Fed. Reg. 50,989 (Sept. 9, 2021); *id.* (describing "public health guidance" indicating that vaccination is "necessary . . . to promote the health and safety of the Federal workforce and the efficiency of the civil service").

President Biden issued the order requiring that most federal civilian employees get vaccinated pursuant to his authority under "the Constitution and the laws of the United States of America," *id*. Specifically, the Order cites 5 U.S.C. § 7301, which gives the president broad authority to regulate the "conduct of employees in the executive branch," 5 U.S.C. § 7301, and 5 U.S.C. § 3301, which gives the president the authority to "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," *id.* § 3301.

Despite the breadth of these provisions, the district court enjoined the Order, concluding that Plaintiffs-Appellees were likely to succeed on the merits of the argument that the Order exceeds the president's statutory and constitutional

authority. ROA.1761-1766. Specifically, the court reasoned that conduct regulated under § 7301 "must be *workplace* conduct before the President may regulate it." ROA.1763. But the district court was wrong, and this Court should reject the atextual limitation that it seeks to impose on the president's authority to manage federal employees.

As the Supreme Court has long recognized, the federal government can regulate federal employees and applicants for employment to pursue its legitimate interests—including, for example, its interest in "ensuring the security of its facilities," *Nelson*, 562 U.S. at 150, and promoting the "effective management of the business of the National Government," *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 273 n.5 (1974).

Indeed, presidents and senior-level executive branch officials have regulated government workers since the beginning of the Republic. In the nation's earliest years, for example, President Thomas Jefferson prohibited federal employees' off-duty participation in political campaigns, U.S. Civ. Serv. Comm'n, *History of the Federal Civil Service: 1789 to the Present* 9 (1941), and Alexander Hamilton, as Secretary of the Treasury, required employees to hide their feelings about the "bad qualities of articles furnished" by the federal government, Circular to the Commandants of Regiments (Sept. 7, 1799), *in* 23 *The Papers of Alexander Hamilton* 396 (Harold C. Syrett ed., 1976).

Even vaccination requirements for federal employees are nothing new: in the mid-nineteenth century, federal employees of the Army and Navy were required to get vaccinated against smallpox, S.L. Kotar & J.E. Gessler, *Smallpox: A History* 94 (2013), continuing a practice that George Washington instituted during the Revolutionary War, Letter from George Washington to William Shippen, Jr. (Feb. 6, 1777), *in* 8 *The Papers of George Washington, Revolutionary War Series* 264 (Frank E. Grizzard, Jr. ed., 1998).

Against the backdrop of this history, Congress passed § 3301 and § 7301 in 1871, aiming to codify the president's long-existing authority to regulate the federal workforce and to "restore the executive to its original independence" after years of increasing congressional control over executive branch employees. Cong. Globe, 41st Cong., 1st Sess. 517-23 (1869) (Rep. Jenckes).

In the years since, administrations of both parties have relied on this statutory authority to promulgate regulations that advance the government's interests, including an order issued by President Reagan aimed at preventing "serious health and safety threat[s] to members of the public and to other Federal employees," Exec. Order No. 12564, 51 Fed. Reg. 32,889 (Sept. 17, 1986) (addressing "the use of illegal drugs, on or off duty, by Federal employees" and requiring agencies to implement drug testing programs). The Supreme Court has approved of these regulations in several cases, explaining that § 3301 and § 7301 permit employment-related

regulations that are "reasonable in light of the Government interests at stake." *Nelson*, 562 U.S. at 155.

The Executive Order at issue here is exactly that. If this Court reaches the merits of the district court's decision, it should conclude that the Executive Order at issue here is lawful.

ARGUMENT

I. Executive Branch Leaders Have Long Regulated Executive Branch Employees.

As the Supreme Court has noted "[t]ime and again," the federal government has "wide latitude" in managing federal employees. *Nelson*, 562 U.S. at 148, 154; *see infra* Part III. Indeed, since the nation's founding, executive branch leaders have used that "wide latitude" to regulate employees and applicants for federal employment—including by requiring them to take action in and out of the workplace.

As early as 1801, for example, Thomas Jefferson required the heads of the executive departments to prevent their employees from "attempt[ing] to influence the votes of others nor take any part in the business of electioneering, that being deemed inconsistent with the spirit of the Constitution and his duties to it," U.S. Civ. Serv. Comm'n, *supra*, at 9, because he was "disturbed by the political activities of some of those in the Executive Branch of the Government," *U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 557 (1973).

Cabinet members enjoyed similar authority over federal employees. Since the "beginning of the Republic," the heads of executive departments regulated the "conduct of [the department's] employees" under federal "housekeeping statutes," which "were enacted to give heads of early Government departments authority to govern internal departmental affairs." *Chrysler v. Brown*, 441 U.S. 281, 309 (1979).

The heads of executive departments used this authority to make broad demands of federal employees. For example, as the Secretary of the Treasury, Alexander Hamilton instructed those employed as revenue cutters to avoid any "semblance of haughtiness, rudeness, or insult," deport themselves with "prudence, moderation, & good temper," and make "observations & experiments" regarding the nation's coastline—all obligations that extended beyond their duty to enforce the revenue laws. Circular to the Captains of Regiments (June 4, 1791), *in* 8 *Hamilton Papers*, *supra*, at 426-32. He also ordered military officers to avoid "indulg[ing] remarks . . . respecting the bad qualities of articles furnished, which were of a nature to foster discontent in the minds of the soldiery." Circular to the Commandments of Regiments (Sept. 7, 1799), *in* 23 *id.* at 396. In the same period, the postmaster general required deputy postmasters to become "personally liable for delinquent accounts," Leonard D. White, *The Federalists* 180 (1961), suggesting that the power to supervise employee conduct included the ability to impose significant financial burdens on individual workers. And later in the nineteenth century, Secretary of

State Daniel Webster issued an order similar to the one issued by Thomas Jefferson, prohibiting State Department officials from making "attempts to influence the minds or votes of others" outside of work. U.S. Civ. Serv. Comm'n, *supra*, at 148 (reprinting State Department circular).

Presidents and their delegates also issued orders relating to disease prevention. Even before the nation's birth, during the Revolutionary War, General George Washington ordered that "the whole of [the Continental] Army . . . shall be inoculated" to prevent the spread of smallpox, *see* Letter to Shippen, *supra*, a disease which was "more destructive to an Army . . . than the Enemy's Sword," Letter from George Washington to Patrick Henry (Apr. 13, 1777), *in* 9 *The Papers of George Washington, Revolutionary War Series* 146-48 (Philander D. Chase ed., 1999); *see* Mary C. Gillett, *The Army Medical Department 1775-1818*, at 75 (1981) (describing related orders of the Continental Congress).

In the 1790s, army officials continued General Washington's smallpox inoculation requirement. *Id.* at 135 (describing Maj. Gen. Anthony Wayne's order to "innoculat[e] all men" against smallpox during conflicts with northwest Indians in the 1790s). In the same period, consular officers were required to collect "newspapers, pamphlets and collections of facts as may make their appearance on the subject of epidemical disorders and quarantine regulations" in their foreign posts. Department of State, Circular Letter to American Consuls and Commercial Agents

(July 1, 1805), *in* 10 *The Papers of James Madison, Secretary of State Series* 1-2 (Hackett et al. eds., 2014).

In the early nineteenth century, vaccination replaced inoculation as the primary method of conferring immunity to smallpox, Gillet, *supra*, at 14 (describing the benefits of smallpox vaccination, which uses an attenuated form of the cowpox virus, over inoculation, which involves deliberate exposure to smallpox itself), and government officials used vaccine mandates to protect servicemembers and other federal workers from disease. Not long after the development of the smallpox vaccine, the War Department ordered Army surgeons to vaccinate the entire Army during the War of 1812, *id*. at 14, becoming what the Army's Office of the Surgeon General called "one of the greatest achievements in the history of public health," Stanhope Bayne-Jones, M.D., *The Evolution of Preventive Medicine in the U.S. Army, 1607-1939*, at 75 (1968). In 1818, vaccines were made mandatory in the Army and Navy, Kotar & Gessler, *supra*, at 94, leading to a reported reduction in smallpox fatalities among servicemembers, *see* H. Doc. No. 19-90, at 4 (1826) (noting that the Army had "but two deaths from smallpox" between 1818 and 1826). And in the decades that followed, officers of the United States Jail in Washington, D.C.—then the only prison facility under federal control, *see* Nat'l Inst. Corr., *Brief History of the Fed'l Prison Sys.* (Feb. 9, 2022), https://nicic.gov/history-corrections-

america—also became subject to a "rigid system of vaccination," U.S. Dep't of Justice, Annual Report of the Attorney General 169 (1882).

In sum, presidents and other senior-level executive branch officials have regulated the conduct of federal employees, both inside and outside of the workplace, since the earliest days of the Republic. Congress codified this long-standing authority in the statutes at issue in this case, as the next Section discusses.

II. In 5 U.S.C. § 7301 and other Civil Service Statutes, Congress Codified the President's Broad Authority to Regulate Federal Employees.

A. Against the backdrop of this long history of regulation of the federal workforce, Congress in 1871 passed a series of civil service provisions that expressly authorized the president to regulate federal employees and applicants for employment. At that time, Congress granted the president the authority to "establish regulations for the conduct of persons who may receive appointments in the civil service." *See* Act of Mar. 3, 1871, 29 Rev. Stat. § 1753, 16 Stat. 495, 514-15 (1871). The same act gave the president the power to probe the "health, character, knowledge, and ability" of an individual to "ascertain the[ir] fitness" for government service, and to "prescribe such rules and regulations for the admission of persons into the civil service of the United States as will best promote the efficiency thereof." *Id.* at 514.

These provisions were later recodified to broaden their scope. In 1966, Congress confirmed the president's authority to "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," Act of Sept. 6, 1966, Pub. L. No. 89-554, 80 Stat. 378, 417 (1966), and replaced the language authorizing the establishment of "regulations for the conduct of persons who may receive appointments in the civil service" with language authorizing the establishment of regulations for the conduct of "employees in the executive branch," *id.* at 524; *see* 5 U.S.C. §§ 7301, 3301.

Since 1871, then, the president has enjoyed an express and "discretion-laden power," *Crandon v. United States*, 494 U.S. 152, 180 (1990) (Scalia, J., concurring in the judgment), over executive branch employment. In using the broad term "conduct," Congress authorized regulations pertaining not only to employees' "management" and "mode of carrying on," but also their "personal behavior," "deportment," and "course of action." Noah Webster, *An American Dictionary of the English Language* 209 (Philadelphia, J. B. Lippincott & Co., 1867); Joseph B. Worcester, *A Dictionary of the English Language* 289 (Boston, Brewer & Tuleston, 1875) ("manner of life; behavior; deportment"); *Holt Basic Dictionary of American English* (1966) ("way of acting; behavior"); *see Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014) (to identify the "ordinary, contemporary, common meaning," of statutory terms, this Court consults "[d]ictionaries from the era of [the statute]'s enactment").

Indeed, nineteenth century jurists used the word "conduct" as a synonym for "character," "habits," and "manner," *see Brown v. Memphis & C. R.R. Co.*, 7 F. 51, 62 (C.C.W.D. Tenn. 1881); *Richards v. Richards*, 37 Pa. 225, 226 (1860) (noting that a party's "general conduct" could be "kind and respectful"), as well as a patient's symptoms and medical treatment, *see People ex rel. Norton v. New York Hosp.*, 3 Abb. N. Cas. 299, 268 (N.Y. Sup. Ct. 1876) (using the "events belonging to [a patient's] conduct" to refer to "the mental state, bodily condition and medical treatment of such patient, together with the forms of restraint employed [during the patient's] care"). Thus, the plain text of § 7301 nowhere limits the executive's authority to employees' official, on-the-job conduct.

Significantly, Congress knew how to impose such limits if that had been its plan. In contemporaneous statutory provisions and legislative documents, lawmakers referred to "official conduct," H.R. Rep. 189, 44th Cong., 2nd Sess. 4 (1877); "conduct in [] office," Act of Aug. 18, 1856, ch. 127, § 32, 11 Stat. 52, 64 (making consular officers liable for "any corrupt conduct in his office"); Act of June 8, 1872, ch. 335, § 65, 17 Stat. 283, 293 (making postmasters solely liable for "misconduct in office"); and the "conduct of" certain efforts, H.R.J. Res. of Feb. 9, 1871, § 3, 16 Stat. 593, 594 (referring to "the conduct of [the Commissioner's] duties"); Act of Oct. 19, 1888, ch. 1210, 25 Stat. 565, 585 (making appropriations to the Utah Commission for the "conduct of the work of the Association"); *see Civil Service of the*

United States, H. R. Rep. No. 47, 40th Cong., 2nd Sess. 187 (1868) (referring separately to the "work and the[] conduct" of employees).

Finally, in codifying this broad authority, Congress used the same language to describe the president's power to regulate employees' conduct as it had used to describe the power of private employers. The Pacific Railroad Act of 1862, which gave government bonds and land grants to the Union Pacific Railroad Company, also empowered the company to make bylaws concerning the "conduct of their officers," § 1, 12 Stat. 489, 491. The fact that Congress used the same language in the civil service statutes suggests that those statutes conferred the same power on executive branch leadership that was enjoyed by chief executives in the private sector. *Union Pac. R.R. Co. v. Peniston*, 85 U.S. 5, 32 (1873) (describing the railroad company as "a private corporation, though existing for the performance of public duties"). And in the private sector, "many employers made vaccine refusal grounds for dismissal," Michael Willrich, *Pox: An American History* 232 (2011), and numerous railroads "strictly enforce[ed]" vaccine requirements for all workers, *see No Small-Pox Wanted*, The Leavenworth Times (Dec. 30, 1881) (reprinting railroad circular); *Smallpox*, The Northern Pacific Farmer (Feb. 1, 1883) (reprinting Southern Pacific Railroad order to "vaccinate all train men and work gangs"); *see generally* Patricia Reeve, "Embodied Citizenship," in *Bodily Subjects: Essays on Gender and*

Health 25 (Tracy Penny Light, et al. eds., 2014) (describing antebellum employers' "unbounded authority over employees").

B. The history of the 1871 statute confirms that by giving the president the power to regulate the "conduct" of employees and their admission to the civil service, Congress planned to give the president the "flexibility" needed to regulate federal employees. Cong. Globe, 41st Cong., 3rd Sess. 1936 (1871) (Rep. Armstrong). As the Supreme Court has recognized, the 1871 Act was "regarded as a codification of established practice," *Nelson*, 562 U.S. at 149, and only served to confirm existing assumptions about the president's power to regulate federal employment, *see* Cong. Globe, 41st Cong., 1st Sess. 1935 (1871) (Rep. Dawes) (noting that "[the president] has all that power" already).

Congress confirmed the president's power over federal employees and applicants for employment amid broad calls to reform the civil service and protect the independence of the executive. Sponsors of the bill that became the 1871 Act were convinced that the "spoils system," in which political parties distributed government employment in exchange for political service, Paul P. Van Riper, *History of the United States Civil Service* 44-50 (1958) (describing a system where the civil service was "inextricably intertwined" with party organization), made the president beholden to legislators' appointment decisions, *see* Cong. Globe 41st Cong., 2nd Sess. 1068 (Feb. 5, 1870) ("Every Senator, and every Representative in the other House,

knows that appointments in most cases are dictated by them"). They planned for legislation that "would restore the executive to its original independence," Cong. Globe, 41st Cong., 1st Sess. 517-23 (1869) (Rep. Jenckes), and "clothe[] the president with such power . . . to regulate the service, according to the exigencies and nature" of the circumstances, *id.*; *see* Cong. Globe, 41st Cong., 3rd Sess. 1936 (1871) (Rep. Armstrong) (describing the "flexibility which [the bill] leaves at all times in the hands of the President").

C. Since 1871, presidents have repeatedly relied on the authority under these provisions to regulate federal employees and applicants for the civil service. For example, in 1873, Ulysses Grant required federal employees to refrain from "accept[ing] or continu[ing to] hold[] any . . . State, Territorial, or municipal office." Exec. Order No. 9 (Jan. 17, 1873). In 1877, Rutherford B. Hayes instructed civil service officers that they were not "permitted to take part in the management of political organizations, caucuses, conventions, or election campaigns." U.S. Civ. Serv. Comm'n, *supra*, at 149 (reprinting circular to federal officials).

Then, in 1962, John F. Kennedy issued an Executive Order protecting the right of employees to join a labor union and requiring employees to conduct unionization and solicitation efforts during "non-duty hours." Exec. Order No. 10988, 27 Fed. Reg. 551 (Jan. 17, 1962); *see generally Old Dominion*, 418 U.S. at 273 n.5 (reviewing history of executive action concerning federal unionizing and concluding that a

similar Executive Order promulgated by President Nixon had "express statutory authorization in 5 U.S.C. § 7301" and preempted state defamation law applied against union organizers). Three years later, Kennedy ordered federal employees to refrain from "engag[ing] in outside employment, . . . teaching, lecturing, or writing which might result in a conflict, or an apparent conflict, between the private interests of the employee and his official government duties." Exec. Order No. 11222, 30 Fed. Reg. 6,469 (May 8, 1965). In 1989, President George H. W. Bush issued a similar order, limiting federal employees' ability to earn income outside of work, requiring them to relinquish "financial interests that conflict with the conscientious performance of duty," and mandating that they "satisfy in good faith their obligations as citizens, including all just financial obligations." Exec. Order No. 12674, 54 Fed. Reg. 15,159 (Apr. 14, 1989). As the Department of Justice later noted, this order "reaches a substantial amount of off-the-job conduct by executive branch employees." *See* 28 Op. O.L.C. 102, 104 (2004); *cf.* 32 Op. O.L.C. 79, 81 (2008) (concluding that 5 U.S.C. § 301, which authorizes the heads of executive or military departments to "prescribe regulations for the . . . conduct of [department] employees," permits agencies "to regulate employee conduct outside the workplace"); 28 Op. O.L.C. 102, 104 (2004) (concluding that "section 301 authorizes, at a minimum, the regulation of employees' on-the-job conduct, as well as off-the-job conduct that may undermine

the efficient operation of the Department or the effectiveness of employees in the performance of their duties").

A Reagan administration order explicitly applied to conduct outside the workplace. In 1986, Ronald Reagan issued Executive Order 12564, directing agencies to require their employees to "refrain from the use of illegal drugs[,] . . . whether on or off duty," 51 Fed. Reg. at 32,890, and requiring them to test certain employees and all applicants for illegal drug use, *id.* at 32,890; *see id.* at 38,889 (citing the president's authority under 5 U.S.C. § 7301). Reagan's order cited the "lost productivity," risk of "absenteeism," and "serious health and safety threat to members of the public and to other Federal employees" caused by employee drug use. *Id.*

And in 2004, President Bush issued Homeland Security Presidential Directive-12, which required the creation of a "common identification standard for federal employees and contractors." Compilation of Homeland Security Presidential Directives 71, H. Comm. on Homeland Sec., 110th Cong., 2nd Sess. (Comm. Print 2008). Although the directive cited no statutory authority, *see id.* at 71-73, the Supreme Court understood it to be authorized by the civil service statutes, *see Nelson*, 562 U.S. at 149 (citing the Act of March 3, 1871), and consistent with the "wide latitude granted the Government in its dealings with employees," *id.* at 154 (quotation marks omitted).

* * *

For over a century, the president has enjoyed the express statutory authority to regulate executive branch employees and applicants for employment. *See* 5 U.S.C. § 7301; 5 U.S.C. §§ 3301-3302. Congress gave the president this authority to codify the executive's "independence," Cong. Globe, 41st Cong., 1st Sess. 517-23 (1869) (Rep. Jenckes), and "flexibility," Cong. Globe, 41st Cong., 3rd Sess. 1936 (1871) (Rep. Armstrong), in manners of executive employment. As reflected by actions taken by presidents from Ulysses Grant to George W. Bush, these statutes give the nation's executive broad authority to regulate federal employee "conduct," both inside and outside the workplace. Consistent with that history, the Supreme Court has long recognized the breadth of the president's authority over federal employment, as the next Section discusses.

III. Supreme Court Precedent Supports the President's Broad Authority to Regulate Federal Employees, Including Their Out-of-Office Conduct.

When evaluating presidential orders like the ones discussed above, the Supreme Court has explained that federal statutes give the president a "discretion-laden power," *Crandon*, 494 U.S. at 180, to promote the "efficient operation of the Executive Branch," *Old Dominion*, 418 U.S. at 273 n.5. Significantly, the Supreme Court has recognized that the government's interests in "safety and national security," *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 674 (1989), "ensuring the

security of its facilities," *Nelson*, 562 U.S. at 150, and promoting the "effective management of the business of the National Government," *Old Dominion*, 418 U.S. at 273 n.5, can justify regulations pertaining to executive employees, even when employees raise constitutional challenges to these regulations.

In *National Treasury Employees Union v. Von Raab*, for example, the Supreme Court considered a constitutional challenge to an agency regulation that implemented Reagan's order requiring drug testing of certain employees. The Court rejected the argument that the testing requirement violated the employees' rights under the Fourth Amendment, holding that such an order need only be a reasonable response to "valid public interests" to be sustained. *Von Raab*, 489 U.S. at 671. In reaching this result, the Court validated the government's stated interests in promoting "public safety," *id.* at 677, protecting the "physical safety of [federal] employees," *id.* at 669, and "ensuring against the creation of . . . dangerous risk[s]," *id.* at 671—the very interests at issue here, *see* Order, *supra*, 86 Fed. Reg. at 50,989 (describing threats to the "health and safety of the Federal workforce [and the] members of the public with whom they interact"). After *Von Raab*, federal courts evaluated drug test regulations using "fact-specific" inquiries that involved balancing the interests of the government and the privacy interests of employees, *see, e.g.*, *Stigile v. Clinton*, 110 F.3d 801, 804 (D.C. Cir. 1997) (collecting cases and describing the

"case-by-case balancing of interests")—an exercise completely eschewed by the court below in this case.

When addressing a constitutional challenge to a background check program instituted in response to President Bush's Homeland Security Directive, the Supreme Court again affirmed the reasonableness requirement, explicitly rejecting the argument that the government should show that the program was "'necessary' or the least restrictive means of furthering its interests." *Nelson*, 562 U.S. at 151-54. While it recognized that background checks intruded into the private lives of federal employees and contractors, requiring them to disclose "any treatment or counseling received" for illegal-drug use and submit references relating to their "mental or emotional stability," *id.* at 152-54, the Court concluded that the program was reasonable in light of the government's "broad authority in managing its affairs" and its interest in "employing a competent, reliable workforce," *id.* at 150. Significantly, the Court observed that the "pervasiveness" of similar background check procedures in the private sector demonstrated that the government's request was "reasonable" and "appropriate." *Id.* at 154; *see Old Dominion*, 418 U.S. at 274-75 (noting that a "primary purpose" of Exec. Order No. 11491 "was to 'strengthen the Federal labor relations system by bringing it more into line with practices in the private sector of the economy'" (citing statement of President Nixon)); *see generally* Haley Messenger, *From Amex to Walmart, Here are the Companies Mandating Vaccines for Employees*,

NBC News (Jan. 25, 2022), https://www.nbcnews.com/business/business-news/amex-walmart-are-companies-mandating-covid-vaccine-employees-rcna11049.

Notably, these cases all involved the alleged violation of an employee's constitutional rights, *see Von Raab,* 489 U.S. at 668 ("privacy interests"); *Nelson*, 562 U.S. at 144 ("right[s] to informational privacy"), which prompted the Court to balance the employee's asserted rights with the government's interests at stake, while keeping in mind the government's "broad authority in managing its affairs," *id.* at 150. Here, Plaintiffs-Appellees do not meaningfully argue that the Executive Order violates their individual rights. ROA.1761 ("The plaintiffs' arguments fall into two categories: (1) that the President's action was *ultra vires* . . . and (2) that the agencies' implementation of his order violates the Administrative Procedure[] Act"). Without a constitutional violation in the balance, the reasonableness of the Order is even clearer.

* * *

The decision of the district court is at odds with statutory text, historical practice, and Supreme Court precedent. As the Supreme Court has recognized, the executive has broad authority to ensure the "efficient operation of the Executive Branch," *Old Dominion Branch*, 418 U.S. at 273 n.5, and prevent "dangerous risk[s]" to the public, *Von Raab*, 489 U.S. at 671. Executive Order 14043 is entirely

consistent with numerous other presidential orders promulgated both before and after the passage of 5 U.S.C. § 3301 and § 7301, and the court below erred when it concluded that it exceeds the president's authority.

CONCLUSION

For the foregoing reasons, if the Court reaches the merits, it should reverse the judgment of the district court.

Respectfully submitted,

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Dated: August 3, 2022

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 August 3, 2022.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 3rd day of August 2022.

/s/ Brianne J. Gorod
Brianne J. Gorod

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 4,669 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that the attached *amicus* 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 proportionally spaced typeface using 14-point Times New Roman font.

Executed this 3rd day of August, 2022.

/s/ Brianne J. Gorod
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