

2025-1363

**United States Court of Appeals
for the Federal Circuit**

CHRIS J. KROENUNG,

Petitioner

v.

DEPARTMENT OF DEFENSE,

Respondent

Petition for Review from the Merit Systems Protection Board
in CH-0752-23-0234-I-1

**PETITIONER CHRIS KROENUNG'S
SECOND MOTION FOR JUDICIAL NOTICE**

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I. INTRODUCTION & BACKGROUND

The agency fired Petitioner Mr. Christopher Kroenung (Kroenung or Petitioner) for his refusal to take a test only authorized for emergency-use, resolution on that ground alone is the simplest because it requires this Court to judicially notice a single, undisputed (though opposed) fact. Resolution on the other grounds of illegality require factual development that is not beyond this Court's judicial notice, but is significantly more burdensome. The government contends the EUA issue was waived, despite Kroenung's attempt to question an excluded witness about the issue and raising it at the hearing. The other grounds were indisputably raised below.

A. Incorporation of First Motion for Judicial Notice

Petitioner filed a first Motion for Judicial Notice containing documents cited in the opening brief (OB) and in anticipation of what would be needed for the Reply, wherein his arguments as to why these government records are properly subject to judicial notice. *See* ECF No. 24. This Second Motion for Judicial Notice (2MJN) contains additional public record documents needed for the reply, though they in no way are meant to be comprehensive, as many grounds of illegality could not be fully presented at this stage in the litigation, and to demand otherwise puts an unbelievable burden on Petitioner. This is especially true because Petitioner is being required to address the propriety of the agency's mandated test in the first instance, whereas this issue should have been developed below and he should have only been required to

present any argument on this point *after*, and *in response to*, whatever the government put forward to justify its mandate and prove removal promotes efficiency of the service. Being required as appellant to address this issue in the first instance has made this appeal almost impossible. The instant motion is the last step in what Petitioner believes fulfills his duty without waiving arguments of legality later in this proceeding (if they are needed), while bringing the issues ready for resolution to this Court's attention.

B. Respondent's Position

Respondent's position on this Motion tracks their position on the initial Motion for Judicial Notice, which opposes any and all additional material not contained in the record from below. *See also* ECF No. 24 p. 6 (Respondent's Position); ECF No. 25 (Response to Motion for Judicial Notice). In particular, Respondent's position as of November 13, 2025 is that "the government takes the same position it articulated at ECF No. 25 regarding the previous motion for judicial notice."

C. On the Necessity (Or Not) of Additional Factual Evidence Herein

The Court may judicially notice the Federal Register document attached as Exhibit 26 that proves the self-test was only authorized for emergency-use. *See infra* § II.A.1; MJN at 11 (contents of Federal Register are subject to judicial notice). If the Court disagrees or does not reach the EUA-status ground, the inquiry into the

mandated-tests' legality is more difficult at this stage, because the test was illegal for different reasons on different dates, including in some cases for reasons that depend on the differing levels of authorization (e.g. as an order from Presidential Task Force versus a discretionary decision made by the agency versus not in accordance with law for other APA violations), and various policies that were not well-defined (nor even presented until the Response) require tedious and fact-sensitive examination. Given uncertainties of burdens and procedure (Issue 4), and not wishing to waive any grounds on which he may properly argue illegality, Petitioner thus continues in this Motion, as in the First MJN, to roughly outline facts needing development with respect to the additional grounds of illegality he attempted to raise below.

Congress created a single, exclusive channel for judicial review of federal-employment disputes, and *Elgin* makes clear that this channel culminates in meaningful review by this Court, even when the Board refuses to consider the legality of the underlying agency action. Thus, when the Board refuses to determine whether the agency's order was lawful, *Elgin* does not permit those issues to evaporate. It requires the Federal Circuit to decide them. A contrary rule would create a nonreviewable pocket of executive authority, permit agencies to circumvent statutory limits by declining to develop a record, and defeat the constitutional structure *Elgin* reaffirmed. In this case, the Board's refusal to reach Part 339, EUA,

statutory-authority, and constitutional arguments makes this Court the first tribunal capable of providing the review the CSRA guarantees. Under *Elgin*, these questions are not optional; they are the core of the Court's duty to maintain the integrity of the channel Congress created. *See also infra* § II.A, C.

II. THE MANDATED SELF-TEST: MARKET STATUS

The fact the mandated “self-test” was only available under EUA is not “beyond”¹ those which this Court may judicially notice, therefore Petitioner presents a proof below.² Petitioner has asked Respondent for months to stipulate this fact, ever since learning it can be proven through public record documents during this course of preparing for a settlement letter in around March 2025. He was not required to prove this fact before the Board, where he sought to question a witness (Markham) about test EUA status, but that witness was denied and the AJ only permitted *agreed-upon* stipulations as to the other three witnesses he proposed for the hearing. OB20 (citing Appx237); *see also* OB4,10,18-19; *infra* II.A (citing *L.E.A. Dynatech*). It was

¹ *See* ECF 24-1 (MJN) at 7 (quoting *Security People, Inc. v. Iancu*, 971 F.3d 1355, 1363 (Fed. Cir. 2020)).

² No standard of proof is established for these circumstances (Agency's burden once challenged, Board refused to hear, Petitioner appeals to this Court). *See also* Issue 4; *Hansen v. DHS*, 911 F.3d 1362, 1368 n.2 (Fed. Cir. 2018) (““The quantum of rebuttal evidence necessary may depend on the quality of the government's case [and] ‘it may be that little countering evidence would be required, where, for example, the prima facie case was minimally supported.’”) (quoting *Schapansky v. Dep't of Transp.*, 735 F.2d 477, 482 (Fed. Cir. 1984)).

only after hundreds of hours of study of DHP and extensive CDC and FDA website study that the fact of EUA-status appeared to be true, though in hindsight it is easy.

Respondent *does not dispute* this fact, the government continues its attempts to avoid the fact altogether. The fact has enormous implications. It is the only highly relevant fact that is true during each specified refusal by Kroenung, thus brings the issue of illegality to this single fact true across the entire period of discipline (unlike for the remaining grounds of illegality, which Kroenung undisputably raised below but which depend on level of authority, discretion, APA violations, various policies including some off-record, etc.). This Court “‘is fully capable of providing meaningful review’ [and] disputed factual questions does not change that calculus” where the fact is not beyond one this Court may judicially notice. MJN at 7; *Security People, Inc. v. Iancu*, 971 F.3d 1355, 1363 (Fed. Cir. 2020) (quoting *Elgin v. Dep’t of Treasury*, 567 U.S. 1, 10).

A. The mandated “self-test” was only available under EUA.

This case can be resolved as a matter of law the Board is not authorized to reach if the Court takes judicial notice of the single fact the mandated tests had EUA-status. This is the simplest resolution of the case because no further factual development is necessary and it should not be considered waived. *See Briggs v. Merit Sys. Prot. Bd.*, 331 F.3d 1307, 1312-13 (Fed. Cir. 2003) (noting the Board’s “consistent refusal” to reach challenges to legality of legislation, the petitioner’s

“attempt, albeit futile, to raise the issue before the Board; the purely constitutional nature of the issue; the lack of a need to develop a factual record before adjudication; and the lack of a need for Board expertise to decide the issue” in holding there was no requirement for administrative exhaustion) (citation omitted). “An appellate court will consider an issue not presented below only if: (i) the issue involves a pure question of law and refusal to consider it would result in a miscarriage of justice; (ii) the proper resolution is beyond any doubt; (iii) the appellant had no opportunity to raise the objection at the district court level; (iv) the issue presents ‘significant questions of general impact or of great public concern[;]’ or (v) the interest of substantial justice is at stake.” *L.E.A. Dynatech, Inc. v. Allina*, 49 F.3d 1527, 1531 (Fed. Cir. 1995) (citations omitted). The self-test EUA status qualifies for at least one, and arguably all, of these exceptions, so the Court can reach the issues that turn on this fact even if it finds Kroenung did not raise it below with sufficient specificity.

Kroenung’s discipline period ran from January 3 to August 15, 2022. Public record documents prove only EUA self-tests were available during that period. Two proofs are provided below. Petitioner withholds additional proof (again found, but only after unduly burdensome searches of the public record), but respectfully requests they not be waived by not including them below. Petitioner will advance those arguments later if needed.

Predicate facts about the “self-test” are undisputed from the record. Analyzing DHP in detail, attributes are that the self-test must be in these categories: antigen, at-home, over-the-counter (OTC, i.e. no prescription required), rapid, and viral (i.e., detects virus that is present). Appx127-129.³ The self-tests are *not*: molecular,⁴ NAAT, lab-based, POC, serology. *Id.* DOD’s Consolidated Guidance (Rev 2) (“CG” Rev 2, i.e. CGR2) issued August 8, 2022 confirms these attributes. SAppx75-76. *See also* SAppx252-260 (FDA website, “At-Home OTC COVID-19 Diagnostic Tests” as it appeared on August 5, 2022 (explaining different types of tests)).

1. Remarks in FDA’s publication in the Federal Register on Sept 28, 2022, page 2 (SAppx4061) breaks down the EUA issuances and how many have gone on to full approval. Conveniently (and unlikely coincidentally given DOD’s use of Kroenung’s removal as a test case), as of **August 15, 2022** (Specification #2 date), FDA issued “more than 439 EUAs for COVID–19 tests, including more than 354 diagnostic and 85 serology or other immune response tests. Further, two **molecular** diagnostic COVID–19 tests have been granted marketing authorization through the traditional device premarket review pathways.” SAppx4061 (emphasis added). The

³ Attachments 7 and 8 were new to DHP (which contains FHP Supplement 23 (Rev3) in Tab 1). FHP Supplement 23 Rev0, Rev1, and Rev2 did not have those attachments because the screening program had not yet been set up.

⁴ Molecular tests were only to be offered as confirmatory tests following positive screening tests. Appx128 ¶ 3.

self-test is antigen, not molecular. Ergo on the date of his last Specification, no self-tests were fully licensed, but he was still terminated for refusing to use one.

2. As stated in the first Motion, Exhibit 13 (SAppx252-260) also proves the self-test was only available under an EUA status. MJN at 22 (Fact 1). Because so few tests had full approval, simply comparing lists shows that no self-test was fully-licensed during 2022. FDA’s website catalogs the different types of COVID-19 tests and when they were granted various forms of approval. *See also* Exhibit 14 (SAppx262-268), FDA website, “COVID-19 Tests Granted Traditional Marketing Authorization by the FDA” updated February 24, 2025 (showing that the first “self-test” available as a full-market-approved product was not until November 9, 2023).

B. In addition to being resolute under a single, judicially-noticable fact, and the only fact constant across all refusal dates, the Court should reach this issue because its opinion is important to the national debate and because of its Constitutional nature.

The use of illusory “option” clauses is on the rise nationwide. *See also* Reply p. 4, n.3. By defining the liberty right proposed in OB49-55, or something like it, this Court can protect individual liberty from non-local interference while still letting public health be run locally (for example, by confining the right as one protected under the Fifth Amendment but leaving no opinion on whether it is protected under the Fourteenth as well). Respondent’s contention is frankly spine-chilling: “although Mr. Kroenung presents the right as being ‘free from uninformed, unwanted,

unconsented-to, or unaccountable investigatory medicine’ (Br. 51), **he had that choice and, indeed, exercised it by refusing to test.**” Response at 22 (emphasis added). The proposed liberty right is so fundamental that not even the government here disagrees with it. But the fact they believe they can violate the right by terminating Kroenung for his exercise of it is another reason the Court should reach this issue. The perplexing thing about those who can make a statement like the above, who turn the exercise of a constitutionally-protected liberty right into a ‘choice,’ and as applied here: If Kroenung *did* have a choice because he never tested, what does *lack* of choice look like so as to finally infringe the right? Being forced at gunpoint to test? Is it test *or death*?? Where is the line if termination from federal employment protected under Chapter 75 does not cross it? The Fifth Circuit has started addressing the issue and has a useful approach by considering the analogy of “Hobson’s Choice.” Petitioner makes a standing offer to further brief the issue but will not for now without interest or order by the Court to do so given the unusual procedural situation. Petitioner emphasizes that, taking judicial notice of the single fact (e.g. *supra* § II.A.1 which requires reference to a single page of the Federal Register), the analysis that remains is purely legal.

From the Founding through the modern Court, American constitutional thought warns that benevolent justifications are the most dangerous pretext for coercive power. Jefferson observed that “the natural progress of things is for liberty

to yield, and government to gain ground,” especially when officials invoke necessity.

Letter from Thomas Jefferson to Edward Carrington (May 27, 1788).⁵ Hamilton

likewise cautioned that the means of defense against danger have been always the instruments of tyranny at home, because emergencies induce people to confer

powers they would never otherwise grant. *The Federalist No. 8* (Alexander

Hamilton) (1787)⁶ (“continual effort and alarm attendant on a state of continual

danger, will compel nations the most attached to liberty, to resort for repose and

security, to institutions, which have a tendency to destroy their civil and political

rights”). George Washington warned that even measures that appear “the instrument

of good” become “the customary weapon by which free governments are destroyed.”

George Washington, Farewell Address (Sept. 19, 1796):⁷

If in the opinion of the People, the distribution or modification of the
Constitutional powers be in any particular wrong, let it be corrected by an

⁵ *Founders Online*, National Archives, available at <https://founders.archives.gov/documents/Jefferson/01-13-02-0120>. Original source: *The Papers of Thomas Jefferson*, vol. 13, March-7 October 1788, ed. Julian P. Boyd. Princeton: Princeton University Press, 1956, pp. 208-10.

⁶ *Founders Online*, National Archives, available at <https://founders.archives.gov/documents/Hamilton/01-04-02-0160>. Original source: *The Papers of Alexander Hamilton*, vol. 4, January 1787-May 1788, ed. Harold C. Syrett. New York: Columbia University Press, 1962, pp. 326-32.

⁷ *Founders Online*, National Archives, available at <https://founders.archives.gov/documents/Washington/05-20-02-0440-0002>. Original source: *The Papers of George Washington, Presidential Series*, vol. 20, 1 April-21 September 1796, ed. David R. Hoth and William M. Ferraro. Charlottesville: University of Virginia Press, 2019, pp. 703-22.

amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield.

The Supreme Court has echoed these principles: Justice Brandeis explained that courts must be “most on our guard to protect liberty when the government’s purposes are beneficent[,]” because the “greatest dangers to liberty” come from “well-meaning” officials who exceed lawful limits. *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting). Justice Jackson warned that a power justified by “urgent need” becomes a “loaded weapon...ready for the hand of any authority” willing to invoke emergency. *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting). And in *Youngstown*, the Court rejected the idea that a public crisis can manufacture power Congress withheld: “emergency powers...tend to kindle emergencies.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 649-50 (1952) (Jackson, J., concurring); *see also* MJN at 23, n.11; *infra* n.9.

These principles apply with full force here. Congress expressly prohibited mandatory use of EUA medical products and required that individuals retain the “option to accept or refuse” them. 21 U.S.C. § 360bbb-3(e)(1)(A)(ii); OB49-55. Courts across the nation are grappling with the issue, albeit most often in the context of vaccine mandates that were issued *after* at least one vaccine no longer held only

EUA-status (i.e. was fully approved, removing it from infringing the right as defined in OB). Although the test at issue here does not inject the body with something intended to invoke a permanent response, it is clearly a medical battery when unconsented-to, and goes so far into the nasal passage as to constitute an invasion of the body very different from the drug test ultimately held lawful in *Watson* (which also had a clear nexus with efficiency of the service).^{8,9}

This Court is uniquely situated to deal with the issue, because the violation here arises completely within the confines of a CSRA-driven inquiry reviewable under § 7703(c)'s 'in-accordance with law' review into whether an agency's

⁸ These principles also apply to the executive-overreach argument, which is another reason Petitioner attempts to bring those to the Court's attention. They are intertwined with the EUA issue as well, in that public health decisions should be made locally and are reserved for the States under the Tenth Amendment. See *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985) ("the regulation of health and safety matters is primarily, and historically, a matter of local concern"); *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring in the denial of application for injunctive relief) ("Our Constitution principally entrusts 'the safety and the health of the people' to the politically accountable officials of the States." (citation omitted)).

⁹ "The question before us is not how to respond to the pandemic, but who holds the power to do so. The answer is clear: Under the law as it stands today, that power rests with the States and Congress...we do not impugn the intentions behind the agency's mandate...if this Court were to abide [the law's demands] only in more tranquil conditions, declarations of emergencies would never end and the liberties our Constitution's separation of powers seeks to preserve would amount to little." *NFIB*, 595 U.S. 109, 126 (2022) (Gorsuch, J., concurring, joined by Thomas and Alito, JJ.). See also n.10.

required use of an EUA product can be the basis for removal. As the sole reviewing court of non-discriminatory actions by the federal government in its role as employer, this Court's voice is imperative to the debate, and this case presents the issue. For the forgoing reasons, and as explained in OB, agencies cannot convert an asserted public-health benefit into a license to compel what Congress made voluntary (or alternatively, what is reserves for the States).^{10,11} *See also* Reply at 11-12 and n.13. Good intentions cannot supply power the Constitution and statute deny. This Court can and should reach the issue, and reverse the Board's decision.

¹⁰ “An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable. Fidelity to principles of federalism is not for the States alone to vindicate.” *Bond v. United States*, 564 U.S. 211, 223 (2011).

¹¹ The Tenth Amendment issue can arguably be reached on the unsupplemented record but may require resolution of factual disputes. All agency officials testified to the significance of Kroenung's January 3, 2022 refusal, and Kroenung would not have been removed absent that step in the progressive punishment. OB12-13. *SDTX-PI* enjoined all implementation and enforcement of EO14043, and that unequivocally covers DHP. OB11, 28 (*SDTX-PI* enjoined the Secretary of Defense's enforcement of DHP); Reply at 2-3, 9. Because the agency's enforcement of an enjoined policy is “clearly unlawful” the Board sustainment of Kroenung's removal should be reversed. OB28-29 (citing *Watson, Walker*). Alternatively, this Court can undertake its own analysis of illegality of the EO (and for the first Removal specification, of SFWTF's testing mandate) independently.

C. Petitioner reserves the right to show mandated use was ‘off-label’ and other reasons for illegitimacy.

In light of the history of FDA’s evaluation of tests, the self-test was experimental during 2022, which counters any showing of JRCBN. OB7-8, OB47-49; Reply pp. 12-14. Three facts give a flavor of why it is important to preserve this argument, as there were many aspects of illegality that Kroenung should be permitted to argue if/when/in response to any showing of legitimacy or attempt to meet JRCBN by the agency. Asymptomatic testing appears to only be permitted even under EUA label because FDA told manufacturers to stop sending FDA their asymptomatic data, so that FDA would no longer have to put ‘not authorized for asymptomatic use’ on the label. SAppx6375, SAppx6377, SAppx6385. Once President Biden’s mandates came into effect, CDC guidance added asymptomatic to permitted uses. *Compare* SAppx1553 with SAppx1560 (CDC’s Self-Testing Website on 11/4/21 with 12/6/21, showing CDC adds new usage permitting the self-test to be used “regardless of vaccination *or symptom* status” whereas previously asymptomatic testing was only recommended following known exposure). Neither FDA nor DOD had reason to believe weekly screening of asymptomatic (or their equating of unvaccinated) would be effective, as evidenced in the Town Hall, and confirmed after the Aug. 5, 2022 preprint was released. FDA’s Safety Announcement on August 11, 2025 even admits they “knew that for people to get accurate results, test instructions would need to include directions for repeat, or

serial, testing.” SAppx2199. Many additional documents, not all included in the Motions at this time, are supportive of a myriad of grounds of illegality. To-date there are still no self-tests fully-approved for asymptomatic testing, and EUA tests now require three times a week for asymptomatic testing, even under that lower standard. Arbitrary actions by DOD and FDA violate APA and therefore the Board’s affirmance is not in accordance with law.

Another ground of illegality here, again only due after a showing by Respondent that the agency’s mandated test met JRCBN, particularly if the agency uses compliance with EEOC standards to do it, is APA violations by EEOC. *See, e.g.,* OB14-15, OB40(i); Reply at 15, n.15; MJN at 21, n.10. Petitioner reserves the right to rebut any showing by Respondent that the mandated tests meet JRCBN when or if the burden shifts to him outside of the general requirement that he bring all claims in the opening brief.

Thus there are multiple grounds on which Petitioner can respond if/when Respondent is made to address his challenge to that the mandated test was not JRCBN, and if Respondent actually makes a showing, at which time these arguments and their supporting factual evidence would become due.

III. EXHIBITS

For this Court to decide issues of legality on the grounds Kroenung unquestionably raised below (executive overreach (including but not limited to

enjoinment of DHP), JRCBN), remand for factual development is almost certainly needed, because despite Petitioner's best efforts to present various challenges here on appeal, the absence of any narrowing of the issues below make these additional grounds unreasonably burdensome to present here in full in the first instance. Nevertheless many are provable with public record documents, and if the Court wishes to reach them at this stage, we include the following exhibits in case any of the additional grounds are discussed at Oral argument and/or depending on the Court's interest, but, unless indicated in § A, they will not be included in the Supplemental Appendix.

A. Seven Exhibits Included in the Supplemental Appendix

Exhibit 26 is a notice in the Federal Register submitted by FDA that is the sole document necessary to prove the mandated self-test was only available under EUA. (Though the fact is now relatively easy to prove, it took months of research to uncover that its proof could be this simple.)

Exhibit 61B is a corrected filing of Exhibit 61 (ECF No. 24-33).

Exhibit 70 is a collection of notices in the Federal Register submitted by FDA relevant to EUA status during the pandemic, as cited in the Reply brief.

Exhibit 82 is DOD's Consolidated Guidance (Rev 3) as cited in the Response, and its inclusion in the SAppx shows there was no difference in this revision and

earlier revisions with respect to the passage Respondent cites to argue DOD mandated testing on its accord, with CDC guidance being only a starting point.

Exhibit 87 is Federal Register notices submitted by DOD in December 2021 (SAppx845-46) and February 2022 (SAppx847-48) regarding Form DD3150. *See also* SAppx5556 (requiring the Form for federal employees *prior to* the EO); Appx122 (requiring the Form for Contractors after the EO issued); Appx120 (requiring DD3175 after the EO issued despite no OMB number in upper right).

Exhibit 91 is a June 2021 GAO report was cited in the Reply and herein. It is relevant to show DOD understood EUA products could not be mandated (SAppx3536). The report also found DOD “testing protocols generally align with CDC guidance.” SAppx3531. This included DOD’s directive to use tests “with an [EUA] from the FDA.” *Id.* There was a time before testing was required. On remand, the agency could be required to answer questions as to why it believes it can mandate EUA-products but was reserved about the vaccines.

Exhibit 145 is a transcript from a September 2021 press conference by DOD’s Press Secretary the day after the EO issued. It shows the DOD knows it cannot mandate EUA products, and questions are asked about how refusals will be treated, e.g. whether they will “be punished like refusals to obey an unlawful order.” SAppx6209.

B. Exhibits Not Included in the Supplemental Appendix

Exhibits 71 and 73 are related to a prominent self-test (Flow-Flex, the first to receive full market approval).

Exhibits 74 and 76 are OSHA-related documents: the ETS and a website with FAQ relevant to JRCBN.

Exhibits 64-69, 87-89 contain additional material related to Forms (e.g. SAppx1149-50 in Ex. 65), relevant to impact of the EO on mandated testing and attestation of vaccination status, for arguments not due at this time.

Exhibit 80 is DOD's Consolidated Guidance (Rev 0), the policy that now incorporates community levels into testing requirements, but was not issued until April 4, 2022, as cited in the Response.

Exhibit 92 contains the articles at the links cited in Kroenung's Pre-Hearing Submission (Appx281 n.1).

Exhibit 98 contains DOD Instruction 6055.1 which Respondent argues (for the first time on appeal) was the basis for the agency's authority to mandate testing.

IV. CONCLUSION

For the foregoing reasons, Kroenung asks that his Motions be granted, at least with respect to the Exhibits included in the proposed Supplemental Appendix, which is the subject of a motion for leave to be filed immediately following this filing.

Respectfully submitted,

Date: December 1, 2025

/s/ Erin D. Knese

Erin D. Knese, Esq.

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Counsel for Petitioner, Mr. Chris Kroenung

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1. Second Declaration of Erin Knese

Attachments:

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Exhibit 61B

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Exhibits 87-89

Exhibits 91-92

Exhibit 98

Exhibit 145

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: 11/4/2025 _____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

Gordon Reese

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

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 27(d)(2)(A) and Fed. Cir. R. 27(a), the undersigned certifies that the word processing software used to prepare this motion indicates there are a total of **4524** words in the motion, not counting permitted exclusions. Per Fed. R. App. P. 27(d)(1)(E), this motion 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 Word in 14-point font, Times New Roman Font.

Date: December 1, 2025

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

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of December, 2025, I electronically filed the foregoing PETITIONER CHRIS KROENUNG'S SECOND MOTION FOR JUDICIAL NOTICE, with supporting affidavit, using the Court's CM/ECF filing system, which in turn served copies of the document on all registered counsel.

/s/ Erin D. Knese

Erin D. Knese, Esq.

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Counsel for Petitioner, Mr. Chris Kroenung

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

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

SECOND DECLARATION OF ERIN KNESE

Erin D. Knese, an attorney duly admitted to practice before this Court, under penalty of perjury (28 U.S.C. § 1746), declares the following:

INTRODUCTION

1. I am an attorney admitted to practice in the State of Missouri, several district courts, the USPTO, as well as this Court.

2. Petitioner Mr. Chris Kroenung (“Kroenung”) is my client and I represent him in this case. We have been working together on this case since mid-January 2025. As such, I am fully familiar with the facts and circumstances surrounding this matter.

3. I submit this Declaration and the attached exhibits in support of Kroenung’s Second Motion for Judicial Notice (“2MJN”) pursuant to the applicable

rules of the Federal Rules of Appellate Procedure and this Court's Rules of Procedure.

4. The documents attached are from the public record and are not subject to dispute. Conclusory statements in the Motion may *apply* facts, or *weigh* facts to advocate for a position. Respondent's position is set forth in the Motion at § I.B.

5. Pursuant to Federal Circuit Rule 27(a)(4), this document is my unsworn declaration made under penalty of perjury under 28 U.S.C. § 1746, which is repeated in the heading.

6. Pursuant to Federal Circuit Rule 27(d), the Motion contains a list of the exhibits in the addendum.

7. I further submit the Declaration in accord with suggestions by the Supreme Court in *Elgin v. Department of Transportation*, 567 U.S. 1, 19 (2012) as a method to present material that can assist this Court's resolution of the constitutional issues present in the case, where no record was built at the MSPB proceeding.

8. Exhibits proposed to become part of the *Supplemental Appendix* are detailed in the chart accompanying the Motion for Leave to File a Supplemental Appendix, to be filed immediately following this filing in the ECF.

9. The first page of each Exhibit is provided at the end of each document's paragraph below.

THE EXHIBITS

10. **Exhibit 26** is a notice in the Federal Register submitted by FDA that issued on Sept. 28, 2022. It alone can prove the mandated self-test was only available under EUA. (Though the fact is now relatively easy to prove, it took months of research to uncover that its proof could be this simple.) SAppx4060.

11. **Exhibit 61B** is a corrected filing of Exhibit 61 (ECF No. 24-33). In the original filing, updated versions of the January 24, 2022 and February 28, 2022 documents were inadvertently included as the originals. This version fixes that. The SAppx range has gone from 5001-5060 and is now at 7001-7058.

12. **Exhibits 64 and 65** are additional captures of the SFWTF FAQ website for Testing (Ex. 64) and Vaccination (Ex. 65) on the dates shown in the Wayback capture. These are an extension of MJN Exhibit 60 with additional dates to show changes should particular issues arise at Oral Argument.

13. **Exhibits 66-69** are documents related to attestation forms and additional details will be provided if needed. These were linked to from SFWTF websites in Exhibits 60, 64 and/or 65. Exhibit 66 was for onsite contractors. Exhibit 67 was for federal employees and linked in SFWTF August 6, 2021 FAQ. Exhibit 68 was the privacy noticed linked to for federal employees after EO 14043 issued, and Exhibit 69 is the privacy notice linked to for federal employees after EO 14043 was enjoined.

14. **Exhibit 70** is a collection of notices in the Federal Register submitted by FDA relevant to EUA status during the pandemic, as cited in the Reply brief.

15. **Exhibits 71** contains three letters sent from FDA regarding FlowFlex, the first antigen, rapid, at-home test to receive full market approval in November 2023. The letters are dated Oct. 4, 2021, Feb. 18, 2022, and March 7, 2022. They were downloaded from FDA's website through links in FDA's listing for At-Home Antigen Tests on various dates.

16. **Exhibits 74** is the Federal Register Notice for the OSHA Emergency Temporary Standard published in November 2022.

17. **Exhibit 76** is an OSHA website with FAQ relevant to JRCBN. It is available at <https://www.osha.gov/coronavirus/ets2/faqs> (last accessed December 1, 2025).

18. **Exhibit 80** is DOD's Consolidated Guidance (Rev 0) as cited in the Response and available at their link.

19. **Exhibit 82** is DOD's Consolidated Guidance (Rev 3) as cited in the Response and available at their link.

20. **Exhibit 87** is Federal Register notices submitted by DOD in December 2021 (SAppx845-46) and February 2022 (SAppx847-48) regarding Form DD3150.

21. **Exhibit 88** contains 4 versions of DOD's Form DD3112 obtained through the Wayback machine using the links provided in the DOD documents referring to the form.

22. **Exhibit 89** contains 4 notices from the Federal Register related to DOD's Form DD3112.

23. **Exhibit 91** is a June 2021 GAO report available at <https://www.gao.gov/assets/gao-21-321.pdf>.

24. **Exhibit 92** contains the articles at the links cited in Kroenung's Pre-Hearing Submission (Appx281 n.1).

25. **Exhibit 98** contains DOD Instruction 6055.1 which Respondent argues (for the first time on appeal) was the basis for the agency's authority to mandate testing. The link is in Respondent's brief.

26. **Exhibit 145** is a transcript from a September 2021 press conference by the Pentagon Press Secretary the day after the EO issued. It was downloaded from DOD's website at <https://www.war.gov/News/Tag/155445/EndDate/2021-12-01/?Page=9> and the particular document is at <https://www.war.gov/News/Transcripts/Transcript/Article/2725063/pentagon-press-secretary-john-f-kirby-holds-a-press-briefing/>.