Appeal No. 21-14269

In the United States Court of Appeals for the Eleventh Circuit

JOSEPH R. BIDEN, IN HIS OFFICIAL CAPACITY
AS PRESIDENT OF THE
UNITED STATES OF AMERICA, ET AL.
Defendant-Appellants,

v.

THE STATE OF GEORGIA, ET AL,
Plaintiffs-Appellees, and

ASSOCIATED BUILDERS AND CONTRACTORS, INC.,
Plaintiff-Intervenor-Appellee.

On Appeal from the United States District Court
for the Southern District of Georgia
No. 1:21-cv-00163 (Baker, J.)

ASSOCIATED BUILDERS AND CONTRACTORS' OPPOSITION TO DEFENDANT-APPELLANTS' MOTION FOR STAY OF DECEMBER 7, 2021, ORDER PENDING APPEAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Counsel for Petitioners, certifies that the following is a complete list of interested persons as required by Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1 to 26.1-3:

Ahuja, Kiran

Alabama Department of Agriculture and Industries

Alabama Department of Public Health

Alabama Department of Rehabilitation Services

Alabama, State of

American Academy of Allergy, Asthma & Immunology

American Academy of Family Physicians

American Academy of Pediatrics

American College of Chest Physicians

American College of Medical Genetics and Genomics

American College of Physicians

American Geriatrics Society

American Lung Association

American Medical Association

American Medical Women's Association

American Psychiatric Association

American Society for Clinical Pathology

American Society of Hematology

American Thoracic Society

Andrapalliyal, Vinita

Associated Builders and Contractors of Georgia, Inc.

Associated Builders and Contractors, Inc.

Austin, Lloyd

Bagenstos, Samuel R.

Baker, Honorable Stan R., U.S. District Court Judge

Becerra, Xavier

Biden, Joseph R.

Black, Gary W.

Boynton, Brian M.

Capers, Dunbar, Sanders & Belloti LLP

Caplan Cobb LLP

Caplan, Michael

Carnahan, Robin

Chavez, Richard

Collins, Francis S.

Criswell, Deanne

Democracy Forward Foundation

Dubner, Jeffrey B.

Dunbar, III, Paul H.

Epps, Honorable Brian K., U.S. Magistrate Judge

Fried, Rachel L.

Garg, Arpit K.

General Services Administration

Georgia, State of

Granholm, Jennifer

Holyoak, Melissa A.

Hydrick, Thomas T.

Idaho State Board of Education

Idaho, State of

Ivey, Kay

Jennings, Kathleen J.

Josephson, Matthew Allan

Kansas, State of

Kemp, Brian P.

Kintz, JoAnn L.

Klein, Alisa B.

Klorfein, Jarred A.

LaCour, Jr., Edmund Gerard

Lambert, William, Grayson

Laue, Brant M.

Limehouse, Jr., Thomas A.

Little, Brad

McDonough, Denis

McMaster, Henry

Melton, Harold David

Mohan, Anna 0.

Morton, Jessica Anne

Murray, James M.

National Aeronautics and Space Administration

National Institutes of Health

National Science Foundation

Nelson, Bill

Office of Management and Budget

Office of the Attorney General of Alabama

Office of the Attorney General of Georgia

Office of the Attorney General of Idaho

Office of the Attorney General of Kansas

Office of the Attorney General of South Carolina

Office of the Attorney General of Utah

Office of the Attorney General of West Virginia

Office of the Governor of South Carolina

Office of the Solicitor General of Kansas

Panchanathan, Sethuraman

Parker, Jr., William Glenn

Patrick, Bradford Collins

Patterson, L. Eric

Peeler, Charles E.

Peters, David L.

Petrany, Stephen J.

Raimondo, Gina

Revesz, Joshua

Safer Federal Workforce Task Force

Scheinman, Sarah R.

See, Lindsay S.

Shedd, Michael G.

Smith, Jr., James Emory

Society of Interventional Radiology

South Carolina, State of

Stern, Mark B.

Stine, J. Larry

The Board of Regents of the University System of Georgia

Troutman Pepper

Tseytlin, Misha

U.S. Department of Commerce

U.S. Department of Defense

U.S. Department of Energy

U.S. Department of Health and Human Services

U.S. Department of Transportation

U.S. Department of Veterans Affairs

U.S. Office of Personnel Management

Upradhyaya, Shraddha A.

Utah, State of

Waldbeser, Drew F.

Walensky, Rochelle

West Virginia, State of

Wilson, Thomas A.

Wimberly Lawson Steckel Schneider & Stine PC

Young, Shalanda

Zanzig, W. Scott

Zients, Jeffrey

No publicly traded company or corporation has an interest in the outcome of this case or appeal.

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BACKGROUND

Defendants-Appellants (hereafter the Government) have filed an interlocutory appeal from a preliminary injunction issued by the District Court against nationwide enforcement of the so-called Federal Contractor Vaccination Mandate (the "Mandate"). The Mandate requires, *inter alia*, that all contractors and subcontractors performing work on covered federal contracts ensure that their employees and others working in connection with the federal contracts be fully vaccinated against COVID-19, along with other burdensome compliance actions. The District Court issued its injunction at the request of seven state governments and a national trade association of construction industry employers, many of whose members regularly perform federal government contracts and confront an imminent threat of direct and irreparable harm from the Mandate.

In issuing the injunction, the District Court agreed with its counterpart in the Eastern District of Kentucky, as follows:

> The question presented here is narrow. Can the president use congressionally delegated authority to manage the federal procurement of goods and services to impose vaccines on the employees of federal contractors and subcontractors? In all likelihood, the answer to that question is no."

Dist. Ct. Opn. at 3, quoting Commonwealth of Ky. v. Biden, 2021 U.S. Dist. LEXIS 228316, at *5. The District Court found irreparable harm in the absence of an injunction to be amply demonstrated by the Plaintiff States and the Intervenor ABC, and that the balance of harms and public interest strongly favored the Plaintiffs. The District Court issued a nationwide injunction, consistent with applicable law, as the only means of providing full relief to nationwide parties in interest.

As further explained below, the Government's motion to stay the injunction pending appeal is without merit and should be denied. Indeed, granting such a stay would sow chaos among federal contractors and government agencies, as the injunction would remain in effect in multiple states, and for the rest would impose impossible compliance deadlines on thousands of government contractors and their employees. The Government is unlikely to prevail on the merits of its appeal, and their motion ignores or mischaracterizes the overwhelming direct and irreparable harm imposed on the State Plaintiffs and ABC's national membership of federal contractors. The balance of harms and great weight of public interest militate strongly in favor of a nationwide

injunction remaining in place to preserve the status quo while the merits of the unprecedented Mandate are fully litigated.

SUMMARY OF ARGUMENT

Defendants/Appellants' Motion should be denied because they are unlikely to prevail on appeal, and the harm to federal contractors and subcontractors likely to result from granting the requested stay, and allowing implementation and enforcement of the vaccine mandate, greatly exceeds the potential injury to the Government of allowing the injunction to remain in place pending this appeal. The federal contractor vaccine mandate has been enjoined by two District Courts. *See, e.g.,* B*iden,* 2021 U.S. Dist. LEXIS 228316 (regional); *Commonwealth of Ky.,* 2021 U.S. Dist. LEXIS 234032 (2021) (national).[1] These decisions enumerate That the President lacks authority under the guise of federal procurement to impose a sweeping health policy Mandate and to deputize federal contractors and subcontractors to be his enforcers. Nor is the purported risk of productivity losses a sufficient rationale. Any

[1] A motion for a preliminary injunction of the federal contractor vaccine mandate was denied in *Smith v. Biden*, 2021 U.S. Dist. LEXIS 215437, at *1 (2021) (alleging only non-meritorious substantive due process claims of employees; and none of the issues presented here).

"productivity losses" from enjoining the Mandate are highly speculative and fail to account for the much greater productivity losses which – based on the record here - are certain to result from the forced termination or resignations of thousands of skilled and experienced employees who have declared their intention to refuse vaccination.

Lifting the injunction now would cause chaos for federal contractors as to their compliance obligations and bid preparation, while the Government will suffer no prejudice if the preliminary injunction remains in place. Indeed, it is the District Court's preliminary injunction, not the Government's attempt here to enforce the vaccine mandate, that actually preserves the status quo. Granting the Government's motion would do precisely the opposite of maintaining the status quo because it would authorize the implementation and enforcement of an unprecedented vaccine mandate on federal contractors that had not been implemented when suit was brought.[2] The status quo is, and was, that federal procurement contracts are not required to contain a mandatory vaccine clause, and employers granted those contracts are not required

[2] The initial Complaint in this matter was filed on October 29, 2021, well before the Government's implementation date for new Federal contracts.

to terminate the employment of employees who decline to be vaccinated. The Fifth Circuit on denying the Government's stay motion held, "That is especially so because preserving the status quo 'is an important' equitable consideration in the stay decision. *Dayton Bd. of Educ. v. Brinkman*, 439 U.S. 1358, 1359 (1978). Here, the Secretary's vaccine rule has not gone into effect." *State of Louisiana et al v. Becerra, et al, Fifth Circuit, Case No.* 21-30734 (December 15, 2021). To preserve the actual status quo, the District Court's preliminary injunction should remain in place pending a full ruling on the merits, and Defendant-Appellants' Motion must be denied.

STATEMENT OF FACTS

The District Court below conducted an evidentiary hearing and made factual findings. Three witnesses from Georgia Institute of Technology (Georgia Tech), Augusta University and the University of Georgia (UGA) testified and were found credible. Georgia Tech has approximately 16,000 employees who work on numerous federal contracts and received approximately $664 million in federal contracts for fiscal year 2021. (Dist. Ct. Opn. at 8.) Augusta University received over $17 million per year on federal contracts and had roughly 5,802

employees working on federal contracts, which represent 95% of its workforce. UGA has 14,728 employees working on or in connection with federal contracts. Prior to seeking an injunction, the Universities had engaged in laborious undertakings to comply with the mandate. (Dist. Ct. Opn. at 8.) Those efforts have been unsuccessful, in as much as the Universities still have many employees who have not yet provided proof they are vaccinated or in the process of being vaccinated which would result in the Universities becoming non-complaint and possibly losing valuable employees. About 39% of Augusta University employees, fewer than half of UGA employees, and about 20% of Georgia Tech employees have not provided proof they are vaccinated. (Dist. Ct. Opn. at 9.)

Georgia Tech is a finalist in response to a solicitation valued in excess of $250.000 from NASA and was required to agree to FAR clause 52.223-99 (Vaccine Clause) and advised that if it is awarded the contract the Vaccine Clause must be included in the contract. (Dist. Ct. Opn. at 13.)

ABC is a trade organization representing thousands of contractors and subcontractors that regularly bid and work on federal contracts. Bill Anderson, President and CEO of ABC's Georgia chapter, stated that

"[a]ccording to recent data posted on the government website www.usaspending.gov, ABC member general contractors compose a crucial segment of the construction industry's federal contracting base as ABC members won 57% of the $118 billion in direct federal U.S. construction contracts exceeding $25 million awarded during fiscal years 2009–2020." (Declaration of Bill Anderson (Doc. 49-1) at 4 (citing www.usaspending.gov data (accessed Dec. 22, 2020) (cross-referenced with ABC membership). (Dist. Ct. Opn. at 15 n.6.)

Compliance with EO 14042 by ABC members will be "costly, laborious and likely to result in a reduction in available members of the workforce." (Dist. Ct. Opn. at 10.) ABC provided "sworn declarations showing that at least two of its members "intended to bid" on specified upcoming federal construction projects, but, following EO 14042, have concluded that it is not practical for them to do so because they likely will not have sufficient employees to perform the job if they enter into a contract that requires all of the covered employees to be vaccinated." (Dist. Ct. Opn. at 14.) As further made clear in Mr. Anderson's affidavit, ABC represents thousands more federal contractor members whose experience and injuries mirror the two members whose affidavits were

provided. It is the combined weight of harms to all federal contractors - ignored by the Government's motion - on which the preliminary injunction is based.

The Government's Motion cannot (and does not) dispute that thousands of federal contracts totaling billions of dollars of work will imminently be solicited and awarded with the unlawful Mandate imposed on every covered contractor and subcontractor – including the State Plaintiffs and ABC's members. As the District Court found, the General Services Administration's Website for federal contracts shows that the federal government has already issued dozens of solicitations and pre-solicitations for bids on construction contracts to which the Mandate will apply; and many more such contracts are on the way, as to which the Mandate will directly and irreparably injure ABC's nationwide members - unless this Court upholds the preliminary injunction issued by the District Court. (Dist. Ct. Opn. at 14 -15.)

ARGUMENT AND AUTHORITY

I. Standard of Review.

A stay or injunction pending appeal is an "extraordinary remedy." *Touchston v. McDermott*, 234 F.3d 1130, 1132 (11th Cir. 2000); *Florida v.*

HHS, 2021 U.S. App. LEXIS 35998, at *13 (2021). "[T]he traditional stay factors . . . govern a request for a stay pending judicial review." *Nken v. Holder*, 556 U.S. 418, 426, 129 S. Ct. 1749 (2009). Thus, the party seeking an emergency stay or injunction pending appeal must show: (1) a substantial likelihood that they will prevail on the merits of the appeal; (2) a substantial risk of irreparable injury to the party seeking the stay, i.e., the Government in this case, unless the injunction is granted; (3) no substantial harm to other interested persons; and (4) no harm to the public interest. *Touchston*, 234 F.3d at 1132; *accord Nken*, 556 U.S. at 426, 129 S. Ct. 1749. While no single factor is determinative, "[o]rdinarily the first factor is the most important." *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986).

II. The Government is Unlikely to Succeed on the Merits.

The District Court was correct in concluding that the parties challenging the vaccine mandate are likely to prevail, and that the mandate will ultimately be invalidated on Constitutional and statutory

grounds. For these reasons the District Court correctly granted the preliminary injunction barring its enforcement.[3]

A. Contrary to the Government's Motion, the Procurement Act Did Not Authorize the President to Make Health Policy, as the Mandate Certainly Does.

Defendant-Appellants' Motion relies entirely on the Presidential authority purportedly granted by the Procurement Act, 40 U.S.C. § 401, *et seq*., to justify requiring federal contractors and subcontractors to mandate COVID-19 vaccines for their employees, and if the employees fail to get vaccinated, to fire them. But Congress has not authorized the President, as the procurer-in-chief, to exercise such power over what is undeniably a public health issue. *Commonwealth of Ky.*, 2021 U.S. Dist. LEXIS 228316, at *5. Indeed, the Chief Executive is seeking to intrude into public health issues which are solely within the police powers of the States. *Id.* . . . *See also Dr. A. v. Hochul*, No. 21A145, 2021 U.S. LEXIS

[3] ABC here addresses only the statutory argument relied on by the District Court, but there are multiple additional grounds for finding the Mandate to be unlawful, as set forth in ABC's motion papers in the District Court, incorporated by reference. The Government did not address these additional grounds for affirmance in its Motion, and the Government is again unlikely to succeed on these additional grounds. The Court should not grant the Government's motion without considering all aspects of the likelihood of success.

6279 (Dec. 13, 2021) (upholding New York regulation requiring healthcare workers to receive a COVID-19 vaccine, as an exercise of state police power).

The Supreme Court has criticized similar executive branch overreach in reaction to the pandemic, noting that "[w]e expect Congress to speak clearly when authorizing an agency to exercise powers of "vast 'economic and political significance.'" *Ala. Ass'n of Realtors*, 141 S. Ct. 2489, 2489 (2021) (citing *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324, 134 S. Ct. 2427 (2014)) (quoting *FDA v. Brown & Williamson Tobacco Corp., 52*9 U.S. 120, 160, 120 S. Ct. 1291 (2000)). The Fifth Circuit cited *Ala. Ass'n of Realtors* in issuing a stay of the OSHA Emergency Temporary Standard, which contains a similarly overbroad vaccination mandate. *BST Holdings, L.L.C.*, 2021 U.S. App. LEXIS 33698, at *26 (2021) ("[H]ealth agencies do not make housing policy, and occupational safety administrations do not make health policy."). Procurement agencies likewise are not authorized to make health policy, absent an express Congressional delegation, which is not contained in the Procurement Act. *See also U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837 (2020) ("Our precedents require Congress to enact

exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property.").[4] The Fifth Circuit denied the Government's motion for stay in *State of Louisiana et al v. Becerra, et al,* Fifth Circuit, Case No. 21-30734 (December 15, 2021) ("the merits of the injunction will not likely be disturbed on appeal."

"As is clear from the terms and history of the statute [Procurement Act, 40 U.S.C. § 401] and from experience with its implementation, our decision today does not write a blank check for the President to fill in at his will." *AFL-CIO v. Kahn*, 199 U.S. App. D.C. 300 (D.C. Cir. 1979) (emphasis added). While the Defendants/Appellants cite various cases in

[4] Defendants/Appellants fail to mention *Ala. Ass'n of Realtors* in their Motion, and instead rely on this Court's recent denial of an injunction pending appeal in *Florida v. Biden*, No. 21-14098 (11th Cir. Dec. 6, 2021). But as the District Court properly found (Opn. at n.9), *Florida v. Biden* is itself distinguishable as it dealt with a much different mandate involving only health care workers. In that limited context this Court declined to apply *Ala. Ass'n of Realtors* because the CMS Mandate under review in *Florida* "directly related to the statute's goal of preventing the spread of disease at facilities treating Medicare or Medicaid patients." Whatever the merits of that claim (disputed by the Dissent), there is no such connection here between the Procurement Act and the sweeping vaccination Mandate; so the Supreme Court's holding *Ala. Ass'n of Realtors* is controlling.

which Presidential procurement authority was upheld based upon a reasonable nexus between the action taken and congressional authority,[5] they effectively ignore cases where the President exceeded the limits of Congressional authority, as is the case here. *See, e.g.,* C*hamber of Commerce of the U.S. v. Reich,* 74 F.3d 1322, 1330 (D.C. Cir. 1996) (invalidating executive order purporting to bar employers who permanently replaced striking workers from federal contracting); *Associated Builders & Contrs. of Se. Tex. v. Rung, Civil* Action No. 1:16-CV-425, 2016 U.S. Dist. LEXIS 155232, at *21 (E.D. Tex. Oct. 24, 2016) (ED TX 2016) (granting injunction barring implementation and enforcement of executive order imposing requirements on federal contractors to report labor law violations before final adjudication); *See also Missouri v. Biden*, Case No. 4:21-cv-01329-MTS, at *3-4 (E.D. Mo.

[5] The present case bears no resemblance to such cases as *UAW-Labor Empl. & Training Corp. v. Chao, 325* F.3d 360 (D.C. Cir. 2003) (requiring employers to post a notice of union rights) or *Chamber of Commerce of the U.S. v. Napolitano*, 648 F. Supp. 2d 726 (D. Md. 2009) (requiring federal contractors to use E-Verify). The vaccine mandate compels contractors to impose drastic changes on their employees' personal health decisions for reasons far beyond mere economic goals, not just to put up posters or check employment eligibility.

Nov. 29, 2021) ("Congress must provide clear authorization if delegating the exercise of powers of 'vast economic and political significance'….").

The government's heavy reliance on *Kahn* is misplaced. While that court did find that the President has considerable flexibility and authority in setting procurement policies, it also noted that the President's power was greatest where Congress has explicitly authorized its exercise: "Congress intended that the President play a direct and active part in supervising the Government's management functions." *AFL-CIO v. Kahn*, 618 F.2d 784, 789 (D.C. Cir. 1979). In *Kahn* the court found that in passing the Procurement Act Congress had delegated to the President the power to govern the procurement process, and that there was a sufficient nexus between economy and efficiency to support voluntary wage and price controls. Similarly, where the President has imposed anti-discrimination mandates on federal contractors, Presidential power is greatest because it is grounded in statute. 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, as amended, explicitly prohibit discrimination with regard to hire or tenure of employment based upon race, color, religion, sex or national origin by any employer engaged in an industry affecting commerce was made an unlawful

employment practice. *Id.* § 703(a)(1); 42 U.S.C.A. § 2000e-2(a)(1) (West); *see also Adams v. United States*, 375 F.2d 635, 635 n.3 (10th Cir. 1967) (noting statutory authority for executive order.) Thus, when the President issued executive orders requiring federal contractors to take affirmative action in hiring to promote these statutory goals, he was exercising authority delegated to him by Congress in 1864, with the reconstruction acts; and in 1964, with the Civil Rights Act.

In *UAW-Labor Empl. & Training Corp. v. Chao, 35*5 U.S. App. D.C. 460, 462, 325 F.3d 360, 362 (D.C. Cir. 2003) the court found there was a sufficient nexus between EO 13201, 66 Fed. Reg. 11,221 (2001), requiring federal contractors to post notices advising employees of their rights not to be forced to join a union or pay mandatory dues, and the Procurement Act such that the executive order was not unenforceable. The executive order connected its requirements to economy and efficiency by stating that "[w]hen workers are better informed of their rights, including their rights under the Federal labor laws, their productivity is enhanced. The availability of such a workforce from which the United States may draw facilitates the efficient and economical completion of its procurement

contracts." *UAW-Labor Empl. & Training Corp., 355* U.S. App. D.C. 460, 325 F.3d at 366 (quoting EO 1*3201 § 1* (a); 66 Fed. Reg., at 1*1,* 221 (2001)).

But the vaccine mandate is a bridge too far. The statutory foundation is lacking in the instant case: there is no Congressional basis, in the Procurement Act or elsewhere, for the Presidential imposition of a vaccination mandate. *Commonwealth of Ky.*, 2021 U.S. Dist. LEXIS 228316, at *5. *See also BST Holdings, L.L.C.*, 2021 U.S. App. LEXIS 33698, at *26, Moreover, as the *Kentucky* court observed, the question is not whether vaccines are a good idea or not. There are all manners of afflictions in addition to COVID-19 that put a burden on public health and a drag on the economy. As the *Kentucky* court observed, "[u]nder the same logic employed by the Defendants regarding the vaccine mandate, what would stop [the Procurement Act] from being used to permit federal agencies to refuse to contract with contractors and subcontractors who employ individuals over a certain BMI for the sake of economy and efficiency during the pandemic? After all, the CDC has declared that obesity worsens the outcomes from *Covid-19." Commonwealth of Ky.*, 2021 U.S. Dist. LEXIS 228316, at *21-22 (internal quotations and citations omitted).

B. The Government's Motion Improperly Ignores or Misstates the District Court's Ample Findings of Direct Injury and Irreparable Harm.

The District Court properly found that the State Plaintiffs and ABC each demonstrated both direct injury for purposes of standing and irreparable harm for purposes of injunctive relief. (Opn. at 24). Defendants/Appellants conflate these two holdings and mischaracterize the basis for the District Court's finding of irreparable harm. Thus, the Government's motion incorrectly claims irreparable harm was found only on the part of "two" ABC member contractors, whose affidavits were obtained in response to the Government's demand for "identification" of at least one individual ABC member injured by the Mandate for purposes of standing (not irreparable harm). The Government's Motion ignores the Declaration of ABC chapter president Anderson, who stated without contradiction that "many" of ABC's 21,000 nationwide members perform federal contracts and subcontracts totaling billions of dollars annually, and that they fully expected to continue to do so but for the unlawful burdens imposed by the unprecedented Mandate.

It is undisputed in the record that virtually every federal contract solicited after November 14 must contain the new FAR Clauses

implementing the mandate, absent the injunction. Each such contract containing the FAR Clause irreparably harms every ABC member who desires to perform such federal work going forward, as well as the State governments who are likewise harmed. *See also Associated Builders & Contrs. of Se. Tex., Ci*vil Action No. 1:16-CV-425 (irreparable harm found based on ABC's representations on behalf of its members performing government contracts nationally).

In further arguing against ABC's showing of irreparable harm, the Government's Motion states without any basis in fact that ABC and its member companies are "speculating" as to the likelihood that significant percentages of their workers will resign or otherwise refuse to get vaccinated under the Mandate (Gov't brief at 20). To the contrary, the District Court properly found credible the sworn declarations that construction workers have made known their intent to refuse vaccination and quit if necessary "in no uncertain terms." (McKelvey Dec. at para. 6, Dkt. 78-2; Graugnard Dec. at para. 7, Dkt. 78-1.)

The Government further argues that some Fortune 500 companies, such as AT&T, Bank of America, Google, Johnson & Johnson, United Airlines, and Microsoft, have established vaccination requirements for

their workforces, and that some of these non-construction industry employers have not suffered significant losses of employees. (Govt. Brief at 23). Comparing construction contractors to United Airlines or the other corporate giants listed in the Government's Motion is disingenuous and misleading.

Each of the Fortune 500 companies cited above is one of only a few comparable employers in their respective industries, meaning that employees who resign their positions, as pilots for example, are much less likely than construction workers to be able to relocate to positions of similar status or pay working for other employers. As previously noted, the undisputed testimony in the record shows that construction workers are uniquely transient and can easily relocate to non-government contractors without loss of pay; and many such workers have openly threatened to do so if a Mandate is imposed on them. Such skilled workers cannot be readily replaced in the construction industry; and smaller subcontractors in particular have no recourse or ability to withstand even a few employee departures during the current labor shortage. It is clear in the record that many contractors and

subcontractors will be crippled in their efforts to perform federal contracts if the Mandate is allowed to take effect.

In any event, the Government's Motion, and OMB's cherry-picked findings on the likelihood of mass resignations and dislocations caused by the Mandate, are contradicted by published reports of much higher numbers of lost employees than OMB predicted in the Federal Register. To name but a few examples, the Wall Street Journal on December 14, 2021, noted, "Vaccine mandates have been a factor constraining the supply of healthcare workers, according to hospital executives, public-health authorities and nursing groups."[6] Further, the paper noted, "More recently, thousands of nurses have left the industry or lost their jobs rather than get vaccinated. As of September, 30% of workers at more than 2,000 hospitals across the country surveyed by the Centers for Disease Control and Prevention were unvaccinated." *Id.* . Similarly, USA Today recently reported that Amtrak is expecting to cut back service in the beginning of 2022 due to approximately 5% of its employees not

[6] https://www.wsj.com/articles/some-hospitals-drop-covid-19-vaccine-mandates-to-ease-labor-shortages-11639396806.

complying with the Mandate.[7] The Washington State Department of Transport likewise reported a loss of 6% of its workforce due to the vaccine mandate.[8] More examples can be found simply by searching the Internet, demonstrating the lack of evidentiary support for the Government findings on which the Mandate is based, and leaving undisputed the District Court's well supported findings of irreparable harm to the State Plaintiffs and ABC.

C. The District Court was Correct in Entering a Nationwide Injunction.

Also contrary to the Government's motion, the nationwide injunction granted by the District Court was entirely appropriate and should not be stayed or limited. The APA provides that unlawful agency actions shall be vacated and "set aside" in their entirety, not in geographic piecemeal. See Holdings, supra. In addition, affording full relief to Plaintiffs/Appellees necessitates a nationwide injunction. An injunction limited to only some parts of the country would mean that

[7] https://www.usatoday.com/story/travel/news/2021/12/09/amtrak-frequency-vaccine-mandate/6453049001/

[8] https://mynorthwest.com/3193738/wsdot-has-largest-segment-of-state-employees-to-leave-over-vaccinemandate/

construction workers who decline to be vaccinated could simply move from a state where vaccination is required to one where it is not. This would exacerbate the current shortage of skilled and other construction workers.

The Government's argument that an injunction should be tailored to "only those before the court" (Gov't brief at 17) ignores two important considerations: First, the larger reality of the process of federal government contracting and the impact of the EO on that process; and second, the declarations submitted by ABC on behalf of their members, not just the two the Government mentions. (Govt. brief at 18.) The Government appears simply to have overlooked the attachments identifying approximately 85 contracts upon which ABC members are preparing to bid, issued in just the first two weeks following the November 14 start date of the Mandate (prior to injunction). (See ABC Exhibit 4.) Federal contractors are constantly making plans to bid on government contracts for projects throughout the United States that will be solicited and awarded after the vaccine clause becomes mandatory, absent injunctive relief. (Exhibit 2, Graugnard Decl., ¶¶ 3,4.) Sizable projects require months of advance planning prior to bidding, and

typically call upon a general contractor to enter into joint ventures with minority and small businesses. (Graugnard Decl., ¶ 4.) If the current injunction is stayed pending this appeal – upending the status quo, as explained above -- contractors likely will be unable to bid on the upcoming federal projects in the next several months because of the significant risk of irreparable harm to their business resulting from the Mandate. (Graugnard Decl., ¶ 4.)

Defendants/Appellants devote much ink to this Court's decision in *Florida v. HHS* to support their argument against a nationwide injunction. But as discussed above, the *Florida v. HHS* case is factually distinguishable from this one.[9] The Eleventh Circuit's opinion in that case reaffirmed that "a nationwide injunction may be warranted where it is necessary to provide complete relief to the plaintiffs, to protect similarly situated nonparties, or to avoid the "chaos and confusion" of a patchwork of injunctions." (Op. at 17). None of those circumstances were

[9] Likewise distinguishable on its facts is the Fifth Circuit's order this date, limiting the Louisiana injunction to the 14 states in *State of Louisiana et al v. Becerra, et al,* Fifth Circuit, Case No. 21-30734 (December 15, 2021). The Fifth Circuit noted:, "The district court here gave little justification for issuing an injunction outside the 14 States that brought this suit. Slip Opn. 5.

found by the appeals court to be present in the Louisiana case; but all of them are present here: In addition to the multiple state plaintiffs from different sections of the country, it is undisputed that ABC represents a nationwide constituency of construction contractors who are "dispersed among the United States or 'myriad jurisdictions.'" (Op. 18-19). Indeed, the sheer impracticality of subjecting thousands of multi-state businesses to what can only be described as a patchwork of mandates must be acknowledged. And the desire to allow "percolation" of competing legal theories does not justify failing to provide relief from an unlawful nationwide Mandate to plaintiffs whose harms are nationwide in scope, as the District Court here properly held. (Dist. Ct. Op. at 14-15.)

III. The Balance of Harms and the Public Interest Strongly Militate in Favor of the District Court's Injunction Remaining in Place.

As noted above, the Government's Motion wrongly asserts that lifting the injunction will restore the "status quo." But because the District Court enjoined enforcement of the Mandate before its major enforcement components could go into effect, the emergency stay the Government seeks will plainly disrupt, not maintain, the status quo. A stay would cause chaos in federal construction contracts, requiring immediate

compliance with the mandate, except in the states governed by the District of Kentucky's separate injunction. Arching over the entire scene will be the uncertainty of whether contractors awarded contracts will be in a position to fulfill them, or risk default.

Moreover, the Government's protestations to the contrary notwithstanding, there is no guarantee that implementing the mandate would slow the spread of COVID-19 among millions of federal contractors and the public with whom they interact. As the U.S. District Court for the Eastern District of Missouri Court acknowledged in granting a stay of the CMS vaccine mandate for healthcare workers. "the effectiveness of the vaccine to prevent disease transmission by those vaccinated [is] not currently known.. . ." *Missouri v. Biden, et al*, Case: 4:21-cv-01329-MTS Doc. #: 28 (filed 11/29/2021).

The public interest is not well served by the perpetuation of unlawful agency action. As the Supreme Court said in *Ala. Ass'n of Realtors*, "[i]t is indisputable that the public has a strong interest in combating the spread of the COVID–19[;]" however, "our system does not

permit agencies to act unlawfully even in pursuit of desirable ends." *Ala. Ass'n of Realtors*, 141 S. Ct. at 2490.

CONCLUSION

For the foregoing reasons Defendant-Appellants' Motion should be denied.

Respectfully submitted this 15th day of December 2021.

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CERTIFICATE OF COMPLIANCE

This brief contains ***4,943*** words. This motion complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Century Schoolbook 14-point font, proportionally spaced.

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CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2021, I caused a true and correct copy of the foregoing to be served on counsel of record for all parties via ECF.

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