Case 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, INCORPORATED; 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

BRIEF OF AMICUS CURIAE INSTITUTE FOR HEALTH RESEARCH

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February 22, 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 F.R.A.P. 29(a)(4) and Fifth Circuit Rule 29.2:

Ralph Fucetola, J.D.;

Dr. Rima Laibow.

As required by F.R.A.P. 26.1, *Amici Curiae* certify that no publicly traded company or corporation (other than any that may be identified in the Parties' certificates of interested persons) has an interest in the outcome of this case or appeal.

Respectfully submitted,

/s/ *Lowell H. Becraft, Jr.*
Lowell H. Becraft, Jr.

TABLE OF CONTENTS

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

Cases: Page:

State Constitutions:

Statutes:

Other Authorities:

IDENTITY AND INTEREST AMICI CURIAE[1]

The Institute for Health Research is an exempt nongovernmental organization located in the States of New Jersey and Texas, and its Trustee and President is Ralph Fucetola, J.D., and its other Trustee is Dr. Rima Laibow, its Medical Director. The Institute advocates for natural solutions to human health problems, as opposed to the use of vaccines, pharmaceutical drugs and other unnatural interventions. The Institute seeks to help the public to prevent disease and strengthen immunity and health through providing information covering studies, protocols, and information on dietary supplements and other natural products.

Compelled vaccination through governmental force represents the exact scenario that the Institute for Health Research seeks to discourage and prevent, in the interest of the bodily integrity of all individuals. Since this case involves compelled vaccinations, the Amicus desires to point out for this court two legal propositions related to the primary issue in this appeal.

ARGUMENT

While this appeal is very important, the Amicus has observed after reading the

[1] This brief was authored entirely by the undersigned counsel for *Amici Curiae*. No party or their counsel contributed any funds to the preparation of this brief. Only the *Amici Curiae*, and its officers, contributed money to fund the preparation or submission of this brief.

parties briefs that certain extremely important legal principles bearing on this court's decision herein haven't been adequately presented:

1. This case involves simple rules of statutory construction, one of which is that statutes are construed and the words thereof are given the meaning intended by the Congress that enacted that law. Here, the laws at issue forming the legal basis for President Biden's Executive Order 14043 were enacted in 1872 and 1883, and it is clear that Congress did not authorize the President by these laws to impose vaccine mandates on government employees.

2. This case concerns the principle that executive officials cannot exercise legislative powers and the common law origins of this principle clearly affect this court's decision of this appeal. This principle was developed at the common law and that legal history as well as relevant state decisional authorities certainly should be considered when this court decides this appeal.

I. The Origins of 5 U.S.C. §§ 3301, 3302, and 7301.

"[I]t's a 'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute.'" *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019). President Biden's Executive Order 14043 claims that it is authorized via 5 U.S.C. §§ 3301, 3302, and 7301. But, these statutes DO NOT provide authority for this

Executive Order.

The origin of § 3301 is found in § 9 of "An Act Making Appropriations for sundry civil Expenses of the Government for the fiscal Year ending June 30, eighteen hundred and seventy-two, and for other Purposes", 16 Stat. 495, 514, ch. 114. This section was later incorporated into the Revised Statutes of 1873 as § 1753, and thereafter it was incorporated into 5 U.S.C. § 631 when the U.S. Code was created in 1926. A part of this § 631 became § 3301 when this title of the U.S. Code was enacted into positive law in 1966. See Pub.L. 89-554, 80 Stat. 378, at 417.

Section 2 of "An act to regulate and improve the civil service of the United States", 22 Stat. 403, ch. 27, enacted by Congress on January 16, 1883, is the genesis of § 3302. When the current U.S. Code was created in 1926, parts of this section were incorporated into 5 U.S.C. § 633. When this title of the U.S. Code was enacted into positive law in 1966, this section became § 3302. See Pub.L. 89-554, 80 Stat. 378, at 417.

The origin of § 7301 is the same as that for § 3301: § 9 of "An Act Making Appropriations for sundry civil Expenses of the Government for the fiscal Year ending June 30, eighteen hundred and seventy-two, and for other Purposes", 16 Stat. 495, 514, ch. 114. This § 9 was later incorporated into the Revised Statutes of 1873 as § 1753 and it was later incorporated into 5 U.S.C. § 631 when the U.S. Code was

created in 1926. A single sentence of § 631 became § 7301 when this title of the U.S. Code was enacted into positive law in 1966. See Pub.L. 89-554, 80 Stat. 378, at 417.

Courts "normally interpret[] a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020). Here, these laws upon which the executive order was based were enacted by Congress in 1872 and 1883, and there is absolutely no proof or indication that at that time Congress intended to authorize the President to impose vaccine mandates on any or all federal employees.

II. The Common Law Origins of the Principle of Non-Delegation of Legislative Powers.

The legal principle that a legislature cannot delegate the power to make law to an executive official has common law origins, to be very briefly addressed here. In 1539 at the insistence of King Henry VIII, Parliament enacted the Proclamation by the Crown Act, which made proclamations of the Crown "as though they were made by act of parliament." 31 Hen. VIII c. 8. But less than 8 years later, Parliament realized that it had made a mistake and repealed that act. *See* 1 Edw. VI 6. c. 12. § 4 (1547).

Later English monarchs continued this "tradition," and they issued a number of unpopular Proclamations, thus abusing this "privilege." Eventually with the *Case*

of Proclamations, 77 ER 1352 (1611), Sir Edward Coke, Chief Justice of the King's Bench, was asked to decide the legality of one proclamation. Coke and his fellow judges declared that "the King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm* * * also the King cannot create any offence by his prohibition or proclamation, which was not an offence before, for that was to change the law, and to make an offence which was not * * * ergo, that which cannot be punished without proclamation, cannot be punished with it." *Id.* Coke held that the challenged proclamation was "utterly against law and reason, and for that void." *Id*.

Based on this history, John Locke, one of the most influential of Enlightenment thinkers, wrote in his *Second Treatise of Civil Government*, Chap. XI (1690):

> The legislative cannot transfer the power of making laws to any other hands. For it being but a delegated power from the people, they, who have it, cannot pass it over to others. * * * And when the people have said, We will submit to rules, and be govern'd by laws made by such men, and in such forms, no body else can say other men shall make laws for them; nor can the people be bound by any laws but such as are enacted by those, whom they have chosen, and authorised to make Laws for them. The power of the legislative being derived from the people by a positive voluntary grant and institution, can be no other, than what the positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws, and place it in other hands.

"One of the settled maxims in [American] constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that department

to any other body or authority." Cooley, *Constitutional Limitations* (1886), pp. 116-117. The "Federal Constitution and State Constitutions of this country divide the governmental power into three branches. * * * [I]n carrying out that constitutional division * * * it is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power." *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 405-406 (1928). As James Madison noted in Federalist No. 47, delegating legislative power to an executive too often results in tragedy: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands * * * may justly be pronounced the very definition of tyranny."[2]

Congress "manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested." *Panama Refining Company v. Ryan*, 293 U.S. 388, 421 (1935). It "cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks

[2] It may very well be that Madison acquired this idea from Coke, who wrote: "Wherever law ends, tyranny begins, if the law be transgressed to another's harm; and whosoever in authority exceeds the power given him by the law, and makes use of the force he has under his command to compass that upon the subject which the law allows not, ceases in that to be a magistrate * * *." Section 202 of Chap. XVIII "Of Tyranny" in Book II of the *Two Treatises of Government*.

may be needed or advisable for the rehabilitation and expansion of trade or industry." *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537-38 (1935). See also *Carter v. Carter Coal Co.*, 298 U.S. 238, 310–12 (1936), as well as *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), which found President Truman's takeover of steel mills unconstitutional because he lacked statutory authority.

This principle is so important that it is embodied in the State Constitutions for Texas, Louisiana, and Mississippi. Art. II, §1, of the Texas Constitution provides:

> Sec. 1. Separation of Powers of Government Among Three Departments. The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: those which are Legislative to one, those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

This principle manifests itself in Art. II, §1 of the Louisiana Constitution:

> §1. Three Branches
> Section 1. The powers of government of the state are divided into three separate branches: legislative, executive, and judicial.
> §2. Limitations on Each Branch
> Section 2. Except as otherwise provided by this constitution, no one of these branches, nor any person holding office in one of them, shall exercise power belonging to either of the others.

It also appears in Art. 1 of the Mississippi Constitution:

> Section 1.
> The powers of the government of the state of Mississippi shall be divided into

> three distinct departments, and each of them confided to a separate magistracy, to-wit: those which are legislative to one, those which are judicial to another, and those which are executive to another.
> Section 2.
> No person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belonging to either of the others. The acceptance of an office in either of said departments shall, of itself, and at once, vacate any and all offices held by the person so accepting in either of the other departments.[3]

This principle that legislative powers cannot be exercised by executive officials has been the basis upon which several state courts have invalidated health codes or regulations. In the early 20th century, the California Supreme Court was confronted with this problem in *Schaezlein v. Cabaniss*, 135 Cal. 466, 471, 67 P. 755 (1902), which concerned an act designed to provide for the proper sanitary condition of factories, enforced by a bureau commissioner. That court found this act was unconstitutional: "The manifest objection to this law is, that upon the commissioner has been imposed not the duty to enforce a law of the legislature, but the power to make a law for the individual, and to enforce such rules of conduct as he may prescribe. It is thus arbitrary, special legislation, and violative of the constitution."

In *State v. Marana Plantations*, 75 Ariz. 111, 115, 252 P.2d 87 (1953), at issue

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[3] See also Article IV, Section 43 of the Alabama Constitution of 1901 ("the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men.").

were state health regulations applicable to agricultural labor camps. The Arizona Supreme Court concluded that these sanitary regulations were unconstitutional:

> We think that the attempt by the legislature to make it the duty of the board to "formulate general policies affecting the public health" and to give the board unrestrained power to regulate sanitation and sanitary practices and promote public health and prevent disability and mortality is a constitutional relinquishment of its legislative power and to such extent is violative of constitutional principles, and the so-called Sanitary Code applicable to agricultural labor camps is void.

See also *Boreali v. Axelrod*, 71 N.Y.2d 1, 6, 517 N.E.2d 1350 (1987)("We hold that the Public Health Council overstepped the boundaries of its lawfully delegated authority when it promulgated a comprehensive code to govern tobacco smoking in areas that are open to the public.").[4]

A result similar to the decisions made in these three cases is required here.

"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit

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[4] Some older cases have invalidated cattle quarantines on this basis. See *Reims v. State*, 17 Ala. App. 128, 82 So. 576 (1919); *Abbott v. State*, 106 Miss. 340, 63 So. 667 (1913); and *Ex parte Leslie*, 87 Tex. Crim. 476, 223 S.W. 227 (1920). Two interesting cases on different issues are *Long v. State*, 202 Ga. 235, 237, 42 S.E.2d 729 (1947); and *DePetrillo v. Coffey*, 118 R.I. 519, 376 A.2d 317 (1977).

to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives." *United States v. Lee*, 106 U.S. 196, 220 (1882). This proposition applies to President Biden who has unlawfully exercised legislative powers that belong to Congress by issuing Executive Order 14043.

CONCLUSION

The district court's grant of a preliminary injunction should be affirmed.

Respectfully submitted this the 22nd day of February, 2022.

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d) and 5th Cir. R. 25.2.5, I hereby certify that on February 22, 2022, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

Dated this the 22nd day of February, 2022.

/s/ *Lowell H. Becraft, Jr.*
Lowell H. Becraft, Jr.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R.App.P. 32(a)(7)(C), I certify, based on the word-counting function of my word processing system (WordPerfect, Version 11), that this brief complies with the type-volume limitations of Fed.R.App.P. 32(a)(7)(B):

1. Exclusive of the exempted portions specified in Fed.R.App.P. 32(a)(7)(B)(iii), this brief contains fewer than 13,000 words, to wit, 2511 words;

2. The brief has been prepared in a proportional spaced format using Times New Roman type (14 point type).

/s/ *Lowell H. Becraft, Jr.*
Lowell H. Becraft, Jr.