IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

MARGARET M. VIERBUCHEN, *Plaintiff*, v. **JOSEPH R. BIDEN, Jr.,** ***et al.*,** *Defendants*.	**Civil Case No. 22-CV-1-SWS**

Plaintiff's Brief in Support of Motion for Preliminary Injunction

TABLE OF CONTENTS

"Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent."

-Louis Brandeis

I. Introduction

On September 9, 2021, President Biden announced "a new plan to require more Americans to be vaccinated." Remarks on the COVID–19 Response and National Vaccination Efforts, 2021 Daily Comp. of Pres. Doc. 725 at 2. Three weeks ago, the Supreme Court enjoined a key part of this plan: a mandate on private employers, requiring vaccination of employees as a workplace safety requirement. *NFIB v. OSHA*, 142 S. Ct. 661 (2022) (per curiam). It concluded that Congress had not authorized such "a significant encroachment into the lives—and health—of a vast number of employees" when it established the Occupational Safety and Health Administration ("OSHA") to regulate "work-related dangers." *Id.* at 665. "Although COVID–19 is a risk that occurs in many workplaces, it is not an *occupational* hazard in most." *Id.*

The President's September 9 "legislative work around," *NFIB*, 142 S. Ct. at 668 (Gorsuch, J., concurring), also included a sweeping vaccine mandate for federal employees. Again without "clear Congressional authorization," the President imposed "a broad public health regulation" that is "addressing a threat that is untethered, in any causal sense, from the workplace" on the more than 2.8 million Americans who have been "selected simply because they work for" the United States. *Id* at 665-666.

This Court should afford Ms. Vierbuchen the same relief granted to private employees by the Supreme Court and enjoin the effort to force her consent "to an unwanted medical procedure that cannot be undone." *Feds for Med. Freedom v. Biden*, No. 3:21-CV-356, 2022 WL 188329, at *4 (S.D. Tex. Jan. 21, 2022).[1]

II. Background

On September 9, 2021, President Biden issued Executive Order 14,043, which directs every executive branch agency to "implement, to the extent consistent with applicable law, a program to require COVID-19 vaccination for all of its federal employees, with exceptions only as required by law." ECF No. 1-6 at 2-3. On September 17, Lee J. Lofthus, the Assistant Attorney General for Administration, sent an email to Department of Justice employees. ECF No. 1-8; Aff. ¶ 8. Subject only to "limited exceptions for disabilities or religious objections," every employee of the Department of Justice must be "fully vaccinated not later than November 22." *Id.* Defendant Loftus reiterated this deadline in an October 8 email, which added a further requirement: unvaccinated employees cannot enter Department workplaces (other than telework locations) without providing "a negative COVID-19 test result from within the previous three days" to a supervisor. ECF No. 1-12. And on October 26, 2021, the Defendants threatened that Ms.

[1] On January 21, 2022, the U.S. District Court for the Southern District of Texas enjoined the vaccine mandate for federal employees. *Feds for Med. Freedom v. Biden*, No. 3:21-CV-356, 2022 WL 188329, at *8 (S.D. Tex. Jan. 21, 2022). Defendants have appealed this injunction and sought a stay of the court's injunction, pending appeal. *Id.* ECF Nos. 37 & 40. Additionally, that court did not consider the testing requirements that Ms. Vierbuchen challenges here.

Vierbuchen's failure to comply would result in her termination and the loss of her vested retirement benefits earned over two decades of federal service. Aff. ¶ 13.

Ms. Vierbuchen is an experienced federal prosecutor and longtime, dedicated public servant. She has natural immunity after contracting the novel coronavirus Sars-COV-2 in late 2020. Aff. ¶ 3-4. She has refused to receive Defendant Lofthus's mandated COVID-19 injections. Aff. ¶ 5. Ms. Vierbuchen sought a medical exemption from the mandate; the Defendants denied it. Aff. ¶ 9. On January 4, 2022, she filed the present case, asserting claims for relief against President Biden, Mr. Loftus, and other Defendants involved in the vaccine mandate outlined above. ECF No. 1. She now seeks a preliminary injunction.

III. Standing and Ripeness

Ms. Vierbuchen's constitutional rights do not disappear simply because she is a federal employee. The Supreme Court "has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons,"—and government employment is such a benefit—"there are some reasons upon which the government may not rely." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). One such reason is an individual's exercise of a constitutional right. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013). Similarly, "the Fourth Amendment protects individuals from unreasonable searches conducted by the Government, even when the Government acts as an employer." *NTEU v. Von Raab*, 489 U.S. 656, 665 (1989).

The Constitution guarantees Ms. Vierbuchen's rights to privacy and bodily integrity. "Every human being of adult years and sound mind has a right to determine what shall be done with his own body." *Cruzan v. Mo. Dep't of Health*, 497 U.S. 261, 269 (1990). "Because our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause," *id.* at 287 (O'Connor, J., concurring), and "Fourth Amendment jurisprudence has echoed this same concern." *Id.* "The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty." *Washington v. Harper*, 494 U.S. 210, 229 (1990). COVID-19 test swabs into the nasal cavity are indistinguishable from the "physical intrusion" of a blood test or breath test, both of which "infringe[] an expectation of privacy that society is prepared to recognize as reasonable." *Skinner v. Ry. Lab. Executives' Ass'n*, 489 U.S. 602, 616 (1989).

Defendant Lofthus has ordered Ms. Vierbuchen to disclose personal medical information to her supervisors, receive an injection, and, until she agrees to receive this injection, provide the results of weekly medical tests to her supervisors. These requirements impinge on Ms. Vierbuchen's constitutionally guaranteed rights, and they grant her standing to seek this Court's aid. "Federal courts have long exercised the traditional powers of equity, in cases within their jurisdiction, to prevent violations of constitutional rights." *Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1231 (10th Cir. 2005). This is true even for federal employees, who "may seek

to enjoin government actions that violate their constitutional rights." *Nat'l Fed'n of Fed. Emps. v. Weinberger*, 818 F.2d 935, 940 (D.C. Cir. 1987).

IV. Argument

To prevail, Ms. Vierbuchen must show: "(1) that she's substantially likely to succeed on the merits, (2) that she'll suffer irreparable injury if the court denies the injunction, (3) that her threatened injury (without the injunction) outweighs the opposing party's under the injunction, and (4) that the injunction isn't adverse to the public interest." *Free the Nipple-Ft. Collins v. City of Ft. Collins, Colo.*, 916 F.3d 792, 797 (10th Cir. 2019) (quotation marks omitted). The third and fourth factors "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009); *Aposhian v. Barr*, 958 F.3d 969, 990-91 (10th Cir. 2020).

A. Likelihood of Success on the Merits

Ms. Vierbuchen is substantially likely to succeed on the merits of her first and second claims. ECF No. 1 at ¶¶ 116-138. First, neither the President nor any of his subordinates have the authority to compel Ms. Vierbuchen to receive a vaccine. Second, insofar as the Defendants require semiweekly testing and one or more injections, this sweeping regime violates Ms. Vierbuchen's rights to liberty, privacy, and bodily integrity.

1. The Defendants' statutory authority does not authorize a vaccine mandate.

"The challenges posed by a global pandemic do not allow a federal agency to exercise power that Congress has not conferred upon it," *Biden v. Missouri*, 142 S. Ct. 647, 654 (2022) (per curiam), and a vaccine mandate is "no everyday exercise

of federal power," *NFIB*, 142 S. Ct. at 665. "We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *Id.* Ms. Vierbuchen's first claim raises the simple question: do any statutes cited as the basis of Executive Order 14,043 grant the President—or any of his subordinates—authority to compel Ms. Vierbuchen to take a vaccine? As discussed below, they do not.

a. 5 U.S.C. § 3301 is a generic hiring authority.

As its first purported source of authority, Executive Order 14,043 cites 5 U.S.C. § 3301. Section 3301 is titled "Civil Service; generally," and 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 3301 cannot be the authority by which the Defendants can compel Ms. Vierbuchen to take a vaccine, as it is a hiring authority pertaining to "the admission of individuals into the civil service," and "the fitness of applicants." Ms. Vierbuchen is not seeking employment with the federal government; she is a longtime civil service employee. Accordingly, any requirements adopted under Section 3301 would not apply to her. Additionally, this section is not like the statutory framework the Supreme Court found Congress had enacted in *Missouri*. Rather, as the Southern District of Texas found, it is more akin to the lack of

authority the Court found in the *NFIB* case. "Whatever authority the provision does provide is not expansive enough to include a vaccine mandate." *Feds for Medical Freedom*, 2022 WL 188329 at *5.

b. 5 U.S.C. § 3302 governs the competitive service, not excepted service employees like Ms. Vierbuchen.

As its second purported source of authority, Executive Order 14,043 cites 5 U.S.C. § 3302. Section 3302 is titled "Competitive service; rules," and it 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 3302 relates to the structure of the civil service. In this vein, the Civil Service Reform Act divides civil service employees into three main categories: (1) "Senior Executive Service" employees, (2) "competitive service" employees, and (3) "excepted service" employees. *Elgin v. Dep't of Treasury*, 567 U.S. 1, 5 n.1 (2012). "Most federal civil service employees are employed in either the competitive service or the excepted service." *Dean v. Dep't of Labor*, 808 F.3d 497 (Fed. Cir. 2015). Under Section 3302, "[t]he President may prescribe rules governing the competitive service." Furthermore, under Section 3302, the President may designate certain positions into the excepted service, as opposed to the competitive

service. *See, e.g.*, *Patterson v. Dep't of Interior*, 424 F.3d 1151, 1155 n.4, 1159 (Fed. Cir. 2005).

Section 3302 cannot be the authority by which the Defendants can compel Ms. Vierbuchen to take a vaccine. As a federal prosecutor, Ms. Vierbuchen is a member of the *excepted* service, not the *competitive* service. Justice Manual, § 3-4.213(1) ("Assistant United States Attorneys … are excepted from the competitive service under the aegis of 28 U.S.C. § 542.") *available at* bit.ly/3KPW8gQ.

Nor would Section 3302 authorize such a mandate in any event. "When the cross-referenced provisions are checked, it becomes evident that the 'rules' the President may prescribe under Section 3302 are quite limited … [N]ot even a generous reading of the text provides authority for a vaccine mandate." *Feds for Medical Freedom*, 2022 WL 188329 at *5. Thus, Section 3302 does not authorize a vaccine mandate for Ms. Vierbuchen.

c. 5 U.S.C. § 7301 relates to on-the-job conduct, not personal health decisions.

As its third purported source of authority, Executive Order 14,043 cites 5 U.S.C. § 7301. Section 7301 is titled "Presidential Regulations," and provides, "The President may prescribe regulations for the *conduct* of employees in the executive branch." 5 U.S.C. § 7301 (emphasis added). The question under Section 7301 is whether the President's authority to regulate employee "conduct" permits the Defendants to require Ms. Vierbuchen to take a vaccine. As discussed below, it does not. *Contrast Biden v. Missouri*, 142 S. Ct. 647, 652 (2022) (Vaccine mandate specific to health care workers "fits neatly within the language of the statute.").

"[I]t's a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary, contemporary, common meaning at the time Congress enacted the statute." *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018) (punctuation omitted). "After all, if judges could freely invest old statutory terms with new meanings, [they] would risk amending legislation outside the single, finely wrought and exhaustively considered, procedure the Constitution demands." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (punctuation omitted).

Applying these principles, "conduct" in Section 7301 has a straightforward meaning. Congress enacted Section 7301 in 1966, and the pertinent definition of "conduct" at that time was "personal behavior; deportment; way that one acts." WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE 380 (2d ed. 1960). Using this definition, Section 7301 authorizes the President to regulate the way federal employees act: their personal behavior and deportment.

Section 7301 cannot, therefore, compel Ms. Vierbuchen to take a vaccine because vaccination status has nothing to do with behavior and deportment. A conduct-based regulation either requires, allows, or proscribes a type of ongoing behavior for covered employees. For example, in 1969, President Nixon allowed many federal employees to participate in labor organizations. Exec. Order No. 11491, 34 Fed. Reg. 17605 (Oct. 29, 1969). In 1997, President Clinton prohibited smoking in the federal workplace. Exec. Order No. 13058, 62 Fed. Reg. 43451 (Aug. 9, 1997). These were conduct-based regulations. Both the Nixon and Clinton orders

applied to activity in a federal workplace, and they allowed or proscribed behavior on an ongoing basis. Under these orders, every covered employee was subject to the same behavioral allowance or prohibition.

In contrast, President Biden has commanded federal employees to have "fully vaccinated" **status**. And as a status-based regulation, the President's order neither requires, allows, nor proscribes any type of ongoing behavior. Nor does it cover the behavior of all employees. President Biden's executive order does not regulate the conduct of federal employees who were "fully vaccinated" prior to September 9 at all. Contrast this with President Clinton's smoking prohibition, which applied to smokers and non-smokers alike. President Clinton did not require that all federal employees be "non-smokers" away from the workplace. Yet that is the authority the Government now claims. The vaccine mandate is a status-based regulation falling outside the authority of Section 7301, which only concerns the "conduct" of federal employees.

Alternatively, even if this court were inclined to expand the term "conduct" to encompass vaccination, Section 7301 only allows the President to regulate "the conduct *of employees*." 5 U.S.C. § 7301 (emphasis added). To the extent receiving a vaccine is "conduct," it is not workplace conduct. *Feds for Medical Freedom*, No. 3:21-cv-356, Doc. 36, at 14-15. "A vaccination, after all, cannot be undone at the end of the workday." *NFIB*, 142 S. Ct. at 665 (punctuation omitted).

Complying with the mandate would require Ms. Vierbuchen to take action—*i.e.*, to receive one or more injections—away from the workplace but would not

regulate the 'way that [she] acts' or her 'personal behavior' or 'deportment' within the workplace. Thus, Section 7301 does not authorize the vaccine mandate.

d. Conclusion

A review of the statutes cited by Executive Order 14,043 reveals that none of them authorize the Defendants to compel Ms. Vierbuchen to submit to an injection. To the extent the Defendants assert the President has an inherent, constitutional authority for this mandate, this court should reject the argument, as the Supreme Court has done for nearly two hundred years, *see Kendall v. U.S. ex rel. Stokes*, 37 U.S. 524, 610 (1838) (rejecting the notion "that every officer in every branch of that department is under the exclusive direction of the President."), and as the Southern District of Texas did recently. *Feds for Medical Freedom*, 2022 WL 188329 at *6. Certainly, no President has ever sought to unilaterally impose a vaccine mandate on all civilian federal employees.

Other courts have already stayed portions of the government's attempt to "workaround" the lack of a Congressional vaccine mandate, including the private sector, the federal employee, and federal contractor mandates. The order to Ms. Vierbuchen is unlawful, and she is substantially likely to succeed on the merits of her first claim.

2. The Constitution does not permit the Defendants to order Ms. Vierbuchen's to waive her constitutional rights in this manner.

Ms. Vierbuchen's second claim asserts the program violates her constitutional rights to privacy and bodily integrity secured by the Fifth and Fourth Amendments.

a. At a minimum, the Due Process Clause requires a valid exercise of policymaking authority that respects Ms. Vierbuchen's liberty interest in her personal autonomy, not a sweeping executive decree that ignores it.

"The forcible injection of medication" into Ms. Vierbuchen "represents a substantial interference with [her] liberty." *Harper*, 494 U.S. at 229. The Due Process Clause does not preclude all vaccination requirements, *Jacobson v. Mass.*, 197 U.S. 11, 30-31 (1905), but the Defendants must still "identif[y] the conditions under which competing state interests might outweigh" Ms. Vierbuchen's "protected constitutional interest," *Mills v. Rogers*, 457 U.S. 291, 299 (1982).

Courts have allowed government entities to administer medication over a patient's objection, but this jurisprudence is dominated by forced antipsychotic medication for prisoners, *Harper*, 494 U.S. at 226, dangerous residents of mental institutions, *Jurasek v. Utah State Hosp.*, 158 F.3d 506 (10th Cir. 1998), or criminal defendants awaiting trial, *Riggins v. Nevada*, 504 U.S. 127, 132 (1992).[2] Even in these circumstances, the liberty interest can only be overridden with an individualized finding of "an overriding justification and a determination of medical appropriateness." *Riggins v. Nevada*, 504 U.S. 127, 135 (1992). When a

[2] Ms. Vierbuchen's liberty interest is not limited to protection against medication with antipsychotic drugs. Due process liberty interests reflect "concrete examples involving fundamental rights found to be deeply rooted in our legal tradition." *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997). The Court's recognition of the right to refuse medical treatment is based on the understanding that "[a]t common law, even the touching of one person by another without consent and without legal justification was a battery," *Cruzan*, 497 U.S. at 269, not uncertainty about the effect of specific medications unknown until the 1960s.

criminal defendant is not dangerous to himself or others, the Constitution permits forced medication only when the government can prove "by clear and convincing evidence," *U.S. v. Bradley*, 417 F.3d 1107, 1114 (10th Cir. 2005), that "in light of the efficacy, the side effects, the possible alternatives, and the medical appropriateness of a particular course of antipsychotic drug treatment" that there is "a need for that treatment sufficiently important to overcome the individual's protected interest in refusing it." *Sell v. U.S.*, 539 U.S. 166, 183 (2003).

For the "rare" and "limited circumstances" when forced medication is needed for an individual who is not dangerous to himself or others, the government must show (1) "*important* governmental interests are at stake;" (2) "involuntary medication will *significantly* further" those interests; (3) the "involuntary medication is *necessary* to further those interests," *e.g.*, less intrusive alternative treatments are unlikely to be effective; and (4) the administration of the medication is "*medically appropriate*" and in the defendant's best medical interests. *United States v. Chavez*, 734 F.3d 1247, 1249 (10th Cir. 2013) (emphasis in original). Where criminal defendants are protected by a requirement that the government must show the injected medication is "medically appropriate and, considering less intrusive alternatives, essential for the [individual's] safety or the safety of others," *Riggins*, 504 U.S. at 135, hard-working federal employees, apparently, have no protection at all. If this is stands, *then Ms. Vierbuchen provides the criminal defendants she prosecutes with greater Constitutional protections than she receives from the government as her employer*.

The Defendants' vaccine mandate represents "a significant encroachment into the lives—and health" of Ms. Vierbuchen and other federal employees, *NFIB*, 142 S. Ct. at 665, under circumstances where none of "the relevant statutory authorities" governing employees, *cf. Biden v. Missouri*, 142 S. Ct. at 652, have ever been interpreted to permit such a requirement. In the absence of authority from Congress or prior longstanding practice, the Constitution demands, at a minimum, reasoned decision making before ordering Ms. Vierbuchen to waive her constitutional rights. The Defendants supplied nothing to justify this sweeping command.[3]

This Court need not detail the circumstances under which a vaccine mandate *could* be authorized by Congress for federal employees. Rather, the Court need only conclude that the Defendants' responsibility to consider "the conditions under which competing state interests might outweigh" the liberty interest of Ms. Vierbuchen requires more than executive fiat. *Mills*, 457 U.S. at 299.

[3] Other courts have attempted to identify what "level of scrutiny" is required for a vaccine mandate under *Jacobson*, a case that pre-dates such analysis by decades. *See, e.g., Klaassen v. Trustees of Indiana Univ.*, 7 F.4th 592 (7th Cir. 2021) *vacated as moot by Klaassen v. Trustees of Indiana Univ.*, No. 21-2326, 2022 WL 213329 (7th Cir. Jan. 25, 2022). Cases involving state vaccine mandates possess something this case lacks: decision making by an entity with general police power. Plaintiff's "significant liberty interest," *Cruzan*, 497 U.S. at 278, is entitled to greater solicitude than, for example, review of a licensing statute for optometrists, *Williamson v. Lee Optical of Okla.*, 348 U.S. 483 (1955). This Court need not settle upon a specific level of scrutiny because the Defendants have afforded Ms. Vierbuchen's rights no consideration whatsoever.

The OSHA mandate for private employees was developed over two months and included significant explanation for the judgments made therein. COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61,402-61,555 (Nov. 5, 2021). The HHS mandate for health care workers was similarly considered. Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination Requirement, 86 Fed. Reg. 61,555-61,627 (Nov. 5, 2021). And as with the OSHA mandate stayed by the Supreme Court, the Defendants have not "targeted" their vaccine order to "particular features of an employee's job or workplace." *NFIB*, 142 S. Ct. at 665-66. Instead, Ms. Vierbuchen has received blanket threats and generalized orders to submit to vaccination.

The federal government is indiscriminately imposing an unwanted medical procedure on every federal employee—people with established mental competency and who have not lost any rights through imprisonment or confinement—without any individualized finding, reasoned decision, or basic consideration of constitutional rights. This is not permissible under the Due Process Clause.

b. The Defendants' testing regime infringes upon Ms. Vierbuchen's Fourth Amendment privacy rights.

The Fourth Amendment "guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government or those acting at their direction." *Skinner*, 489 U.S. at 613-14. Physical intrusions into the body and other compelled productions of bodily material for chemical analyses are "searches" under the Fourth Amendment. *See Skinner*, 489 U.S. at

616-17 (discussing blood-alcohol and breathalyzer tests). And pertinent here, "the Fourth Amendment protects individuals from unreasonable searches conducted by the Government, even when the Government acts as an employer." *Von Raab*, 489 U.S. at 665.

The Fourth Amendment's strictures vary with context. "In most criminal cases … a search or seizure … is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause." *Skinner*, 489 U.S. at 619. Even when the facts do not require a warrant or probable cause, the Supreme Court has still "usually required some quantum of individualized suspicion before concluding that a search is reasonable." *Id.* at 624 (punctuation omitted).

In this case, the Defendants' vaccine mandate implicates the Fourth Amendment in two ways. First, Defendants' requirement for unvaccinated employees to undergo semiweekly testing entails bodily intrusions and extractions of bodily material for chemical analyses. In addition, the Court has indicated that the Fourth Amendment protects a right to bodily integrity similar to that enjoyed under the Due Process Clause. *See Cruzan*, 497 U.S. at 287 (O'Connor, concurring). Both requirements apply regardless of individualized suspicion.

Under the "special needs" doctrine, a government can search employees without individualized suspicion for reasons unrelated to law enforcement. *See generally, e.g.*, *Indianapolis v. Edmond*, 531 U.S. 32, 54 (2000); *Washington v.*

Unified Gov't of Wyandotte Cnty., Kan., 847 F.3d 1192, 1197-1201 (10th Cir. 2017); *Harmon v. Thornburgh*, 878 F.2d 484, 487-88 (D.C. Cir. 1989).[4]

For a reviewing court, the "special needs" doctrine is similar to the Due Process Clause's balancing test. *See generally Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1213-14 (10th Cir. 2003). First, the government must demonstrate "a legitimate special need" for the suspicion-less searches at issue. *See Washington*, 847 F.3d at 1198 (discussing suspicion-less drug testing). If the government makes this threshold showing, then the court must determine "if the government's interests outweigh the individual's privacy interests." *See id.* This "balancing test … looks to the nature of the privacy interest, the character of the intrusion, and the nature and immediacy of the government's interest." *Dubbs*, 336 F.3d at 1213. *See also Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 654, 658, 660 (1995). Here, the Government has not even attempted to make such a showing.

c. The Defendants' indiscriminate vaccine mandate is not sufficiently tailored to accommodate Ms. Vierbuchen's Fifth and Fourth Amendment rights.

As their threshold interest, Ms. Vierbuchen anticipates the Defendants will invoke workplace and public health and safety, as President Biden did in Executive

[4] *Harmon* stemmed from President Reagan's Executive Order 12,564, which sought to create a drug-free federal workplace and required drug-testing for "employees in sensitive positions." 878 F.2d at 486. Ultimately, the D.C. Circuit upheld the testing requirement for Department of Justice employees with top secret security clearances. *Id.* at 491-92. But it held "the government's interest in preserving all its secrets can[not] justify the testing of all federal prosecutors or of all employees with access to grand jury proceedings." *Id.* at 492.

Order 14,043. ECF No. 1-6 at 2. And to be sure, a substantial and real risk to health and safety may serve as an "important governmental interest" under the due process clause, *Harper*, 494 U.S. at 223 (forced injection of antipsychotic medication in a prison) or a "special need," *Chandler v. Miller*, 520 U.S. 305, 323 (1997) (suspicion-less searches at airports and public buildings); *Dunn v. White*, 880 F.2d 1188, 1195 (10th Cir. 1989) (upholding suspicion-less testing of prisoner for HIV).

Government interest alone, however, is never enough; the interest must justify the intrusion on liberty or privacy.

1. Due Process

Under the due process clause, the vaccine mandate must "*significantly* further" the government's public health interest; the mandatory injections must be "*necessary* to further those interests" where "less intrusive alternative treatments are unlikely to be effective" and the medication must be "*medically appropriate*" for Ms. Vierbuchen and in her best interests. *Chavez*, 734 F.3d at 1249 (emphasis in original).

The employee mandate does not *significantly* further the government's interests in public health. The COVID-19 virus is a pervasive feature of contemporary human existence. "COVID–19 can and does spread at home, in schools, during sporting events, and everywhere else that people gather. That kind of universal risk is no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases." *NFIB*, 142 S. Ct. at

665. Nothing indicates federal employees face unusual risks of infection or pose unusual risks of transmitting the virus to others because of "particular features of an employee's job or workplace." *Id.* Consider last December, when the White House trumpeted the federal workforce's widespread compliance with the injection mandate and encouraged businesses to implement similar requirements. *Update on Implementation of COVID-19 Vaccination Requirement for Federal Employees* (Dec. 9, 2021), *available at* bit.ly/3u7kuwu. The very same document expressed a desire that noncompliant federal employees be spared further enforcement until after Christmas and the new year. *Id.* Why? Certainly not for public health reasons. Rather, the pause is evidence that the mandate is not a vital safety measure. President Biden has stated that "doing the right thing" means receiving a COVID-19 vaccine. ECF No. 1 at ¶ 13. But doing "the right thing" must be authorized by law, not simply command. "[W]hen we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it." *Skinner*, 489 U.S. at 635 (Marshall, J., dissenting).

Second, mandatory injections must be "*necessary* to further [the public health] interests" where "less intrusive alternative treatments are unlikely to be effective." *Chavez*, 734 F.3d at 1249. Assuming *arguendo* vaccines reduce transmission and appreciably prevent severe illness from COVID-19, then their widespread availability offers willing recipients—federal employees and the public alike—a viable defense against the virus. But this also means there is no basis to force vaccines on **unwilling** federal employees—especially now. In the OSHA rule,

the agency concluded that regular testing/masking and mandatory vaccination "are similar but slightly different schemes that provide roughly equivalent protection." 86 Fed. Reg. 61515. Yet the Defendants have not offered that alternative to Ms. Vierbuchen.

Moreover, according to the CDC, "breakthrough infections [with the Omicron variant] in people who are fully vaccinated are likely to occur." Ctrs. for Disease Control & Prevention, *Omicron Variant: What You Need to Know*, *available at* bit.ly/3rSvHhB (updated Dec. 20, 2021). Furthermore, the "CDC expects that anyone with Omicron infection can spread the virus to others, **even if they are vaccinated** or don't have symptoms." *Id.* (emphasis added). Coupled with the lack of an extraordinary risk associated with the federal workplace, this uncertainty about the vaccines' enduring effectiveness eliminates any basis for compulsory injections.

Finally, the administration of the medication must be "*medically appropriate*" for Ms. Vierbuchen and in her best medical interests. The Defendants **might** have credibly claimed an immediate need for vaccines and employee testing if they had imposed the requirement earlier. But now, after waiting more than a year, with vaccines widely available and many employees (like Ms. Vierbuchen) having natural immunity, they have no such need. As discussed above, the Defendants own actions are instructive: by delaying the mandate's enforcement, they undermine any claim of immediate need to require the injections, especially for employees with natural immunity.

2. Fourth Amendment

Under the Fourth Amendment, the Defendants have no special need for the injection or semiweekly testing requirement imposed on Ms. Vierbuchen.

As the first factor this Court considers "the nature of the privacy interest," *Vernonia Sch. Dist.*, 515 U.S. at 654; *Dubbs*, 336 F.3d at 1213. Here, Ms. Vierbuchen has strong privacy interests in her bodily integrity and information related to her health. *Cf. Skinner*, 489 U.S. at 616-17.

The second factor this Court considers is "the character of the intrusion." *Vernonia Sch. Dist.*, 515 U.S. at 658; *Dubbs*, 336 F.3d at 1213. The Defendants' injection requirement is highly intrusive. It not only contemplates a physical invasion of Ms. Vierbuchen's body but also chemical alterations to it. As for the semiweekly testing requirement, although each test may be relatively unintrusive, the aggregate burden of submitting to dozens of semiweekly tests is greater. *Cf. NFIB*, 142 S. Ct. at 665 (describing vaccinate-or-test-weekly requirement of OSHA's now-stayed emergency standard as "a significant encroachment into the lives—and health—of a vast number of employees").

The final balancing factor is "the nature and immediacy of the governmental concern at issue here, and the efficacy of this means for meeting it." *Vernonia Sch. Dist.*, 515 U.S. at 660. *See also Dubbs*, 336 F.3d at 1213. Even assuming the federal government has a strong public health interest and authority in stopping the spread of COVID-19 within its civilian workforce, the "immediacy of the governmental concern" favors Ms. Vierbuchen.

The pandemic has been ongoing for almost two years. Like millions of other workers and the public at large, federal employees continue to face some risk from the virus, but the CDC has concluded that fully vaccinated people can contract and spread the Omicron variant. Ctrs. for Disease Control & Prevention, *Omicron Variant: What You Need to Know*, *available at* bit.ly/3rSvHhB (updated Dec. 20, 2021). The semiweekly testing requirement is also ineffective—it does both too much and too little. It does too much, because it requires too many tests—twice as many as OSHA contemplated under its now-stayed emergency standard. 86 Fed. Reg. 61402, 61404. The Defendants also require the semiweekly tests for **all** unvaccinated employees, regardless of individual risk factors—*e.g.*, whether or not they have natural immunity, recent close contacts, or symptoms. Yet it does too little, because the tests **only** apply to unvaccinated employees, ignoring the CDC, which has concluded that vaccinated employees can also contract and spread the virus and its variants.

3. Conclusion

Suspicion-less searches do not pass muster if they are "symbolic" rather than "special." *Chandler*, 520 U.S. at 322. *See also Von Raab*, 489 U.S. at 681 (Scalia, J., dissenting) ("[T]he Customs Service rules [requiring federal employee drug testing] are a kind of immolation of privacy and human dignity in symbolic opposition to drug use."). The distinction between the 'symbolic' and the truly 'special' captures the flaw with the Defendants' employee mandate. The injection requirement and the semiweekly testing requirement are "symbolic" not "special."

Assuming, *arguendo*, vaccinations reduce viral infections and severe illness from COVID-19, it is undisputed they do not prevent the spread of the virus. Ctrs. for Disease Control & Prevention, *Omicron Variant: What You Need to Know*, *available at* bit.ly/3rSvHhB (updated Dec. 20, 2021). Thus, semiweekly tests of a small subset of federal employees are merely "symbolic" as they accomplish too little to be justified. Neither requirement satisfies constitutional scrutiny. Ms. Vierbuchen is likely to prevail on these claims.

B. Irreparable Injury

Ms. Vierbuchen must also show she will suffer irreparable injury if this court denies the injunction. *Free the Nipple-Ft. Collins*, 916 F.3d at 797. "What makes an injury 'irreparable' is the inadequacy of, and the difficulty of calculating, a monetary remedy after a full trial. Any deprivation of any constitutional right fits that bill." *Id.* at 806 (citation omitted). Furthermore, if subject to an unlawful order, an employee may establish irreparable injury if she thereby would be unable to obtain comparable employment. *See Burgess v. Fed. Deposit Ins. Corp.*, 871 F.3d 297, 304 (5th Cir. 2017); *Feds for Medical Freedom*, 2022 WL 188329 at *4 ("[W]hen an unlawful order bars … employees from significant employment opportunities in their chosen profession, the harm becomes irreparable.").

The Defendants' vaccine mandate violates Ms. Vierbuchen's Fifth and Fourth Amendment rights via compelled semiweekly testing and an injection that would irrevocably alter her body's immune system in a way she does not wish. In addition to this injury, the Defendants are threatening to fire Ms. Vierbuchen and

strip away her vested pension if she is terminated. If this were to happen, Ms. Vierbuchen could never obtain comparable employment: by definition she could not obtain a job as a federal prosecutor. Accordingly, Ms. Vierbuchen has demonstrated she will suffer irreparable injury absent a preliminary injunction.

C. Balancing of Interests and the Public Interest

As the final requirement for a preliminary injunction, Ms. Vierbuchen must show her "threatened injury outweighs the harms that the preliminary injunction will cause the government" and "that the injunction, if issued, will not adversely affect the public interest." *Aposhian*, 958 F.3d at 990. These considerations merge here because the government is the opposing party. *Id.* at 990-91.

"[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013), *aff'd sub nom.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, (2014). This should end the inquiry, but other reasons exist also.

Whatever interest the Defendants might have had in enforcing their vaccine mandate in the first instance, that interest is much weaker now. "[A]n overwhelming majority of the federal workforce is already vaccinated." *Feds for Medical Freedom*, 2022 WL 188329 at *7. Furthermore, as discussed above, full vaccination does not prevent employees from acquiring or transmitting the Omicron variant. Enjoining the Defendants' vaccine mandate would have a negligible effect on the federal workforce's vaccination rate and a similarly negligible effect on safety.

Moreover, any harm to the public interest by allowing federal employees to remain unvaccinated must be balanced against the harm sure to come by terminating unvaccinated workers who provide vital services to the nation. *Id.* Here, the public interest is served by having Ms. Vierbuchen at work. She is a dedicated public servant with many years of experience in U.S. Attorneys' Offices, the Department of Justice, and the Drug Enforcement Administration. She is an outstanding attorney who works hard to prosecute crimes and advises state and federal partners on steps they can take to better protect their communities from drugs. Her departure from Wyoming's U.S. Attorney's Office would be a detriment to that office and to public safety.

V. Conclusion

The Court should preliminarily enjoin all the Defendants (excluding President Biden himself but including all parties listed in Rule 65) from implementing or enforcing the vaccine mandate against Ms. Vierbuchen; and requiring no bond.

[SIGNATURES ON NEXT PAGE]

Respectfully submitted, this 3rd day of February, 2022

/s/

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CERTIFICATE OF SERVICE

I certify that on February 3, 2022, a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) and served on all counsel of record. I also sent copies via certified mail to all Defendants.

/s/
Andrew J. Block