No. 22-30019

In the United States Court of Appeals for the Fifth Circuit

STATE OF LOUISIANA; STATE OF INDIANA; STATE OF MISSISSIPPI,
Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, JR., IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; UNITED STATES OF AMERICA; FEDERAL ACQUISITION REGULATORY COUNCIL; GENERAL SERVICES ADMINISTRATION; ROBIN CARNAHAN, IN HER OFFICIAL CAPACITY AS ADMINISTRATOR OF GENERAL SERVICES, ET AL.,
Defendants-Appellants.

BRIEF OF THE STATES OF FLORIDA, ALASKA, ARIZONA, ARKANSAS, GEORGIA, IDAHO, IOWA, KANSAS, KENTUCKY, MISSOURI, MONTANA, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

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Under the fourth sentence of Fifth Circuit Rule 28.2.1, amici, as governmental parties, need not furnish a certificate of interested persons.

/S/ Henry C. Whitaker
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INTEREST OF AMICI CURIAE

Amici curiae, the States of Florida, Alaska, Arizona, Arkansas, Georgia, Idaho, Iowa, Kansas, Kentucky, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, and West Virginia, are responsible for the health, safety, and welfare of their citizens.[1] As with the Plaintiffs, the challenged vaccination requirements improperly intrude on amici's traditional powers. Some amici also have laws expressly restricting employer-vaccine mandates,[2] which the challenged actions purport to preempt. *See Florida v. Nelson*, No. 8:21-cv-2524, 2021 WL 6108948, at *9 (M.D. Fla. Dec. 22, 2021) ("[T]he state suffers sovereign injury when unlawful agency action preempts state law." (collecting authorities)).

Amici, like Plaintiffs, contract with the federal government as a matter of course and are directly regulated by the challenged actions. Each amicus is party to federal contracts, totaling millions of dollars or more, and plans to pursue federal contracts in the future. And each amicus has a policy or practice of allowing its employees to make intimate medical decisions without interference from the State—including the decision whether to receive a COVID-19 vaccine.

Finally, many amici have pending cases challenging the vaccination requirements. *See, e.g.*, *Florida v. Administrator, NASA*, No. 22-10165 (11th Cir.); *Kentucky v. Biden*, No.

[1] *See* Fed. R. App. P. 29(a)(2).
[2] *See* § 381.00317, Fla. Stat.; Mont. Code Ann. § 49-2-312; Tex. EO GA-39, 40; *see also* Tex. Health & Safety Code § 161.0085.

21-6147 (6th Cir.); *Georgia v. President of the United States*, No. 21-14269 (11th Cir.); *Missouri v. Biden*, No. 22-1104 (8th Cir.); *Texas v. Biden*, No. 3:21-cv-309 (S.D. Tex.).

Accordingly, amici have both sovereign and proprietary interests in the issues presented by this appeal.

SUMMARY OF THE ARGUMENT

On September 9, 2021, President Biden announced a series of measures aimed at one purpose: "As your President, I'm announcing tonight a new plan to require more Americans to be vaccinated, to combat those blocking public health."[3] One of those actions—an Executive Order applicable to federal contractors and their employees—is at issue here. *See* Exec. Order No. 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, 86 Fed. Reg. 50,985 (Sept. 9, 2021). While the government is using this Executive Order to mandate COVID-19 vaccination for millions of workers, the President issued it under the Federal Property and Administrative Services Act (FPASA), a statute enacted in the wake of World War II to streamline federal property management.

The district court correctly enjoined this unprecedented public health measure dressed up as a benign exercise of the government's "proprietary" functions. In arguing otherwise, the government principally relies on the introductory purpose statement of

[3] Remarks by President Biden on Fighting the COVID-19 Pandemic, White House (Sept. 9, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/.

FPASA. *See* Appellants' Br. at 17–18 (citing 40 U.S.C. § 101). But that threadbare authority falls far short of the express authorization needed to justify such "a significant encroachment into the lives—and health—of a vast number of employees." *NFIB v. Dep't of Labor*, 142 S. Ct. 661, 665 (2022). If OSHA's authority to regulate "occupational hazards" does not satisfy that standard, *id.*, surely this mandate too fails. The President's procurement authorities are simply not a "work-around" to mandate vaccines for one-fifth of the Nation's workforce. *See id.* at 668 (Gorsuch, J., concurring). And were the government right that FPASA permits anything that might improve the efficiency of government procurement, then the statute would swallow vast swathes of the federal regulatory apparatus including public health, immigration, and antidiscrimination. *See* Appellants' Br. at 19–20 (asserting those areas as examples within the government's "proprietary" functions).

The Executive Order and its implementation also represent an unauthorized exercise of regulatory power. The President's FPASA authority is limited to "prescrib[ing] policies and directives." 40 U.S.C. § 121(a). He may not issue procurement regulations. That authority is instead vested in the Federal Acquisition Regulatory Council (FAR Council), an entity created by Congress to establish a uniform system of government-wide procurement regulations. Yet the President purported to invest authority to create such regulations in a different set of actors—the Office of Management and Budget (OMB) and a shadowy White House Task Force. The President had no authority to delegate power he does not possess to an entity different

from the one Congress designated as responsible for implementing government-wide procurement regulations.

If all that were not enough, the government's unlawful implementation of the Executive Order provides multiple bases to affirm. For example, on September 28, 2021, the OMB Director—purporting to exercise authority delegated by the President—approved the specifics of the vaccine mandate and related COVID-19 measures. *See* Determination of the Promotion of Economy and Efficiency in Federal Contracting Pursuant to Executive Order No. 14042, 86 Fed. Reg. 53,691, 53,692 (Sept. 28, 2021). But that order was so flawed, both in its reasoning (or lack thereof) and its neglect for procedural requirements, that OMB had to replace it six weeks later. *See* Determination of the Acting OMB Director Regarding the Revised Safer Federal Workforce Task Force Guidance for Federal Contractors and the Revised Economy & Efficiency Analysis, 86 Fed. Reg. 63,418 (Nov. 16, 2021).

Even OMB's second try suffers from several deficiencies. The government has permitted the White House Task Force to impose binding requirements on federal contractors without the OMB approval contemplated by the Executive Order. And OMB promulgated its second order without the notice and comment procedures plainly required by 41 U.S.C. § 1707. The second order is also arbitrary and capricious on multiple grounds: it fails to acknowledge the reliance interests of States and contains a rationale that is blatantly pretextual.

This Court should affirm the district court's decision to preliminarily enjoin enforcement of the vaccination mandate.

ARGUMENT

A plaintiff seeking a preliminary injunction must establish (1) "that he is likely to succeed on the merits," (2) "that he is likely to suffer irreparable harm in the absence of preliminary relief," (3) "that the balance of equities tips in his favor," and (4) "that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Because Plaintiffs established each of these elements, the Court should affirm.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS.

a. The Executive Order is ultra vires.

As many courts across the country have now concluded, "the federal government is unlikely to prevail on its argument that the Property Act authorizes imposition of the contractor mandate." *Kentucky v. Biden*, 23 F.4th 585, 610 (6th Cir. 2022); *see also Nelson*, 2021 WL 6108948, at *14; *Georgia v. Biden*, No. 1:21-cv-163, 2021 WL 5779939, at *10 (S.D. Ga. Dec. 7, 2021); *Missouri v. Biden*, No. 4:21-cv-1300-DDN, 2021 WL 5998204, at *5 (E.D. Mo. Dec. 20, 2021). That conclusion is correct for several reasons.

1. Neither § 101 nor § 121 authorize a vaccine mandate.

As authority for its sweeping mandate, the government relies on 40 U.S.C. §§ 101 and 121. Appellants' Br. at 17–18. Neither is sufficient to sustain the government's actions.

Section 101 states that "[t]he purpose of [FPASA] is to provide the Federal Government with an economical and efficient system" for certain activities, including "contracting." 40 U.S.C. § 101(1). Relying on this provision, the government asserts authority to impose virtually any requirement on federal contractors that the President determines "improve[s] the economy and efficiency of contractors' operations." Appellants' Br. at 18. Here, the government says that mandating vaccines will "decrease worker absence" and "reduce labor costs" for its contractors. 86 Fed. Reg. at 50,985. There are several problems with the government's reading.

First, the government reads FPASA's introductory purpose statement as a substantive grant of authority. But "apart from [a] clarifying function, a prefatory clause does not limit or expand the scope of the operative clause." *District of Columbia v. Heller*, 554 U.S. 570, 578 (2008); *accord Kentucky*, 23 F.4th at 604 (explaining that "statements of purpose . . . cannot confer freestanding powers").

Second, § 101 states that FPASA's purpose is to "provide . . . an economical and efficient *system*" for contracting. 40 U.S.C. § 101 (emphasis added). Section 101 at most authorizes an efficient and economical "scheme or method" for entering government contracts. *Kentucky*, 23 F.4th at 604 (quoting *System*, *Webster's New International Dictionary*

2562 (2d ed. 1959)). In other words, the word "system" clarifies that FPASA permits regulation of the operations of *government* in contracting, rather than the regulation of government contractors' employees. *See id.* FPASA's historical context confirms that reading.[4]

Third, the government's reading creates significant surplusage problems. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("We are thus 'reluctan[t] to treat statutory terms as surplusage' in any setting."). In five separate provisions, FPASA expressly uses the terms "economy" and "efficiency" to define the scope of an official's authority. *See, e.g.*, 40 U.S.C. § 501(a)(1)(A) (requiring the General Services Administrator (GSA Administrator) to take action "to the extent [he] determines that the action is advantageous . . . in terms of economy [and] efficiency"); *id.* §§ 506(b), 581(c)(4); 584(a)(2)(C); 603(a)(1). In reading § 101 as a grant of authority to do anything promoting economy and efficiency in procurement, the government reads those more specific provisions out of the statute.

The government fares no better under § 121. That provision authorizes the President to "prescribe policies and directives that the President considers necessary to *carry out*" FPASA. 40 U.S.C. § 121(a) (emphasis added). But other than § 101, the

[4] *See Kentucky*, 23 F.4th at 606 (explaining that, in World War II, the federal government amassed an enormous amount of property, and "many agencies entered duplicative contracts supplying the same items and creating a massive post-war surplus"); H.R. Rep. No. 81-670, at 1475 (1949) (calling for "an improved and efficient property management system").

government does not identify any specific provision of FPASA that it is "carry[ing] out." In fact, the only provisions of FPASA it cites in its brief are §§ 101 and 121. Appellants' Br. at x.

Further, the President's power under § 121(a) is limited to what is "necessary" to carry out FPASA. "Necessary" is a "word of limitation" and is often synonymous with "required," "indispensable," and "essential." *Vorcheimer v. Phila. Owners Ass'n*, 903 F.3d 100, 105 (3d Cir. 2018) (quotations omitted); *accord In re Microsoft Corp. Antitrust Litig.*, 355 F.3d 322, 327 (4th Cir. 2004). Rather than explaining why a vaccine mandate is required, indispensable, or essential to carrying out FPASA, the government offers only a "threadbare and conclusory rationalization." *Nelson*, 2021 WL 6108948, at *11–12.

While the term "necessary" is sometimes given a broader reading, *see Ayestas v. Davis*, 138 S. Ct. 1080, 1093 (2018), Congress did not use that word in a broad sense in § 121. In that section, Congress imposed a mandatory duty on the GSA Administrator to issue regulations that are "necessary" but gave him discretion as to other regulations. 40 U.S.C. § 121(c)(1)–(2) (using "may" in (1) and "shall" in (2)). Congress thus used "necessary" to designate those regulations that GSA *must* issue. Interpreting "necessary" to mean "simply useful" would read that distinction out of the statute. *See In re MCP No. 165*, 21 F. 4th 357, 392 (6th Cir. 2021) (Larsen, J., dissenting) (quotations omitted). The word "necessary" in § 121(a)—appearing in an identical phrase—should be given the same limited meaning. *See Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 433

(1932) ("[T]here is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning.").

Neither § 101 nor § 121 even plausibly support the government's mandate on their plain text. All the more so because the government "deploy[s] [FPASA] to mandate a medical procedure for one-fifth (or more) of our workforce," a considerable segment of the economy. *Kentucky*, 23 F.4th at 607–08. Congress does not delegate decisions of major economic and social significance "in so cryptic a fashion." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160–61 (2000). And "[i]f administrative agencies seek to regulate the daily lives and liberties of millions of Americans, . . . they must at least be able to trace that power to a clear grant of authority from Congress." *NFIB*, 142 S. Ct. at 668 (Gorsuch, J., concurring).

Moreover, regulation of vaccination is "a matter traditionally committed to the state." *Nelson*, 2021 WL 6108948, at *13. The government cannot overcome the presumption that Congress "preserves the constitutional balance between the National Government and the States," *Bond v. United States*, 572 U.S. 844, 862 (2014), because Congress must "enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power," *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021).

For these reasons, neither § 101 nor § 121 authorize the Executive Order.

2. The Executive Order conflicts with Congress's decision to delegate authority to the FAR Council and GSA, not the President, to create procurement regulations.

The Executive Order is inconsistent with the comprehensive congressional scheme for procurement regulations in two ways: (1) it asserts regulatory authority on behalf of the President that he does not possess; and (2) it purports to delegate that authority improperly.

As to the first point, the vaccine mandate rests on the premise that FPASA grants the President authority to issue procurement regulations himself. *See* ROA.335 ("In accordance with section 5 of the order, agencies are required to include an implementing clause . . . ."); ROA.337 (citing the Executive Order as the sole authority for these implementing clauses); *Nelson*, 2021 WL 6108948, at *7 (discussing documents in which NASA officials told Florida officials, "we are required to incorporate these clauses into the current contract"). That premise is false: FPASA only authorizes the President to "prescribe policies and directives," which refers to *directing* the actions of inferior officials and was animated by a concern that GSA, once considered an "independent agency," should be subject to "direct and active . . . supervisi[on]" from the President. *AFL-CIO v. Kahn*, 618 F.2d 784, 788 (D.C. Cir. 1979).

Supervising and directing are distinct from issuing regulations. In the same section of the statute, Congress authorized the GSA Administrator to "prescribe regulations." 40 U.S.C. § 121(c); *see Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) ("[W]hen the legislature uses certain language in one part of the statute and different

language in another, the court assumes different meanings were intended."). In another section, Congress authorized the President himself to "prescribe regulations" but only with respect to procuring transportation systems.[5] 40 U.S.C. § 603(b); *see Duncan*, 533 U.S. at 174 ("We are thus 'reluctan[t] to treat statutory terms as surplusage' in any setting."). Finally, Congress gave the FAR Council—and not the President—exclusive power to "maintain . . . a single [g]overnment-wide procurement regulation." 41 U.S.C. § 1303(a)–(b).

The government denies that its unprecedented vaccine mandate is "regulatory." Appellants' Br. at 28. But if the concept of a procurement "regulation" means anything, it surely covers a mandate applicable to one-fifth of the Nation's workforce. And the government's sweeping assertion of "unrestricted power" to "determine those with whom it will deal," *id.* (quoting *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940)), fails because its actions here conflict with the restrictions on that power Congress placed in the statute, *see Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb . . . .").

As to the second point, the Executive Order purports to delegate the President's FPASA power to the OMB Director and a White House "Task Force," which includes

[5] Congress frequently authorizes the President to issue regulations himself and speaks clearly when it does. *See* 18 U.S.C. § 3496; 32 U.S.C. § 110; 5 U.S.C. §§ 3302, 7301; 10 U.S.C. § 836.

White House staffers not subject to Senate confirmation.[6] The Order requires federal contracts to include a clause mandating compliance with "all guidance . . . published by the [Task Force]," so long as the OMB Director approves the guidance. 86 Fed. Reg. at 50,985. As authority for that delegation, the order invokes 3 U.S.C. § 301, which provides for delegations of presidential statutory authority to officials appointed with Senate confirmation. That delegation is invalid for several reasons.

First, as discussed, the President does not have regulatory power under FPASA, so his attempt to delegate such power is ultra vires. *See Karuk Tribe of Cal. v. Ammon*, 209 F.3d 1366, 1375 (Fed. Cir. 2000) ("[A] President may only confer by Executive Order rights that Congress has authorized the President to confer.").

Second, 3 U.S.C. § 301 is inapplicable where, as here, the relevant statute "affirmatively prohibit[s] delegation." 3 U.S.C. § 302. Section 1303 designates the FAR Council as the only "executive agency" that may issue "[g]overnment-wide procurement regulation[s]" and prohibits other agencies from doing so, subject to exceptions inapplicable here. 41 U.S.C. § 1303(a)(1)–(2). By delegating authority to issue such regulations to OMB, rather than the entity Congress exclusively invested with that

[6] Overview, Safer Federal Workforce Task Force, https://www.saferfederalworkforce.gov/overview/ (last visited June 18, 2022) (explaining that the Task Force includes the "White House COVID-19 Response Team").

function, the President has delegated authority in a manner that is "affirmatively prohibit[ed]." 3 U.S.C. § 302.[7]

Third, § 301 requires that delegations be made only to Senate-confirmed officials. Purporting to comply with this provision, the Executive Order allows the Task Force to issue guidance only with approval of the OMB Director, who is subject to Senate confirmation. 86 Fed. Reg. at 50,985. The Task Force, however, has run roughshod over this limitation, issuing government-wide pronouncements on its own even though members of the Task Force are not so appointed. *See infra* at 19–20.

3. Congress has not ratified the government's interpretation of FPASA.

The government claims that Congress has ratified a "longstanding consensus among the courts of appeals" that it may broadly regulate the internal operations of government contractors. Appellants' Br. at 22. Even if the government's cases supported its position, "[p]ast practice does not, by itself, create power." *Medellin v. Texas*, 552 U.S. 491, 532 (2008) (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981)). In any event, ratification "derives from the notion that Congress is aware of a definitive judicial interpretation of a statute when it reenacts the same statute using the same language." *Food Marketing Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2365 (2019) (emphasis omitted). No definitive interpretation exists here.

[7] OMB is an "executive agency" under this statute. *See* 41 U.S.C. § 133 (defining the term "executive agency" to include "an independent establishment as defined in section 104(1) of title 5"); 5 U.S.C. § 104(1) ("independent establishment" includes "an establishment in the executive branch," with exceptions not relevant here).

The government cites four cases decided by courts of appeals for this consensus. One, *Farkas v. Tex. Instrument, Inc.*, 375 F.2d 629 (5th Cir. 1967), provides no help to the government because the appellees in that case made no argument that the executive order in question "should be treated as issued without statutory authority." *Id.* at 632 n.1. In fact, the Supreme Court has recognized that *Farkas*'s discussion of FPASA was "dicta." *Chrysler Corp. v. Brown*, 441 U.S. 281, 304 n.34 (1979).

Another, *Liberty Mutual Insurance Co. v. Friedman*, 639 F.2d 164 (4th Cir. 1981), is similarly unhelpful for the government. In that case, the Fourth Circuit "[a]ssum[ed]," but did not "decid[e]," that the government's proffered test applied and held that the government failed that test. *Id.* at 170.

That leaves the government with only two cases: *Kahn*, 618 F.2d 784, and *UAW-Labor Employment & Training Corp. v. Chao*, 325 F.3d 360 (D.C. Cir. 2003). But both are from the same circuit, which hardly establishes "consensus among the courts of appeals," Appellants' Br. at 22, let alone one Congress should have treated as definitive. And even those cases do not help the government. The executive orders in *Kahn* and *Chao* were "demonstrably connected to procurement" or "required by federal or state law" and did not require intrusive regulation on the lives of individual employees. *Nelson*, 2021 WL 6108948, at *12. Moreover, the cases recognize that the government

must demonstrate a close connection to procurement, a bar the government cannot clear here. *See infra* at 15–17.[8]

For these reasons, Congress has not ratified the government's reading of FPASA.

4. The President failed to show that the mandate promotes economy and efficiency.

Even if FPASA authorized the President to impose requirements on the internal operations of federal contractor employees in the name of economy and efficiency in procurement, FPASA is not a "blank check for the president to fill in at his will," *Kahn*, 618 F.2d at 793, and there must be a "demonstrable relationship" between FPASA and the mandate, *Liberty Mutual*, 639 F.2d at 170–71.

Neither the Executive Order nor any subsequent agency actions "identify any instance in which absenteeism attributable to COVID-19 among contractor employees resulted in delayed procurement or increased costs." *Nelson*, 2021 WL 6108948, at *12. This is unsurprising. More than two years into this pandemic, most Americans have learned how to be productive despite the disruptions COVID-19 brings.

Moreover, a vague interest in preventing "absenteeism" is not sufficiently related to efficient procurement to justify such a "sweeping, invasive, and unprecedented public

[8] Contrary to the government's assertion, *Contractors Ass'n of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971), is not a procurement case. *See* Appellants' Br. at 19, 22. It addresses "federal assistance programs," not "procurement of [g]overnment property and services." *Contractors Ass'n*, 442 F.2d at 167; *see also id.* (explaining that, "even if" FPASA cases like "*Farkas* were holdings rather than dicta," those "holdings would not reach the instant case").

health requirement imposed unilaterally by President Biden." *Id.* Without further explanation, a generalized interest in preventing costs or inefficiencies attributable to COVID-19 is "simply too attenuated to allow a reviewing court to find the requisite connection between procurement costs" and public health objectives. *Liberty Mutual*, 639 F.2d at 171.

In fact, an expansive vaccine mandate may have the opposite effect. According to polling data, roughly two-thirds of the unvaccinated say they would quit their job in response to a vaccine mandate. *Kentucky*, 23 F.4th at 600 (citing Jordan Burrows, *Employees Not Given Exemption Prefer to Quit Job Than Get COVID Vaccine, Poll Shows*, Salt Lake City ABC4.com (Sept. 15, 2021), https://perma.cc/6A95-CJXD). Instead of addressing the alleged threat of temporary labor shortages caused by periodic sick leave, the mandate threatens contractors with mass terminations and resignations.

Finally, it is not a foregone conclusion that increased vaccination among employees reduces the risk of COVID transmission, especially in light of information about vaccine efficacy and other variants.[9] Even so, the mandate is at a minimum

[9] *See, e.g.*, Hung Fu Tseng et al., *Effectiveness of mRNA-1273 against SARS-CoV-2 omicron and delta variants*, medRxiv (2022 preprint), https://www.medrxiv.org/content/10.1101/2022.01.07.22268919v1 (concluding that effectiveness of mRNA vaccines to prevent infection was lower for Omicron variant); Madeline Holcombe & Christina Maxouris, *Fully vaccinated people who get a Covid-19 breakthrough infection can transmit the virus, CDC chief says*, CNN (Aug. 6, 2021), https://www.cnn.com/2021/08/05/health/us-coronavirus-thursday/index.html (quoting CDC Director as saying "what [vaccines] can't do anymore is prevent transmission").

overbroad in refusing to account for natural immunity, subjecting those who work exclusively outdoors to the same requirements as those who work indoors, and requiring vaccination of all except those who exist in "hermetic isolation." *Nelson*, 2021 WL 6108948, at *12.

5. The Executive Order does not merely "direct" agency officials, and if it did, that would raise several new problems.

The government seeks to avoid defending its unlawful exercise of regulatory power by suggesting that the Executive Order merely "directs" agencies to include certain provisions in their contracts under their own authorities, and thus the President is not himself regulating procurement or delegating his own authority to others *See* Appellants' Br. at 14 (discussing the President's "power to direct operations of the Executive Branch"). That argument is flawed on several grounds.

First, the challenged contract requirements are subject to change at any time by the OMB Director, acting pursuant to a presidential delegation. 86 Fed. Reg. at 50,985. It is unclear what role OMB's approval of the Task Force guidance serves if the OMB Director is not purporting to exercise regulatory authority delegated from the President.

Second, if the President is merely "directing" agencies to exercise their own regulatory authorities, not exercising or delegating "regulatory" authority himself, then the government must identify agency-specific authority for the challenged actions. It has not done so. *See* ROA.337 (citing the Executive Order as the authority for including the clause).

Third, if the President is "directing" agencies in that way, then inferior officials cannot attribute their actions to him to avoid procedural requirements they continue to ignore. *See* Appellants' Br. at 42–45 (arguing that the notice and comment requirements of 41 U.S.C. § 1707 do not apply to exercises of "presidentially delegated authority"); *Navajo Refining Co. v. United States*, 58 Fed. Cl. 200, 207–09 (2003) (finding those requirements applicable to agency-specific procurement regulations); *see also infra* at 21–24.

Finally, it is contrary to the government's arguments elsewhere. In the first brief it filed defending the Executive Order, the government characterized the Executive Order as "an exercise of the President's longstanding and frequently invoked authority to *regulate* the terms upon which the federal government does business with private contractors." Dkt. 52 at 42, *Brnovich v. Biden*, No. 2:21-cv-1568 (D. Ariz. Nov. 4, 2021) (emphasis added). And it continued that argument through other proceedings. Dkt. 27 at 20, *Kentucky v. Biden*, No. 3:21-cv-55 (E.D. Ky. Nov. 16, 2021) (arguing that "[t]he President [has] [a]uthority [t]o [*r*]*egulate* [f]ederal [g]overnment [c]ontracting" (emphasis added)).[10]

* * *

[10] The government has even at times taken opposite positions in the same proceeding. *Compare* Dkt. 21 at 16 n.2, *Florida v. Nelson*, No. 8:21-cv-2524 (M.D. Fla. Nov. 17, 2021) (arguing that the President's "directive" authority in § 121(a) is no "less expansive" than, and "synonym[ous]" with, the authority to issue regulations), *with* Dkt. 26 at 2, *Florida v. Nelson*, 8:21-cv-2524 (M.D. Fla. Dec. 3, 2021) ("Defendants are not arguing that the President 'issue[d] regulations . . . himself.'").

For all these reasons, the Executive Order exceeds the President's authority.

b. The government's implementation of the Executive Order suffers from myriad other deficiencies.

The government's implementation of the Executive Order has been riddled with errors from the beginning. The Acting OMB Director's first attempt to implement the Executive Order contained only a single sentence justifying its sweeping restrictions and failed to even acknowledge the notice and comment requirements of 41 U.S.C. § 1707. *See* 86 Fed. Reg. at 53,691. In response to numerous lawsuits, OMB issued a new determination (the OMB determination)—announced mere hours before the government's first preliminary injunction hearing for the mandate—that attempted to clean up the mess. *See* 86 Fed. Reg. at 63,418. This determination purported to find that guidance issued by the White House COVID-19 Task Force advanced economy and efficiency in federal contracting. *Id.* Even still, the government's implementation of the order is rife with problems, each of which provides a basis to enjoin the vaccine requirements.

1. <u>The government is unlawfully incorporating contractual requirements through FAQs that were not approved by the OMB Director.</u>

Most egregiously, the federal government has allowed the White House Task Force functionally to set the terms of the public health measures required by the Executive Order. Under 3 U.S.C. § 301, the President may delegate his statutory authorities only to Senate confirmed officials. No doubt for that reason, the Executive Order requires federal contractors to comply with "all guidance for contractor or

subcontractor workplace locations published by the Safer Federal Workforce Task Force" but only if the OMB Director "approves" that guidance. 86 Fed. Reg. at 50,985.

Despite that restriction, the federal government is treating substantive edicts issued unilaterally by the Task Force as binding on federal contractors. Although the Task Force's principal "guidance" was approved by OMB on November 16, 2021, OMB did not approve the Frequently Asked Questions (FAQs) to which it refers. *See* 86 Fed. Reg. at 63,421 (referring to but not incorporating "Frequently Asked Questions regarding this Guidance"). But the deviation clause promulgated by the FAR Council—and indeed being used by every agency—requires "compl[iance] with all guidance, *including guidance conveyed through Frequently Asked Questions*, as amended during the performance of this contract." ROA.338 (emphasis added).

These FAQs—which the Task Force continually modifies—are quite substantive.[11] For example, two FAQs explain that proof of prior COVID infection does not exempt a person from vaccination and that the vaccination requirements apply to pregnant women. The FAQs even purport to give the FAR Council's contract clause preemptive effect, explaining that it "supersede[s] any contrary State or local law or ordinance."

The Task Force has no independent authority to create procurement requirements and no apparent delegation from the President. Nor could such authority

[11] Available at https://www.saferfederalworkforce.gov/faq/contractors/.

lawfully be delegated to them. *See* 3 U.S.C. § 301. The Task Force's practice of modifying the FAQs without OMB approval is manifestly unlawful, and that practice taints every contract in the country containing the challenged requirements.

2. The OMB determination must go through notice and comment under 41 U.S.C. § 1707.

Section 1707 requires "procurement polic[ies], regulation[s], procedure[s], or form[s]" to go through notice and comment, so long as they "relate[] to the expenditure of appropriated funds" and either have "a significant effect beyond the internal operating procedures of" the issuing agency or "a significant cost or administrative impact on contractors or offerors." 41 U.S.C. § 1707(a)–(b). The OMB determination was published without those procedures in defiance of this statutory requirement.

The Acting OMB Director claimed that this determination is exempt from the requirements of § 1707 because she exercised a power delegated by the President under 3 U.S.C. § 301. *See* 86 Fed. Reg. at 63,423 ("That determination is therefore not subject to the procedural requirements of [§ 1707.]"). That is incorrect for two reasons.

First, there is no basis for extending the President's exemption from APA review to his delegees. The APA applies to "each authority of the [g]overnment of the United States," 5 U.S.C. § 551 (defining "agency"), and restricts "agency action," *id.* § 706. When agency officials act pursuant to a presidential delegation, they are unquestionably taking "agency action." Moreover, unlike, for example, Congress, *see id.* § 701(b)(1)(A), the President's APA exemption is found nowhere in the text of the APA, *see Franklin v.*

Massachusetts, 505 U.S. 788, 800–01 (1992) ("[T]extual silence is not enough to subject the President to the provisions of the APA."). But even if the APA were silent on whether agency action is subject to review—and it is not—any such silence would yield the opposite result as applied to an *agency* given the APA's "basic presumption of judicial review for one suffering legal wrong because of agency action." *See DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020) (quotations omitted). Just as agencies cannot invoke Congress's express APA exemption when exercising delegations from Congress, so too they cannot invoke the President's implied exemption. *See Franklin*, 505 U.S. at 828–29 (Scalia, J., concurring in part and concurring in the judgment) (explaining that "[r]eview of the legality of Presidential action" can be obtained in the same manner as review of "unlawful legislative action," by suing the "agents who carry" it out).

Second, whether an agency exercising power delegated by the President is exempt from the APA's review provisions is an entirely different question from whether an agency must still comply with a substantive statute—like § 1707—which is not part of the APA at all. The government does not cite a single case suggesting agencies can ignore statutes governing their operations simply because they are acting pursuant to a presidential delegation, and the suggestion cannot be correct. Consider, for example, the Hatch Act, which prohibits executive branch employees (but not the President) from engaging in certain forms of political activity. *See* 5 U.S.C. § 7321 *et seq.* Agency officials with a delegation of presidential authority surely cannot ignore the requirements of the Hatch Act.

Because § 1707 applies, the government must rely on the "urgent and compelling circumstances" exception in § 1707(d). *See* 86 Fed. Reg. at 63,423 (making such a finding in the alternative). The government cannot satisfy that exception, which is more demanding than the APA's "good cause" exception, itself an exacting standard. *Compare* 41 U.S.C. § 1707(d), *with* 5 U.S.C. § 553(b)(3)(B). *See Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012).

The OMB determination relies on the government's goal to mitigate the COVID-19 pandemic and the Delta variant. 86 Fed. Reg. at 63,423. But the government's entire basis for the vaccine mandate is procurement efficiency—not public health. The government therefore must show that procurement inefficiencies are sufficiently urgent and compelling to justify dispensing with notice and comment. *Cf. Mack Trucks*, 682 F.3d at 93 (rejecting a claim of good cause where the stated purpose of the issued rule was untethered to the purportedly imminent threat). The government has not made that showing, as its procurement efficiency rationale is "merely a hastily manufactured but unproven hypothesis about recent history and a contrived speculation about the future," which does not justify "summary disregard of the requirements of administrative law and rulemaking." *Nelson*, 2021 WL 6108948, at *12.

Plus, the government's own delay dampens any such urgency. If OMB had simply complied with § 1707 when it issued its first order on September 28, 2021, it could have completed the 60-day notice and comment period well before its vaccination deadline of January 18, 2022. *See* 86 Fed. Reg. at 63,424. The government's delay—

caused by its own mistakes[12]—cannot itself create the circumstances justifying good cause. *See Nat. Res. Def. Council v. NHTSA*, 894 F.3d 95, 114 (2d Cir. 2018).

The Acting OMB Director did not comply with § 1707 and cannot justify a departure from that statute. Thus, the OMB determination, the key predicate for the mandate's operation, is invalid.

3. The OMB determination is arbitrary and capricious.

For the same reasons that the Executive Order does not adequately promote economy and efficiency, *supra* at 15–16, the OMB determination is also arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n of U.S. v State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (requiring "a rational connection between the facts found and the choice made"). Several additional reasons confirm that conclusion.

First, the Acting OMB Director claimed to "know of no systematic evidence" that resignations by the unvaccinated have "been a widespread phenomenon, or that it would be likely to occur among employees of [f]ederal contractors." 86 Fed. Reg. at 63,422. But she cites a CNBC article in footnote 14 of the OMB determination, *id.*,

[12] The government asserts as "urgent and compelling circumstances" the need to move the vaccination deadline in the first OMB determination. *See* Appellants' Br. at 44–45 (noting that compliance with the requisite comment period would put the effective date after the vaccination deadline set by the first OMB determination). But if § 1707 applies to the OMB determinations, then the deadline in the first OMB determination was ultra vires. 86 Fed. Reg. at 53,691 (failing to even make a § 1707(d) finding). Extending a deadline that lacks legal force is unnecessary—especially where any urgency was created by the government's own actions—and cannot satisfy the urgent and compelling circumstances exception.

which discusses nationally reported data showing that 72% of unvaccinated workers would quit in lieu of vaccination.[13] That inexplicable failure to account for the obvious is per se arbitrary and capricious.

Second, the OMB determination ignored costs to the States, a "centrally relevant factor when deciding whether to regulate." *Michigan v. EPA*, 576 U.S. 743, 752–53 (2015). In fact, the OMB determination displayed a lack of awareness that the government is imposing requirements on the States at all. It similarly failed to grapple with its preemptive effect on state law. Surely such intrusions on state sovereignty qualify as "important aspect[s] of the problem" that an agency cannot ignore. *State Farm*, 463 U.S. at 43.

Third, the OMB determination did not even mention reliance interests held by federal contractors, some of whom have entire business units oriented around procuring government contracts. *See Regents*, 140 S. Ct. at 1913–14. The federal government has never required its contractors to be vaccinated and as recently as July 2021 gave assurance that vaccine mandates are "not the role of the federal government."[14] Imposing this sort of sea change without considering reliance interests violates the APA. *Id.*

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[13] *See* Liz Hamel et al., *KFF COVID-19 Vaccine Monitor: October 2021*, KFF (Oct. 28, 2021), https://www.kff.org/coronavirus-covid-19/poll-finding/kff-covid-19-vaccine-monitor-october-2021/.

[14] Press Briefing by Press Secretary Jen Psaki, July 23, 2021, White House, https://www.whitehouse.gov/briefing-room/press-briefings/2021/07/23/press-briefing-by-press-secretary-jen-psaki-july-23-2021/.

Finally, the challenged actions seek to regulate public health, not improve the efficiency of contracting, rendering the actions blatantly pretextual. *See Dep't of Com. v. New York*, 139 S. Ct. 2551, 2576 (2019). The government has been open about this. For example, in its urgent and compelling circumstances finding, the government points to the "once in a generation pandemic, which has already resulted in more than 46,405,253 cases of COVID-19, hospitalized more than 3,283,045 Americans, and taken more than 752,196 American lives" not any procurement inefficiencies. 86 Fed. Reg. at 63,423. As the Sixth Circuit observed, "[t]he federal government's actions are, of course, simply a pretext to increase vaccination, as its own documents confirm." *Kentucky*, 23 F.4th at 609 n.15 (discussing a government document where the government admits its goal is "getting more people vaccinated and decreas[ing] the spread of COVID-19" (quoting ROA.336)).

For these reasons, the OMB determination is arbitrary and capricious.

II. THE OTHER FACTORS FAVOR PRELIMINARY INJUNCTIVE RELIEF.

The Plaintiffs have also satisfied the remaining requirements for a preliminary injunction. Because they face millions of dollars in lost contracts that cannot be recouped, a preliminary injunction is necessary to prevent irreparable injury. *See Nelson*, 2021 WL 6108948, at *15; *Kentucky*, 23 F.4th at 594–95. Further, "[f]orcing federal agencies to comply with the law is undoubtedly in the public interest." *Cent. United Life, Inc. v. Burwell*, 128 F. Supp. 3d 321, 330 (D.D.C. 2015). And the government overstates the reduction in workplace transmission that will be caused by vaccination, especially

in light of evidence that the vaccine is not effective in preventing transmission of new variants.[15] Finally, it is "against the public interest to force a person out of a job." *Vencor, Inc. v. Webb*, 829 F. Supp. 244, 251 (N.D. Ill. 1993).

CONCLUSION

For these reasons, the Court should affirm the district court's order granting a preliminary injunction.

[15] *See supra* note 9.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limits of Federal Rule of Appellate Procedure 32(a)(7)(B)(ii) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), this document contains 6,494 words.

2. This brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Garamond font.

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CERTIFICATE OF SERVICE

I certify that on June 20, 2022, I electronically filed this brief with the Clerk of Court by using the Court's CM/ECF system, which will send a notice of electronic filing to all parties in the case who are registered through CM/ECF.

/s/ Henry C. Whitaker