No. 21-6147

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COMMONWEALTH OF KENTUCKY, et al.,

Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Kentucky

REPLY IN SUPPORT OF MOTION FOR STAY PENDING APPEAL

Of Counsel:

SAMUEL R. BAGENSTOS
General Counsel

ARPIT K. GARG
Deputy General Counsel

SARAH R. SCHEINMAN
Associate Deputy General Counsel

SHRADDHA A. UPADHYAYA
Associate General Counsel
Office of Management and Budget

BRIAN M. BOYNTON
Acting Assistant Attorney General

JOSHUA REVESZ
Counsel to the Assistant Attorney General

MARK B. STERN
ALISA B. KLEIN
ANNA O. MOHAN
DAVID L. PETERS
Attorneys, Appellate Staff
Civil Division, Room 7533
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-3159

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INTRODUCTION AND SUMMARY

Plaintiffs' response demonstrates that they lack standing, are unlikely to succeed on the merits, and have suffered no irreparable injury. Precedent squarely forecloses plaintiffs' attempt to assert *parens patriae* standing on behalf of their citizens in a suit against the federal government, and any cognizable injury thus must be premised on injuries to plaintiffs themselves. But plaintiffs identify no contracts they have with the federal government that will be imminently affected by the vaccination requirements and thus are unable to establish standing, let alone the need for a preliminary injunction.

If the Court reaches the merits, plaintiffs offer no plausible basis for construing the Procurement Act to preclude vaccination requirements in federal contracts. The Procurement Act broadly empowers the President to impose contractual conditions that advance economy and efficiency in the performance of federal contracts. Plaintiffs do not question that the government has an interest in contracting with entities that have taken steps to reduce absenteeism due to sickness and to stop workplace transmission of a deadly disease. Nor do they dispute that COVID-19 vaccination requirements for contractor employees further those goals, or that many private employers have voluntarily adopted the same requirements for the same ends. Plaintiffs instead insist that a variety of inapplicable doctrines require this Court to disregard the Procurement Act's broad grant of authority simply because the statutory text does not specifically mention vaccination. No decision of the Supreme Court

supports plaintiffs' atextual approach or suggests that the federal government is precluded from adopting the same safety measures as the private sector.

Plaintiffs' arguments on the equities fare no better. Every day the district court's injunction remains in place jeopardizes the economy and efficiency of billions of dollars in federal contracts. And that need for relief persists despite a recent Eleventh Circuit decision expediting an appeal but leaving in place a nationwide injunction against the contractor vaccination requirements. By contrast, plaintiffs identify no imminent, much less irreparable, harm. Plaintiffs' supposed injuries—potential compliance costs and the fear that some employees will give up their jobs rather than be vaccinated—are too speculative to support injunctive relief. And plaintiffs offer no basis for second-guessing the Executive Branch's judgment that vaccination requirements are an efficient means of advancing the government's and the public's interest.

Finally, there is no legal basis to extend relief to private contractors in the plaintiff States that are not parties to this action. At a minimum, then, this Court should narrow the injunction's scope.

ARGUMENT

I. The government is likely to succeed on the merits.

A. Plaintiff States lack standing.

1. Plaintiffs do not rebut the government's showing (Mot. 9-10) that States lack capacity to sue the United States as *parens patriae*. As they acknowledge, the Supreme

Court has explained that a "State does not have standing as *parens patriae* to bring an action against the Federal Government." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 610 n.16 (1982). Plaintiffs nevertheless invite this Court to disregard that unambiguous statement in favor of inapposite and outdated authority. Opp. 9-10 (citing two pre-*Snapp* circuit court cases, a district-court decision collecting pre-*Snapp* sources, and a pre-*Snapp* dissenting opinion). This Court should follow the Supreme Court—and, according to the leading treatise, every court of appeals to consider this question after *Snapp*—rather than rely on plaintiffs' paltry authorities. *See* 13B Wright & Miller, *Federal Practice & Procedure* § 3531.11.1 n.7 (3d ed.) (collecting cases from the Third, Fourth, Fifth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits).[1]

2. Plaintiffs can thus establish standing only if they make an "adequate showing" that they "sometime in the relatively near future … will bid on another Government contract" that would be subject to an allegedly unlawful vaccination requirement. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995). The only contract that plaintiffs identify in their briefing, Opp. 7, does not require renewal until September 2022—which is not "the relatively near future," especially in the context of a rapidly changing pandemic. *See* Lease, RE 22-7, Page ID # 594. Plaintiffs have not identified a single contract or contract solicitation that would come within the scope

[1] Plaintiffs' supposed "standing as separate sovereigns" suffers from the same defect. *See* Opp. 8.

of the Executive Order any time within the next nine months. Their failure to do so underscores that they have not met their burden to establish standing (much less demonstrate irreparable injury). And, in the absence of *parens patriae* standing, there is no basis for an injunction that applies to contracts other than those of plaintiffs themselves.

B. The President properly exercised his Procurement Act authority.

1. As the government showed (Mot. 10-15), requiring federal contractors to adopt vaccination requirements as a condition of entering into contracts with the federal government falls within the President's broad power to "prescribe policies and directives" that he "considers necessary" to "provide the Federal Government with an economical and efficient system" of procurement. 40 U.S.C. §§ 101, 121. The determination that requiring vaccination directly advances economy and efficiency in federal contracting by decreasing absences and reducing transmission of a virulent disease among the federal contractor workforce is not only well-founded and reasonable, but also supported in the record.

Plaintiffs' opposition does not come to grips with the text and history of the Procurement Act or with the challenged policy. *See* Mot. 10-12. Plaintiffs do not dispute that, in the midst of an unprecedented pandemic, the federal government has an interest in whether its contractors have taken measures to avoid extended absences and the infection of coworkers. And plaintiffs do not contest that private employers

across the country have chosen to require their employees to be vaccinated in order to advance those employers' own business interests. *See* 86 Fed. Reg. 63,418, 63,422 & n.13 (Nov. 16, 2021). Plaintiffs offer no argument for why the Procurement Act's plain language does not authorize the federal government to insist that its contractors follow that same model.

Plaintiffs instead urge this Court to set aside the President's judgment and engraft atextual limitations onto the statute because, in their view, the Executive Order implicates a question of "vast economic and political significance" and so requires a clear statement of congressional intent. Opp. 11 (quoting *Alabama Ass'n of Realtors v. Department of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021)). As plaintiffs' cases underscore, however, that argument has no application where, as here, the President acts not as a regulator but instead as a market participant. *See* Mot. 15; Opp. 12 (citing *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014) (government cannot "bring about an enormous and transformative expansion in [its] *regulatory* authority" (emphasis added))).

The Supreme Court, moreover, has never suggested that a plaintiff's characterization of an agency action as politically controversial triggers a clear-statement requirement. *See, e.g.*, *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2380 (2020) (analyzing whether agency's contraceptive-mandate rule complied with the statutory text without any heightened-clarity requirement). At most, greater clarity may be required in certain circumstances only

where a court has concluded—after extensive analysis of text, context, and structure—that the "text [is] ambiguous" and that the agency's interpretation would undercut the statutory scheme. *Alabama Ass'n of Realtors*, 141 S. Ct. at 2489; *see, e.g.*, *Utility Air Regulatory Grp.*, 573 U.S. at 321-24; *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 131-60 (2000). In this case, no such ambiguity exists, and no structural feature of the Procurement Act or any other statute suggests the President lacks the authority to require these terms as a condition for contracting with the federal government. The district court thus erred in "imposing limits on [the President's] discretion that are not supported by the text." *Little Sisters of the Poor*, 140 S. Ct. at 2381.

Nor do plaintiffs advance their case by casting the Executive Order as a "public health measure," Opp. 10, or by likening it to a "refus[al] to contract with contractors … who employ individuals over a certain BMI," Opp. 13 (quoting *Kentucky v. Biden*, 2021 WL 5587446, at *7 (E.D. Ky. Nov. 30, 2021)). As noted, many private and public entities have responded to the pandemic by requiring proof of vaccination for all employees. *See supra* p. 4-5. They have done so not in the interests of public health, but to ensure that their workplaces are as economical and efficient as possible in the face of a deadly and contagious disease. Vaccination requirements, moreover, are not new, but "have been common in this nation," *Klaassen v. Trustees of Ind. Univ.*, 7 F.4th 592, 593 (7th Cir. 2021) (Easterbrook, J.), and remain so among employers and educational institutions throughout the plaintiff States. Whatever the outer limits of

the President's Procurement Act authority, measures that are widespread and have been imposed by analogous private entities of all types fall comfortably within the President's power to manage federal contracting.

By the same token, plaintiffs' theory that the Executive Order is unlawful because the President has not previously used his Procurement Act authority to impose a vaccination requirement, Opp. 14-15, disregards the unprecedented nature of the COVID-19 pandemic. Beyond the tragic loss of life, the pandemic has had a devastating effect on employers and the economy. *See* Mot. 12. Nothing in the Procurement Act disables the President from addressing that reality using the same measures available to private entities.

2. Plaintiffs' constitutional arguments fare no better. As every court of appeals to consider the question has held, the Procurement Act does not violate nondelegation principles. The Act's economy-and-efficiency standard supplies an intelligible principle that can be applied "to determine whether [the President's] actions are within the legislative delegation." *AFL-CIO v. Kahn*, 618 F.2d 784, 793 n.51 (D.C. Cir. 1979) (en banc); *see* Mot. 14. Plaintiffs offer no basis to distinguish or reject the reasoning in those cases.

The vaccination requirement also does not "significantly alter the balance between federal and state power," Opp. 13 (quotation marks omitted), because states have no power to set conditions on federal contracts, *see United States v. Virginia*, 139 F.3d 984, 987 (4th Cir. 1998). Plaintiffs respond that vaccination requirements always

"fall[] … within the States' police power." Opp. 12 (quoting *BST Holdings LLC v. OSHA*, 17 F.4th 607, 617 (5th Cir. 2021)). But the reasoning in the case plaintiffs cite has since been rejected by this Court. *See In re: MCP No. 165*, _ F.4th _, 2021 WL 5989357, at *16 (6th Cir. Dec. 17, 2021). That case, moreover, involved an exercise of regulatory authority under the Commerce Clause—not an exercise of the President's proprietary power as a market participant.

3. Plaintiffs maintain that the Executive Order violates the Competition in Contracting Act. Opp. 17. But plaintiffs' reliance on *National Government Services, Inc. v. United States*, 923 F.3d 977 (Fed. Cir. 2019), is misplaced. The policy in *National Government Services*—a cap on the number of contracts a single contractor could receive—prevented certain offerors from winning an award even if they were willing to meet all substantive contract requirements. *See id.* at 980-81. That concern is absent here, where the requirement at issue is directly related to the government's interest in securing economical and efficient procurements. *See* Mot. 16.

II. The remaining factors militate in favor of a stay.

As discussed, plaintiffs have failed to demonstrate standing. And they even more clearly have not demonstrated imminent irreparable injury resulting from the vaccination requirement. Plaintiffs note the costs associated with complying with the challenged provision, Opp. 20-21, but "ordinary compliance costs are typically insufficient to constitute irreparable harm," *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005); *American Hosp. Ass'n v. Harris*, 625 F.2d 1328, 1331 (7th Cir.

1980) (similar). And the costs plaintiffs incur preparing bids for contracts containing the vaccination requirement could be recovered pursuant to the Tucker Act. 28 U.S.C. § 1491(b)(1)-(2).

Also unfounded is plaintiffs' dire prediction that contractor employees will leave their jobs rather than be vaccinated. Opp. 20-21. Plaintiffs identify nothing in the record to support that assertion. Indeed, "the experience of private companies is to the contrary," 86 Fed. Reg. at 63,422, with one recent study reporting that only "1% of all adults … say they left a job because an employer required them to get vaccinated," Kaiser Family Found., *The KFF COVID-19 Vaccine Monitor* (Oct. 28, 2021), https://perma.cc/ENL7-E7HE. In short, as OMB noted, there is "no systematic evidence" that "vaccine mandates may lead some workers to quit their jobs rather than comply … or that it would be likely to occur among employees of Federal contractors." 86 Fed. Reg. at 63,422.

By contrast, enjoining the Executive Order's implementation "will cause significant productivity losses" from "schedule delays," "leave and health care costs for workers who are sick, isolating, or quarantined and unable to perform," and "reduced performance." Field Decl., RE 53-1, Page ID # 921-922, ¶ 9. Contrary to plaintiffs' assertion (Opp. 18-20), these harms to the federal government are far from speculative. For instance, the Department of Energy alone has already reimbursed federal contractors over $550 million in paid leave costs related to COVID-19. U.S. Gov't Accountability Office, GAO-20-662, *Observations on Contractor Paid Leave*

Reimbursement Guidance and Use (Sept. 2020), https://perma.cc/TPF7-9VN4. The harms are also irreparable, as the injunction will hinder "the Federal Government's procurement of essential services"—including, critical "contracts for national security requirements"—"that are required to support the American people." Field Decl., RE 53-1, Page ID # 920, ¶¶ 3, 12. None of those costs will be recoverable if the government prevails in this appeal.[2]

III. Any injunction should be narrowed.

At a minimum, the Court should narrow the injunction. Plaintiffs' response does not even address the government's scope-of-relief arguments.

As the government explained (Mot. 20-21), injunctive relief should not extend beyond the parties to a given suit. Here, because plaintiffs have no capacity to bring suit on behalf of private businesses within their borders, *see supra* p. 2-4, there is no equitable basis to enjoin the federal government from interacting with those businesses as it sees fit. *See Louisiana v. Biden*, 2021 WL 5986815, at *1 (W.D. La. Dec. 16, 2021) (enjoining the challenged vaccination requirements as to contracts held by three States but declining to extend relief to private businesses within those States). Thus, if the Court holds that plaintiffs lack capacity to sue the United States as *parens patriae*, plaintiffs have provided no basis to maintain the injunction in its current form.

[2] Plaintiffs' emphasis on preserving the status quo (Opp. 19) ignores that the government is irreparably harmed from its inability to timely enact policies it considers necessary to further the government's essential work, especially given the ever-changing landscape of the COVID-19 pandemic.

It makes no difference that the Eleventh Circuit recently declined to stay a district court's nationwide injunction against the contractor vaccination requirement, instead setting the case for expedited briefing and argument. *Georgia v. Biden*, No. 21-14269 (11th Cir. Dec. 17, 2021). The *Georgia* preliminary injunction does not insulate the judgment below from review, and—absent relief from this Court—the injunction here will remain in place even if the *Georgia* injunction is ultimately reversed. Accordingly, relief from this Court remains necessary to redress the government's irreparable harm from an overbroad injunction premised on legal errors.

CONCLUSION

The district court's preliminary injunction should be stayed pending appeal, or, at a minimum, stayed to the extent it extends beyond plaintiffs' own federal contracts.

Respectfully submitted,

Of Counsel:

SAMUEL R. BAGENSTOS
General Counsel

ARPIT K. GARG
Deputy General Counsel

SARAH R. SCHEINMAN
Associate Deputy General Counsel

SHRADDHA A. UPADHYAYA
Associate General Counsel
Office of Management and Budget

BRIAN M. BOYNTON
Acting Assistant Attorney General

JOSHUA REVESZ
Counsel to the Assistant Attorney General

MARK B. STERN
ALISA B. KLEIN
DAVID L. PETERS
s/ Anna O. Mohan
ANNA O. MOHAN
Attorneys, Appellate Staff
Civil Division, Room 7533
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-3159

December 2021

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(C) because it contains 2,584 words. This brief also complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

s/Anna O. Mohan
ANNA O. MOHAN

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Anna O. Mohan
ANNA O. MOHAN