IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

STATE OF FLORIDA, Plaintiff, v. BILL NELSON, in his official capacity as Administrator of NASA, et al., Defendants.	No. 8:21-cv-2524-SDM-TGW

DEFENDANTS' RESPONSE TO FLORIDA'S SUPPLEMENTAL BRIEF

There is no question—and Florida does not challenge—that the identified class deviations complied with the applicable Federal Acquisition Regulation (FAR) provisions governing when notice and comment is required. *See* FAR §§ 1.404 & 1.501-1. Instead, Florida's supplemental brief ignores these regulations entirely and argues that 41 U.S.C. § 1707's notice requirements apply to temporary class deviations issued by agencies. No district court has ever adopted such an expansive view of the notice requirements in § 1707, and Florida's argument runs counter to the government's considered and longstanding interpretation of its § 1707 obligations.

If accepted, Florida's argument would call into question the legitimacy of hundreds (if not thousands) of agency class deviations going back at least as far as the 1970s. Some of these deviations address urgent national security threats. For example, when Congress provided special emergency procurement authority to respond to cybersecurity incidents, agencies issued class deviations allowing them to use that authority until the FAR could be permanently amended. *See, e.g.*, Memo from William

Clark to Civilian Agencies (Sept. 1, 2017), https://perma.cc/FEC2-MHG4; Memo from Iris B. Cooper to Bureau Chief Procurement Officers (Aug. 31, 2017), https://perma.cc/KK9J-GPHE.

These deviations perform essentially the same function: bridging the gap until the FAR Council can conclude its rulemaking—which is already underway. *See* DoD, Open FAR Cases, FAR Case No. 2021-021, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors (Nov. 1, 2021), https://perma.cc/ZQ4Y-8Y9W. Neither Congress nor the Judiciary have previously questioned the Executive's longstanding practice of issuing class deviations quickly, without notice-and-comment, so that agencies can effectively address urgent requirements on a temporary basis until permanent amendments to the FAR can be implemented.

This Court should not upset past practice and accept Florida's extraordinary argument for three reasons. *First*, this Court lacks jurisdiction over claims challenging a class deviation's compliance with statutory requirements. *Second*, class deviations are not subject to § 1707 generally. FAR § 1.404 explains that class deviations are temporary, so they are not significant revisions to the FAR within the meaning of FAR § 1.501-1. *Third*, even if some class deviations may be subject to § 1707, these class deviations are not, because they merely implement EO 14042 and the OMB economy-and-efficiency determination. As Florida concedes (at 2), these deviations set no policy and regulate nothing on their own.

Alternatively, if the Court disagrees, the proper remedy would be to remand the class deviations to the issuing agencies without vacatur.

I. This Court lacks jurisdiction over Florida's challenge to class deviations applicable to its contracts with the federal government.

This Court does not have jurisdiction over Florida's challenge to the specific class deviations applicable to its covered contracts with the federal government because 28 U.S.C. § 1491(b)(1) gives the Court of Federal Claims exclusive jurisdiction "to render judgment on an action by an interested party objecting to . . . any alleged violation of statute or regulation in connection with a procurement."

Florida tries to duck this clear statutory text based on a single sentence plucked from an out-of-circuit, nonprecedential opinion: *Land Shark Shredding, LLC v. United States*, 842 F. App'x 589, 593 (Fed. Cir. 2021). But *Land Shark* cannot bear the weight of Florida's argument. To be sure, *Land Shark* relied on another Federal Circuit case, *Southfork Sys., Inc. v. United States*, to say that "[c]hallenges to the validity of a [FAR] regulation governing a procurement must be brought in federal district court under the Administrative Procedure Act." *Id.* at 593 (citing 141 F.3d 1124 (Fed. Cir. 1998)). But that statement was dicta: the *Landshark* court expressly noted that the challenger "ha[d] forfeited any challenge to the application" of the disputed FAR regulation "by not raising it while the procurement was pending." *Id.* And even if it were a holding, it would not bear on this case.[1] Although a facial challenge to a FAR regulation promulgated through notice-and-comment rulemaking may have to proceed in district court under the APA, it does not follow that an as-applied § 1707 challenge must, too.

[1] Moreover, *Southfork* concerned the scope of the Court of Federal Claims' jurisdiction under a prior version of 28 U.S.C. § 1491, and that version did not include the language cited above—"alleged

Moreover, *Southfork* and the other opinions Florida relies on have been repudiated. Florida cites *Alphapointe v. Department of Veterans' Affairs*, 416 F. Supp. 3d 1 (D.D.C. 2019), and a Colorado district court case adopting its analysis, *Bayaud Enterprises, Inc. v. Department of Veterans' Affairs*, 440 F. Supp. 3d 1230 (D. Colo. 2020), to assert that district courts have jurisdiction to hear APA challenges to class deviations. In *Alphapointe*, Judge Mehta relied on *Southfork* to conclude that § 1491(b)(1) did not divest district courts of jurisdiction over statutory challenges to a class deviation, a question he described as a "close call." 416 F. Supp. 3d at 7. Less than a year later, Judge Mehta made "an about-face" and concluded that "[p]laintiffs cannot avoid the exclusive jurisdiction of the Court of Federal Claims by casting their cause of action as a general [statutory] challenge to [a] Class Deviation" after all. *Alphapointe v. Dep't of Veterans' Affs.*, 475 F. Supp. 3d 1, 10 (D.D.C. 2020). As he explained, he was "no longer convinced that" *Southfork* "compels jurisdiction." *Id.* at 10-11 (further deeming *Southfork*'s jurisdictional discussion dicta and admitting that "[t]his court should not have relied on *Southfork* as a jurisdictional holding in the first place").

Rather, Judge Mehta relied on *PDS Consultants, Inc. v. United States*, a more recent—and precedential—Federal Circuit decision, to hold that statutory challenges to class deviations "fit[] within the broad jurisdictional parameters of Section 1491(b)." *Id.* at 9-10 (citing 907 F.3d 1345 (Fed. Cir. 2018)). In *PDS Consultants*, the Federal Circuit made clear that disputes about whether a procurement complies with statutory

violation of statute or regulation in connection with a procurement"—conferring exclusive jurisdiction over Florida's challenge to the class deviations here. *Southfork*'s reasoning is therefore inapposite.

procedural requirements "arise[] under the Claims Court's jurisdiction," even if a dispute claims to challenge a regulation's validity. 907 F.3d at 1356.

Florida strains against the weight of this precedent by arguing that it must be allowed to vindicate its sovereign injury in this Court. For the reasons stated in its surreply, the federal government disputes both that Florida has suffered a sovereign injury and that it would have standing to vindicate such an injury in this Court. *See* ECF No. 26 at 14-15. But even if this Court disagrees, Florida would be able to obtain a judgment on the validity of deviations in the Court of Federal Claims either by challenging a procurement it is directly interested in, or by virtue of being a prospective bidder in future procurements. *See PDS Consultants*, 907 F.3d at 1356.

At bottom, this Court should rely on *PDS Consultants* and the more recent *Alphapointe* decision to conclude that the Court of Federal Claims has exclusive jurisdiction over Florida's challenge to agency class deviations' compliance with § 1707.

II. Class deviations are not subject to § 1707 generally because they are temporary exceptions to—not permanent revisions to—the FAR.

Section 1707 applies only to "procurement polic[ies], regulation[s], procedure[s], or form[s]" that "ha[ve] a significant effect beyond the internal operating procedures of the [issuing] agency" or that "ha[ve] a significant cost or administrative impact on contractors." The word "significant" bespeaks of many meanings, including long-lasting, permanent, or indelible. *See, e.g.*, *United States v. Esle*, 743 F.2d 1465, 1473 (11th Cir. 1984) (defining "a significant period of time" as at least more than one year), *overruled on other grounds by United States v. Blankenship*, 382 F.3d 1110, 1122 n.23 (11th

Cir. 2004). Indeed, the FAR defines "significant revisions" as "revisions that alter the substantive meaning of . . . the FAR." FAR § 1.501-1.

By definition, class deviations are temporary exceptions to—not permanent alterations of—the FAR. *See* FAR § 1.404 ("When an agency knows that it will require a class deviation on a permanent basis, it should propose a FAR revision, if appropriate."). So class deviations are not "significant" under the plain meaning of that word, as confirmed by FAR § 1.501-1. Indeed, they are specifically permitted under the FAR.

FAR §§ 1.404 and 1.501-1, which govern when notice is required, underwent notice-and-comment rulemaking and were added to the FAR in the 1980s. So the public had a chance to weigh in, and for many decades has been aware of agencies' ability to make temporary deviations from the FAR without notice and comment pending a forthcoming FAR amendment. (Even before 1983, the FAR's predecessor—the Federal Procurement Regulation System—authorized agencies to issue non-permanent class deviations without notice and comment.) Agencies have exercised that authority countless times, and neither Congress nor the Judiciary has questioned that approach.

To the extent Florida wishes to challenge FAR §§ 1.404 and 1.501-1, it is far too late. *See* 28 U.S.C. § 2401. Florida should not be permitted to collaterally attack regulations it "could have but chose not to challenge at the time." *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1292 (11th Cir. 2015). And any challenge would fail on the merits, because §§ 1.401 and 1.501-1 constitute "reasonable interpretation[s]" of § 1707's text. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984); *see also*

41 U.S.C. § 1303 (delegating the FAR Council authority to harmonize procurement statutes and regulations); *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).[2]

In all events, FAR §§ 1.404 and 1.501-1 do not leave agencies' class deviation authority to the whim of each agency. At a minimum, civilian agencies are required to obtain approval of the agency head or its designee, and must further consult with the chairperson of the Civilian Agency Acquisition Council before any class deviation is authorized. *See* FAR § 1.404(a). Many civilian agencies have promulgated additional approval processes through notice-and-comment rulemaking. *See, e.g.*, General Services Acquisition Manual, 48 C.F.R. Subpart 501.4. Likewise, the Defense Department and NASA have specific FAR supplements—DFARS and NFS—providing a well-established process prescribing specific conditions and limitations on deviations. *See also id.* All told, then, several layers of agency regulation provide a rigorous process for issuing deviations.

The importance of these procedural controls was central in the case Florida most relies on. In *Navajo Refining Co. v. United States*, the Court of Federal Claims struck down the challenged class deviations partly because the agency did not comply with

[2] FAR § 1.501-1 in particular is entitled to "peculiar weight" given that it was promulgated just months after Congress added what is now § 1707, *see* Small Business and Federal Procurement Competition Enhancement Act of 1984, Pub L. No. 98-577, § 302(a), 98 Stat. 3066, 3076 (1984), and thus represents "a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Prod. Co. v. United States*, 288 U.S. 294, 315 (1933); *see* Federal Acquisition Regulation, 50 Fed. Reg. 2268, 2269 (Jan. 15, 1985).

the procedures in its own regulations, which imposed approval and publication requirements for class deviations. *See* 58 Fed. Cl. 200, 207-09 (2003). Here, by contrast, Florida has not shown that these agencies departed from any prescribed processes.

III. In all events, these specific deviations are not subject to § 1707 because they merely implement EO 14042 and the OMB determination.

Even if the Court concludes that class deviations are not generally exempt from § 1707, it should determine that these specific deviations are exempt from § 1707 because they merely provide contract language effectuating the policy set forth in EO 14042 and the OMB determination. Indeed, the EO and OMB determination are the only actions that arguably impose anything or standardize a course of action; as Florida concedes (at 2), the deviations "impose no obligations" on their own.[3] Yet the EO was published in the Federal Register and the OMB determination voluntarily complied with § 1707's procedural requirements. Nothing would be gained by further publishing and receiving comments on these purely derivative deviations.

Navajo Refining is not to the contrary. That opinion merely recognized that "a class deviation *may* fall within any of the various categories of procurement changes identified" in § 1707. 58 Fed. Cl. at 209 (emphasis added). In effect, that restates FAR § 1.401(a), which recognizes that deviations can be "polic[ies]" or "procedure[s]," but

[3] Nor does the sur-reply's citation to Florida's § 1303 argument amount to an admission that these deviations constitute "regulations." Section 1303 addresses standalone agency-specific procurement regulations; it says nothing about agencies' authority to issue class deviations from the FAR, which are different. *See supra* Part II.

can just as easily be other things, too—including "contract clause[s]," like these deviations. And in all events, a stray sentence in a Court of Federal Claims opinion does not bind this Court.[4] For the reasons explained in Part II, the federal government disagrees that class deviations are subject to § 1707 at all.

IV. Alternatively, if § 1707 ultimately applies to these class deviations, the Court should remand them to their issuing agencies without vacatur.

Finally, even if § 1707 applies to these deviations, the ultimate answer would not be to strike them down as procedurally defective. Courts in this Circuit refuse to vacate procedurally defective agency action "where it is not at all clear that the agency's error incurably tainted the agency's decisionmaking process." *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1290 (11th Cir. 2015) (citing *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150 (D.C. Cir. 1993)). In other words, vacatur is inappropriate if "there is at least a serious possibility that" these agencies "will be able to substantiate [their] decision[s]" and adopt the same deviations "on remand." *Allied-Signal*, 988 F.2d at 151.

Remand without vacatur is appropriate here because these agencies can adopt the same class deviations on remand, and because vacatur would be "quite disruptive" to the many parties who have already agreed to the challenged class deviations. *Allied Signal*, 988 F.2d at 151. What is more, because § 1707(d) would permit a deviation to

[4] That is especially true because *Navajo Refining* rested solely on *La Gloria Oil & Gas Co. v. United States*, 56 Fed. Cl. 211 (2003), a case later abrogated by *Tesoro Hawaii Corporation*, 405 F.3d 1339.

take immediate effect when "urgent and compelling circumstances" require, the agencies could potentially reissue the deviations immediately on a temporary basis.

By extension, the availability of remand without vacatur means that Florida cannot carry its burden to show an irreparable injury absent a preliminary injunction. Even if this Court concludes at this juncture that the deviations are likely subject to § 1707, it should leave them in place until it makes a final determination, and then for a period thereafter to allow the agency to cure any deficiency on remand.[5]

* * *

For these reasons, § 1707 does not apply to class deviations generally or to these deviations specifically. Yet even if the Court ultimately concludes that § 1707 does apply, the Court can later remand these deviations without vacatur. As a result, and for all the other reasons provided in prior briefs, the Court should deny Florida's amended preliminary injunction motion.

[5] In addition, the Court should not countenance Florida's too-clever-by-half argument that naming the United States as a defendant entitles a plaintiff to obtain relief from every entity in the government's alphabet soup. If that were true, why would any plaintiff ever bother to specify what federal entity it sought relief from besides the umbrella "United States"? *Cf. Choctaw Mfg. Co. v. United States*, 761 F.2d 609, 615 n.10 (11th Cir. 1985) (noting that plaintiffs suing under the APA's sovereign-immunity waiver must join the relevant officer).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

On December 22, 2021, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Middle District of Florida, using the electronic case filing system of the Court. I hereby certify that I have served all parties electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

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