In the United States Court of Appeals for the Eleventh Circuit

No. 21-14269

STATE OF GEORGIA, ET AL.,
Plaintiffs-Appellees,

v.

PRESIDENT OF THE UNITED STATES, ET AL.,
Defendants-Appellants.

BRIEF OF THE STATES OF FLORIDA, ALASKA, ARKANSAS, ARIZONA, INDIANA, IOWA, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEW HAMPSHIRE, OHIO, OKLAHOMA, SOUTH DAKOTA, TENNESSEE, AND TEXAS AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, counsel for amici curiae furnish this supplemental certificate of persons and parties that may have an interest in the outcome of this case:

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INTEREST OF AMICUS CURIAE

Amici curiae, the States of Florida, Alaska, Arkansas, Arizona, Indiana, Iowa, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, Ohio, Oklahoma, South Dakota, Tennessee, and Texas are sovereign States responsible for the health, safety, and welfare of their citizens. As with the Plaintiff States, the challenged vaccination requirements improperly intrude on amici States' traditional powers. Some amici States also have laws expressly restricting employer-vaccine mandates,[1] 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 States, like the Plaintiff States, also contract with the federal government as a matter of course and are directly regulated by the challenged actions. Each amici State is party to federal contracts, totaling millions of dollars or more, and plans to pursue federal contracts in the imminent future. And each amici State 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.

[1] *See* § 381.00317, Fla. Stat.; Mont. Code Ann. § 49-2-312; Tex. Exec. Order GA-39 (Aug. 25, 2021); Tex. Exec. Order GA-40 (Oct. 11, 2021).

Finally, many amici States have pending cases challenging the vaccination requirements. *See, e.g.*, *Florida v. Administrator, NASA*, No. 22-10165 (11th Cir.); *Kentucky v. Biden*, No. 21-6147 (6th Cir.); *Missouri v. Biden*, No. 22-1104 (8th Cir.); *Louisiana v. Biden*, No. 22-30019 (5th Cir.); *Texas v. Biden*, No. 3:21-cv-309 (S.D. Tex.).

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

ISSUES PRESENTED

1. Whether the President may mandate COVID-19 vaccination for millions of American workers based on his authority to manage federal property under the Federal Property and Administrative Services Act.
2. Whether the agencies have lawfully implemented the President's mandate.
3. Whether the Plaintiffs satisfied the other prerequisites for preliminary injunctive relief.

SUMMARY OF THE ARGUMENT

On September 9, 2021, President Biden announced a series of measures aimed at one singular purpose: "As your President, I'm announcing tonight a new plan to require more Americans to be vaccinated, to combat those blocking public health."[2] One of those actions—an Executive Order applicable to federal contractors and their

[2] 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/.

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 American 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 the management of federal property.

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 FPASA. *See* Appellants' Br. at 14 (citing 40 U.S.C. § 101). But as the Sixth Circuit correctly concluded, *see Kentucky v. Biden*, 23 F.4th 585, 609–10 (6th Cir. 2022), 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 whole vast swathes of the federal regulatory apparatus—from public health, to

immigration, to antidiscrimination. *See* Appellants' Br. at 15–16 (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 Regulation Council (the FAR Council), an entity created by Congress to establish a uniform system of government-wide procurement regulations. Yet the President in his Executive Order purported to delegate authority to implement his directive to an entirely different set of actors—the Office of Management and Budget (OMB) Director and a shadowy White House Task Force—rather than the entity Congress chose to implement government-wide procurement regulations.

If all that were not enough, the government's unlawful implementation of the Executive Order provides multiple alternative bases to affirm. For example, on September 28, 2021, the OMB Director—purporting to exercise authority delegated by the President—issued an order approving 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 rescind and 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, which is needed to give the government even an arguable basis to do so. And OMB's second order was promulgated without the notice and comment procedures plainly required by 41 U.S.C. § 1707. It 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 the 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.

The district court concluded that the Executive Order's "directives and resulting impact radiate too far beyond the purposes of [FPASA] and the authority it grants to the President." *Georgia v. Biden*, No. 1:21-cv-163, 2021 WL 5779939, at *10 (S.D. Ga. Dec. 7, 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 14–15. 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

"determine[s] enhance[] the economy and efficiency of federal contractor operations." Appellants' Br. at 15–16. 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 upon the President").

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 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 the employees of government contractors. *See id.* FPASA's historical context and legislative history confirm that reading.[3]

[3] *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" (citing a contemporaneous Senate report)); H.R. Rep. No. 81-670, at 1475 (1949) (calling for "an improved and efficient property management system").

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"); *accord id.* §§ 506(b), 581(c)(4); 584(a)(2)(C); 603(a)(1). In reading § 101 as a general 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 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 viii.

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 Assoc.*, 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 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," affecting a staggering number of American workers and a considerable segment of the economy. *Kentucky*, 23 F.4th at 608. 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 actions rest on the premise that FPASA grants the President authority to issue procurement regulations himself, rather than instruct inferior officials to exercise their own procurement authorities. *See Issuance of Agency Deviations to Implement Executive Order 14042* at 2 ("In accordance with section 5 of the

order, agencies are required to include an implementing clause.");[4] *id.* at 5 (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"). The 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 of FPASA, 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

[4] https://www.whitehouse.gov/wp-content/uploads/2021/09/FAR-Council-Guidance-on-Agency-Issuance-of-Deviations-to-Implement-EO-14042.pdf.

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

as surplusage' in any setting."). Finally, Congress gave the FAR Council—and not the President—the exclusive power to "maintain . . . a single [g]overnment-wide procurement regulation." 41 U.S.C. § 1303(a)–(b).

The government counters that its unprecedented vaccine mandate is not "regulatory" because it claims to "enjoy[] the unrestricted power" to "determine those with whom it will deal," and on what terms. Appellants' Br. at 25 (quoting *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940)). 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 "inherent power," Appellants' Br. at 30—based largely on a case that pre-dated the enactment of FPASA—fails because its actions here conflict with the comprehensive scheme Congress subsequently enacted. *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 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

[6] Overview, Safer Federal Workforce Task Force, https://www.saferfederalworkforce.gov/overview/ (last visited February 14, 2022) (explaining that the Task Force includes the "White House COVID-19 Response Team").

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 by and with the advice and consent of the Senate. That delegation is invalid.

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 "government-wide regulation[s]" and prohibits other agencies from doing so, subject to exceptions not applicable here. 41 U.S.C. § 1303(a)(1)–(2). By delegating authority to issue such regulations to OMB, the President has thus 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 officials appointed with advice and consent of the Senate. Purporting to comply with this provision, the

[7] OMB is an "executive agency" under this statute. *See* 41 U.S.C. § 133 (defining the term "executive agency" for purposes of Division B of Title 41, which includes § 1303, 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).

Executive Order allows the Task Force to issue guidance only with approval of the OMB Director, who is subject to appointment only after 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 despite the fact that members of the Task Force are not so appointed. *See infra* at 18–20.

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 18. But even if these cases supported the government's 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, this canon "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). Here, no such interpretation exists.

The government cites four FPASA cases decided by courts of appeals. 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 Mut. Ins. 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 test the government argues for here applied and held that the government failed even that test. *Id.* at 170.

That leaves the government with only two cases: *AFL-CIO v. Kahn*, 618 F.2d 784 (D.C. Cir. 1979), and *UAW-Labor Emp't & 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 18, 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 daily 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.

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. 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" in federal contractors in and of itself is not sufficiently related to the government's general procurement policies to justify such a "sweeping, invasive, and unprecedent public 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 and increase labor costs for contractors. According to polling data, roughly two-thirds of the unvaccinated say they will quit their job in response to a vaccine mandate. Dkt. 55 at 27 n.10 (citing COVID-19 Vaccine Monitor: October 2021 at Figure 10). 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 new information about vaccine efficacy and the Omicron variant.[8] Even so, the mandate is at a minimum 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.

* * *

For all these reasons, the district court rightly concluded that the Executive Order exceeds the President's authority under FPASA.

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

The government's implementation of the Executive Order has been riddled with errors. The Acting OMB Director's first attempt to implement the Executive Order—by approving the specific requirements pursuant to the President's delegation—contained only a single sentence justifying its sweeping restrictions and failed to even

[8] *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 than Delta); 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 Rochelle Walensky as saying "what [vaccines] can't do anymore is prevent transmission").

acknowledge the notice and comment requirements of 41 U.S.C. § 1707. *See* Determination of the Promotion of Economy and Efficiency in Federal Contracting Pursuant to Executive Order No. 14042, 86 Fed. Reg. 53,691 (Sept. 28, 2021). 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* 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). 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 since then is rife with problems, each of which provides a basis to enjoin the vaccine requirement.

1. The government is unlawfully incorporating substantive contractual requirements through Task Force FAQs that were not approved by the OMB Director.

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 officials appointed with the advice and consent of the Senate. 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 important 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) it references. *See* 86 Fed. Reg. at 63,421 (referencing but not incorporating "Frequently Asked Questions regarding this Guidance" and providing a hyperlink). 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." *Issuance of Agency Deviations to Implement Executive Order 14042*, *supra* note 4 at 5 (emphasis added).

These FAQs—which the Task Force continually modifies—are quite substantive.[9] For example, two FAQs explain that proof of prior COVID infection—even with an antibody test proving natural immunity—does not exempt a person from vaccination. The FAQs also make clear that the vaccination requirements apply to pregnant women. And 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."

[9] The FAQs are available at https://www.saferfederalworkforce.gov/faq/contractors/.

The Task Force's exercise of presidential statutory authority to bind federal contractors is manifestly unlawful. The Task Force has no independent authority to create procurement requirements and no apparent delegation from the President. Nor could such authority lawfully be delegated to them given 3 U.S.C. § 301. The Task Force's job is merely to propose requirements that the OMB Director may (or may not) approve. *See* 86 Fed. Reg. at 50,985.

For these reasons, every contract clause in the country attempting to impose the challenged requirements unlawfully incorporates the FAQs.

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).[10] 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

[10] As Plaintiffs explain in their brief, the model deviation clause issued by the FAR Council and the deviation clauses issued by each agency are similarly subject to notice and comment. *See* Resp. Br. of State Pls. at 53–54.

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, indeed because that conclusion 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 in possession of 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—and 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.

And 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—especially when caused by the government's own mistakes—cannot itself create the circumstances justifying good cause. *See Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 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. For these reasons, the OMB determination, which is a necessary predicate for operation of the challenged vaccination requirements, is invalid.

3. The OMB determination is arbitrary and capricious.

For the same reason that the Executive Order does not adequately promote economy and efficiency, *supra* at 15–17, 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) ("[T]he agency must examine the relevant data and articulate a satisfactory

explanation for its action including 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.*, which discusses nationally reported data showing that 72% of unvaccinated workers would quit in lieu of vaccination.[11] 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

[11] *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/.

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 of last year gave assurance that vaccine mandates are "not the role of the federal government."[12] Imposing this sort of sea change without considering reliance interests violates the APA. *Id.*

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) ("Accepting contrived reasons would defeat the purpose of the enterprise [of judicial review.]"). 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." 86 Fed. Reg. at 63,423. The Sixth Circuit agrees: "[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 *Issuance of Agency Deviations to Implement Executive Order 14042*, *supra* note 4 at 3)).

[12] 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/.

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

II. THE OTHER FACTORS FAVOR PRELIMINARY INJUNCTIVE RELIEF.

Plaintiff States have also satisfied the remaining requirements for a preliminary injunction. Because Plaintiff States 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. 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 the Omicron variant.[13] 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.

[13] *See supra* note 8.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limits of Rules 32(a)(7)(B)(i) and 29(a)(5) of the Federal Rules of Appellate Procedure because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 6,227 words.

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/s/ Natalie P. Christmas

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I certify that on February 15, 2022, I electronically filed the foregoing brief with the Clerk of Court by using the Court's CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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