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March 21, 2023

Honorable Lyle W. Cayce
Clerk of the Court
U.S. Court of Appeals for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130

Re: Rule 28(j) Response Letter in *Feds for Medical Freedom v. Biden*, No. 22-40043

Mr. Cayce:

Payne v. Biden (Ex.A) did not address *Thunder Basin*'s strong presumption against implied preclusion in a "'situation in which compliance is sufficiently onerous and coercive penalties [are] sufficiently potent that a constitutionally intolerable choice' is presented." F4MF.EB.Br.18 (quoting *Thunder Basin*).[1] This Court has "*already* held that government-imposed vaccine mandates impose just such a constitutionally intolerable choice on employees by 'threaten[ing] to substantially burden the liberty interests of reluctant individual recipients put to a choice between their job(s) and their jab(s),' amounting to 'the loss of constitutional freedoms.'" *Id.* (quoting *BST Holdings*). This ground independently warrants finding jurisdiction.

On the *Thunder Basin* factors, D.C. Circuit precedent strongly presumes a "special statutory scheme" precludes *all* claims. Ex.A.9, 14; *AFGE v. Trump*, 929 F.3d 748, 755 (D.C. Cir. 2019). By contrast, *Cochran* held there is "district court jurisdiction" whenever administrative proceedings merely "*threaten*[] to deprive [plaintiffs] of the opportunity" to receive judicial review, or where it is "'*possible* that [a plaintiff] could never have that opportunity'" for judicial review. F4MF.EB.Br.40

[1] In *Elgin*, DOJ itself acknowledged this point. F4MF.EB.Br.20.

(quoting *Cochran*). *Payne* contended an employee could complain to the Office of Special Counsel (OSC) and then proceed to the Merit Systems Protection Board (MSPB) and the Federal Circuit, Ex.A.4, 13, but during *en banc* oral argument here, DOJ conceded that "OSC is never obligated to then in turn petition the MSPB," Recording.15:28–15:34, and an employee has no ability to do so himself, 5 U.S.C. § 1214(b)(2)(C). This confirms it is at least "possible" an employee would be unable to obtain judicial review via the OSC route, which independently fails for numerous other reasons. F4MF.EB.Br.32–34.

Payne further argued that CSRA preclusion applies because "an action [wa]s proposed," Ex.A.11, but DOJ declined to raise that argument in its *en banc* brief here, forfeiting it. Anyway, as Judge Barksdale explained, there has not been a statutorily defined "proposed action." F4MF.EB.Br.31–32.

Payne also erroneously held that *Elgin* silently overruled decades of precedent. Ex.A.13. *Elgin* never once addressed a broad, pre-enforcement challenge, let alone one attacking an ongoing and constitutionally intolerable choice. F4MF.EB.Br.26–29.

Respectfully,

/S/ R. TRENT MCCOTTER

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