

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

CHRIS J. KROENUNG,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 2025-1363
	)	
DEPARTMENT OF DEFENSE,	)	
	)	
Respondent.	)	
	)	

**PETITIONER KROENUNG’S REPLY IN SUPPORT OF HIS MOTION
FOR JUDICIAL NOTICE**

Acceptance of the government’s position effectively forecloses judicial review for categories of federal employees, in violation of the scheme set forth by Congress through CSRA and upheld by the Supreme Court, even for constitutional issues not properly heard by the Board as contemplated by *Elgin* and realized here. The government characterizes the Board’s exclusion of evidence offered by Petitioner Mr. Christopher Kroenung (“Kroenung”) as a situation where he ‘failed to raise’ the issue. But that is not the case. For example, Kroenung attempted to raise the EUA issue. *See* Opening Brief, ECF No. 23-2 at 38 (AJ excluded Kroenung’s witnesses, including Markem, who Kroenung proposed to ask “if there was ever a vaccine or test for covid that was FDA approved” and agreed-upon stipulations were only permitted for the other three witnesses, not Markem) (citing Appx237, Markem ¶ 1). The government’s cases are generally pre-*Elgin* and not applicable here.

This should be an easy question and one the agency should have been made to answer at MSPB: were any of the covid tests Kroenung was mandated to use approved by the FDA (approved, not merely authorized for emergency use)? The convoluted treatment of the question and maze of websites potentially required to answer that simple question counsels toward its consideration here, as the more one attempts to review the evidence the more evident it becomes an answer was designed to evade review. That does not mean this Court has to resolve the issue, and remand to MSPB for development is certainly within range of approaches from here. But given this Court *could* resolve the issue based on the public record evidence alone, Petitioner's MJN presents documents the Court could use if it chooses to do so.

The unadjudicated fact of the covid 'self-test' EUA-status does not mean the issue is a statutory one. On the contrary, Petitioner argues that an unenumerated, fundamental liberty right is infringed when the government forces participation or use of experimental medicine, such as medical devices only authorized for EUA like the covid 'self-test.' The liberty right is addressed in the last five pages of the opening brief. If the liberty right cannot be asserted now, at what point could it have been? The Board excluded the witness Kroenung proposed to ask about EUA status and did not permit stipulations, not even agreed-upon ones. There was no penalty when the agency's other witnesses came to the hearing unprepared on other issues. There was no response when his attorney at the hearing argued "Kroenung was

aware of reports that...the test that the Agency required[] had only received emergency approval from the FDA [and] did not have the benefit of the full process of the approval for drugs and devices.” ECF No. 24-53 at 365 (Tr. 116:16-20).

The AJ also refused briefing on ‘legality’ of the testing policy. *Ibid.* at 367. In doing so, the AJ refused to address how the enjoined EO---whose injunction amounted to a constitutional issue---affected the vaccinate-or-test policy underlying this case. *See also Id.* at 366 (Tr. 120:6-9) (noting DHP “was enjoined” and does not “reference any further authority to the question of testing”). As far as the ADA issue, which requires the most evidence of all due to its standard becoming tied to “current” FDA and CDC “information” on websites, the agency’s attorney states “EEOC who arbitrates typically that ADA and Rehab Act has declared the DOD testing policy was within compliance with the ADA.” *Id.* at 367 (Tr. 122:9-11). But there is no evidence whatsoever that this was adjudicated, and in any case, by the time of the Removal Notice, DOD was plainly *not* in alignment with the CDC, FDA, nor SFWTF.

Respondent cites SAppx6000 (ECF No. 24-46 at 5) and Appx31 (ECF No. 24-53 at 31) to say constitutional issues were not raised below. But those citations were made to show that Kroenung *requested an agency response* to a particular, limited set of issues, and that one never came. Had the agency responded, the parties could have developed the record needed for this Court to more efficiently reach the

issues that they entail. Absent an agency response on any of them, the burden and the standards are unclear, and the Motion (“MJN”) is an attempt to cover all bases *in case* remand is not made and the Court resolves the factual issues here on appeal.

Petitioner respectfully requests, contrary to the government, that the Court does not wait until consideration of the parties’ merits briefing to resolve this Motion or aspects of it. Petitioner respectfully suggests development of the record on remand, wherein MSPB could be ordered to, for example, have the agency respond to Petitioner’s points as requested in his November 4, 2022 reply at SAppx6000, could develop a record sufficient to cover the three bases set forth in the opening brief (ECF No. 23-2 at 38, first ¶) and/or the ‘Nine Categories’ set forth in the MJN (which are coextensive with the three in OB). Remand for record development and/or other resolution of the MJN could lift the significant, improper burden shift that currently places extreme demands on Petitioner’s Opening Brief and MJN, due to the agency never being made to respond to any of Petitioner’s points or arguments of illegality. Alternatively, though not ideally, Petitioner is prepared to defend on his Opening Brief as is.

Respectfully submitted,

Date: August 12, 2025

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 27(d)(2) and 32(g)(1) and Fed. Cir. R. 27(a), the undersigned certifies the following:

1. The word processing software used to prepare this reply indicates there are a total of **890** words in the reply, including footnotes, and excluding documents authorized by Fed. R. App. P. 27(a)(2)(B) and items excluded by Fed. R. App. P. 27(d)(2) and 32(f).

2. The reply complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6). It was prepared in a proportionally-spaced typeface using Microsoft® Office Word in fourteen-point Times New Roman font.

Date: August 12, 2025

/s/ Erin D. Knese
Erin D. Knese, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of August, 2025, I electronically filed the foregoing PETITIONER KROENUNG'S REPLY IN SUPPORT OF HIS MOTION FOR JUDICIAL NOTICE using the Court's CM/ECF filing system, which in turn served copies of the document on all registered counsel.

/s/ Erin D. Knese

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Counsel for Petitioner, Mr. Chris Kroenung

FORM 9. Certificate of Interest

Form 9 (p. 1)
March 2023

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

CERTIFICATE OF INTEREST

Case Number 2025-1363

Short Case Caption Kroenung v. Defense

Filing Party/Entity Chris J. Kroenung

Instructions:

1. Complete each section of the form and select none or N/A if appropriate.
2. Please enter only one item per box; attach additional pages as needed, and check the box to indicate such pages are attached.
3. In answering Sections 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance.
4. Please do not duplicate entries within Section 5.
5. Counsel must file an amended Certificate of Interest within seven days after any information on this form changes. Fed. Cir. R. 47.4(c).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 01/24/2025

Signature: /s/ Erin D. Knese

Name: Erin D. Knese, Esq.

FORM 9. Certificate of Interest

Form 9 (p. 2)
March 2023

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	2. Real Party in Interest. Fed. Cir. R. 47.4(a)(2).	3. Parent Corporations and Stockholders. Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☒ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☒ None/Not Applicable
Christopher J. Kroenung		

☐ Additional pages attached

FORM 9. Certificate of Interest

Form 9 (p. 3)
March 2023

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

☐ None/Not Applicable

☐ Additional pages attached

Edward Scott Lloyd

Lloyd Law Group, PLLC

5. Related Cases. Other than the originating case(s) for this case, are there related or prior cases that meet the criteria under Fed. Cir. R. 47.5(a)?

☐ Yes (file separate notice; see below)

☒ No

☐ N/A (amicus/movant)

If yes, concurrently file a separate Notice of Related Case Information that complies with Fed. Cir. R. 47.5(b). **Please do not duplicate information.** This separate Notice must only be filed with the first Certificate of Interest or, subsequently, if information changes during the pendency of the appeal. Fed. Cir. R. 47.5(b).

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☒ None/Not Applicable

☐ Additional pages attached