No. 22-30019

In the United States Court of Appeals for the Fifth Circuit

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

v.

JOSEPH R. BIDEN, JR., in his official capacity as President of the United States; UNITED STATES OF AMERICA; FEDERAL ACQUISITION REGULATORY COUNCIL; GENERAL SERVICES ADMINISTRATION; ROBIN CARNAHAN, in her official capacity as Administrator of General Services, et al.,
Defendants-Appellants

Appeal from the United States District Court for the Western District of Louisiana No. 1:21-cv-3867 (Hon. Dee D. Drell)

APPELLEES' BRIEF

TYLER R. GREEN
JEFFREY S. HETZEL
CONSOVOY MCCARTHY PLLC
222 S. Main Street, 5th Floor
Salt Lake City, UT 84101
(703) 243-9423

Additional Counsel Listed on Signature Page

JEFF LANDRY
Attorney General
ELIZABETH B. MURRILL
Solicitor General
JOSEPH S. ST. JOHN
Deputy Solicitor General
LOUISIANA DEPTARTMENT OF JUSTICE
1885 N. Third Street
Baton Rouge, LA 70802
(225) 326-6766

June 13, 2022

Counsel for Appellees

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Plaintiffs-Appellees
    a. State of Louisiana
    b. State of Indiana
    c. State of Mississippi
2. Defendants-Appellants
    a. Joseph R. Biden Jr.
    b. Robin Carnahan
    c. Federal Acquisition Regulatory Council
    d. General Services Administration
    e. United States of America
3. Counsel for Plaintiffs-Appellees
    a. Elizabeth Baker Murrill
    b. Joseph Scott St. John
    c. Tyler R. Green

d. Jeffrey S. Hetzel

e. Todd Rokita

f. Thomas M. Fisher

g. Lynn Fitch

h. John V. Coghlan

4. Counsel for Defendants-Appellants

a. Jerry Edwards, Jr.

b. Anna O. Mohan

c. Kevin J. Wynosky

/s/ Elizabeth B. Murrill
Counsel for Appellees

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff States believe that oral argument would facilitate the Court's consideration of this case because it involves important constitutional and statutory questions.

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INTRODUCTION

Congress has said many things in the federal procurement laws, but it has never said that the President can regulate the medical decisions of all employees of all federal contractors. To the contrary, in those laws, Congress has enacted a series of statutory limits and obstacles that make it difficult for the President to do much at all. And independent of those laws, the Constitution forbids the Executive Branch from usurping State authority and the Administrative Procedure Act forbids it from imposing unreasoned, pretextual rules.

The Biden Administration, in the name of universalizing its vaccine agenda, overlooked all these legal limits. It invoked inapplicable provisions of federal law to impose the Contractor Vaccine Mandate at issue in this lawsuit. The Mandate purported to require all federal contractors to mandate that their employees submit to COVID-19 vaccinations or lose their jobs. It was imposed without notice-and-comment rulemaking and without substantive justification. The Mandate is not rooted in federal law and is antithetical to the Constitution. The district court enjoined its enforcement, and this Court should affirm.

JURISDICTION

The district court had subject-matter jurisdiction over this case because it arises under the Constitution and laws of the United States. *See* 28 U.S.C. §§1331, 2201; 5 U.S.C. §§701-706. This Court has jurisdiction under 28 U.S.C. §1292(a)(1).

STATEMENT OF ISSUES

The district court enjoined the Biden Administration's Contractor Vaccine Mandate, which required employees of all federal contractors to submit to the government's vaccination demands. This appeal presents six issues:

1. Whether the Mandate was authorized by Congress.
2. Whether the Mandate was consistent with other statutory provisions governing procurement law.
3. Whether the Mandate was valid under the Tenth Amendment.
4. Whether the Mandate could be enacted without notice-and-comment rulemaking.
5. Whether the Mandate was arbitrary and capricious.
6. Whether equitable factors favor a preliminary injunction.

STATEMENT OF THE CASE

I. THE FEDERAL CONTRACTING FRAMEWORK ESTABLISHED BY CONGRESS.

After World War II, Congress enacted the Federal Property and Administrative Services Act "to provide the Federal Government with an economical and efficient system for ... [p]rocuring and supplying property and nonpersonal services, ... establish[ing] ... pools or systems for transportation of Government personnel, ... [and] managing [] public utility services." 40 U.S.C. §101(1) ("Procurement Act"). The motivating purpose behind the Act was that "the manner in which federal agencies were entering into contracts to procure goods and services was not economical and efficient"—"not that personnel executing duties under nonpersonal-services contracts were themselves performing in an uneconomical and inefficient manner." *Kentucky v. Biden*, 23 F.4th 585, 606 (6th Cir. 2022).

Because the "lack of centralized coordination of procurement efforts" resulted in "many agencies enter[ing] duplicative contracts supplying the same items and creating a massive post-war surplus," Congress enacted the Procurement Act to "'integrate[] and centraliz[e] procurement responsibility to prevent agencies from 'unnecessary

buying' of 'the same articles in the same markets.'" *Id.* (citing S. Rep. 1413 at 3). To prevent such waste and duplication, Congress authorized the President to prescribe "policies and directives that the President considers necessary to carry out" the Procurement Act. 40 U.S.C. §121(a). Congress did not authorize the President to issue orders with the force or effect of law. Instead, it vested that power to "prescribe regulations" with the GSA Administrator. *Id.* §121(c).

In 1988, to remedy perceived flaws in the existing procurement system, Congress established the Federal Acquisition Regulation Council "to assist in the direction and coordination of Government-wide procurement policy and Government-wide procurement regulatory activities in the Federal Government." Pub. L. No. 100-679, §3, 102 Stat. 4056, codified at 41 U.S.C. §1302(a). Subject to exceptions not relevant here, the FAR Council has jurisdiction to issue "a single Government-wide procurement regulation." *Id.* §1303(a)(1). The FAR Council's jurisdiction to issue such regulations is exclusive. *Id.* §1303(a)(2).

The later-enacted Procurement Policy Act further constrains agencies' ability to issue procurement regulations by requiring that any "procurement policy, regulation, procedure, or form"—whether issued by

the FAR Council or by an individual agency for that agency—is subject to notice-and-comment procedures. *Id.* §1707(a), (b). The notice-and-comment procedures may be waived only if "urgent and compelling circumstances make compliance with the requirements impracticable." *Id.* §1707(d).

II. THE BIDEN ADMINISTRATION'S VACCINE POLICY.

The Biden Administration's initial attempts to address COVID-19 focused on measures short of mandating vaccines, and expressly disclaimed an intention to impose a vaccine mandate. *See, e.g.,* Press Briefing by Press Secretary Jen Psaki, July 23, 2021, bit.ly/3pWnJVr (mandating vaccines "not the role of the federal government"). But as courts blocked several Administration policies short of a vaccine mandate as beyond the Executive's authority—and as, in his own words, the President's "patience" began "wearing thin" with those "who haven't gotten vaccinated," White House, Remarks by President Biden on Fighting the COVID-19 Pandemic (Sept. 9, 2021), bit.ly/3Ey4Zj6—the Administration decided to take an unprecedented step: impose federal vaccine mandates.

So in September 2021, President Biden announced requirements compelling most of the adult population of the United States to be vaccinated. *Id*. Those requirements were part of President Biden's broader plan to "increase vaccinations among the unvaccinated with new vaccination requirements." *Id.*; *see also* The White House, National Covid-19 Preparedness Plan, bit.ly/3adkMXx. The White House said that these vaccinations requirements would bring about "a stronger economy." The White House, Vaccination Requirements Are Helping Vaccinate More People, Protect Americans from COVID-19, and Strengthen the Economy 4, 18 (Oct. 7, 2021), bit.ly/3lorbp0.

One part of President Biden's vaccination agenda included the actions at issue here. The President announced that he would issue an Executive Order requiring all federal contractors to be vaccinated. "If you want to work with the federal government and do business with us, get vaccinated. If you want to do business with the federal government, vaccinate your workforce." Biden Sept. 9, 2021 Remarks.

III. THE CONTRACTOR VACCINE MANDATE.

The challenged actions in this case comprise four discrete actions referred to collectively hereinafter as the "Contractor Vaccine Mandate."

A. Executive Order 14042.

On September 9, 2021, President Biden issued Executive Order 14042. The Executive Order directs agencies to ensure that "contracts and contract-like instruments … include a clause … that the contractor or subcontractor shall, for the duration of the contract, comply with all guidance for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force" when such guidance is approved by the OMB Director. Ensuring Adequate COVID Safety Protocols for Federal Contractors, 86 Fed. Reg. 50,985, 50,985 (Sept. 14, 2021).

The Executive Order also directs the Task Force to develop guidance about COVID-19 for federal contractors and subcontractors. Invoking 3 U.S.C. §301, the Executive Order further purports to delegate to the OMB Director the President's power under the Procurement Act to determine whether the Task Force Guidance will promote economy and efficiency in federal procurement. *Id.* at 50,985-86.

The Executive Order further instructs the FAR Council to "amend the Federal Acquisition Regulation to provide for inclusion in Federal procurement solicitations and contracts subject to this order" the contract clause relating to COVID-19, and instructs agencies to implement the

COVID-19 contract clause in contracts not covered by the FAR. *Id.* at 50,986. The Executive Order specifies that it applies to contracts entered into, renewed, or with an option to be exercised on or after October 15, 2021. *Id.* at 50,987. It exempts contracts with a value below "the simplified acquisition threshold," typically $250,000. *Id.* at 50,986-987; FAR §2.101.

B. The Task Force Guidance.

President Biden had created the Safer Federal Workforce Task Force in January 2021. *Kentucky*, 23 F.4th at 590. On September 24, 2021, the Task Force issued a "guidance document." The Guidance requires federal contractors and subcontractors to: (1) require all covered employees to be vaccinated except when an employee is legally entitled to an accommodation; (2) comply with CDC guidance for masking and physical distancing at workplaces; and (3) designate a compliance coordinator. COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors (Sept. 24, 2021), bit.ly/3jTHSHJ.

The Guidance clarifies that prior COVID-19 infection evidenced by an antibody test does not satisfy the vaccination mandate. *Id.* The Guidance also states that even employees who work outdoors are subject

to the requirements. *Id.* The compliance deadline for full vaccination was January 4, 2022. The White House, Background Press Call on OSHA and CMS Rules for Vaccination in the Workplace (Nov. 3, 2021), bit.ly/3k1zVAz. The Guidance states that the Task Force will consider updating the Guidance "as warranted by the circumstances of the pandemic and public health conditions." COVID-19 Workplace Safety, *supra*, at 2. Aside from conclusory statements about decreasing the spread of COVID-19 and a reference to the Executive Order, the Guidance contains no substantive justification.

C. The FAR Council Guidance.

On September 30, 2021, the FAR Council, relying on the Executive Order, issued a guidance document "encourag[ing]" agencies "to make ... deviations" from the FAR to be "effective until the FAR is amended." Issuance of Agency Deviations to Implement Executive Order 14042 (Sept. 30, 2021) ("FAR Guidance"), bit.ly/3bvdizB. A deviation is a clause that is inconsistent with the FAR. FAR §1.401. The FAR prescribes procedures for making individual deviations and class deviations. *Id.* §§1.403-04. But the FAR itself prescribes procedures for deviations and makes clear that a deviation is not an appropriate procedure to implement a government-wide procurement policy. It instructs agencies

that they "should propose a FAR revision" when they "know[] that it will require a class deviation on a permanent basis." FAR §§1.401, 403-04; 48 C.F.R. §§1.401, 403-04. The FAR Guidance provides no rationale for the deviation order and relies only upon Executive Order 14042.

D. The OMB Rule.

Finally, the OMB Director determined that the Task Force Guidance "will improve economy and efficiency." 86 Fed. Reg. 63,418 (Nov. 16, 2021) ("OMB Rule").[1] The OMB Rule, which consists largely of a republication of the Task Force Guidance, includes only conclusory and unsubstantiated justifications created to bolster the Rule for litigation. *Kentucky*, 23 F.4th at 590. The Rule "also includes some information in its final pages about how vaccination reduces COVID's net costs—for instance, by reducing absenteeism" and goes on to "pronounce[] 'OMB's expert opinion that the Guidance will promote economy and efficiency in Federal Government procurement.'" *Id.* at 590-91.

[1] OMB initially published in September a perfunctory determination that the Task Force Guidance would improve economy and efficiency. *See* 86 Fed. Reg. 53,691-692 (Sept. 28, 2021). After Plaintiff States filed this lawsuit, the government rescinded the initial guidance and issued the challenged OMB Rule. *See* 86 Fed. Reg. at 63,418.

IV. THE IMPACT OF THE MANDATE ON THE STATES.

Because Plaintiff States maintain numerous federal contracts with the federal government and intend to continue contracting with the federal government, they are directly subject to the Contractor Vaccine Mandate.

For example, Louisiana routinely oversees contracts implementing federally funded projects for hurricane and flood resiliency and recovery, housing and community development funding, health care funding, education funding, and research through its three university systems. Mississippi routinely oversees contracts implementing federally funded projects for, among other things, public safety, health care funding, education funding, and research through its university systems. And Indiana's Purdue University received $387.3 million in federal awards in 2021. ROA.171. Instead of a vaccine requirement, Purdue has implemented the Protect Purdue Plan, which focuses on testing and voluntary incentives to be vaccinated. ROA.172. Appellants have notified Indiana and its state entities such as Purdue that they will be required to amend current contracts to incorporate the Mandate. ROA.172-73.

Louisiana and Mississippi have also entered into cooperative agreements with the Department of Justice through which the Department provides funds to and supports the two States' respective Internet Crimes Against Children Task Forces. *See* ROA.160-62, 167-68. The ICAC Task Forces rely on this funding and support to protect children by preventing, investigating, and prosecuting child exploitation crimes. *Id*.

The Plaintiff States have already identified several communications sent by federal agencies demanding that State agencies, boards, commissions, or employees submit to the Mandate, committing the State and exposing it to the loss of funds or clawback of future funds. ROA.160-73. Louisiana, Mississippi, or their state entities currently have contracts subject to renewal or option, which Appellants have said they will not exercise unless the States submit to the Contractor Vaccine Mandate. All three States will continue to pursue government contracts in the future that will be subject to the Contractor Vaccine Mandate. State entities such as Mississippi State University and the Mississippi Institute of Higher Learning have made clear that they "really have no choice but to comply due to the research dollars involved and the jobs

those dollars create." Rowe, *Two MS universities will not follow Biden's COVID-19 shot rule*, Clarion Ledger (Oct. 29, 2021), bit.ly/3zAKvqA.

SUMMARY OF ARGUMENT

Congress never authorized the Contractor Vaccine Mandate. Because the Mandate forces a medical procedure on over one-fifth of the American workforce, it is of "vast economic and political significance." *NFIB v. OSHA*, 142 S. Ct. 661, 665 (2022). It therefore triggers the Major Questions Doctrine, which forbids executive rulemaking unless Congress "clearly" authorized it. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014). In the Procurement Act's statement of purpose to "provide the Federal Government with an economical and efficient system" for procurement activities, 40 U.S.C. §101, Congress did not clearly authorize the federal government to force an irreversible medical procedure on millions of employees. The Mandate separately implicates three more clear-statement rules, none of which are satisfied by the Procurement Act's vague pronouncement.

Congress also designed procurement law to prevent this sort of thing. It vested the authority over "a single Government-wide procurement regulation" in the FAR Council, not in OMB or the President. 41 U.S.C. §1303(a)(1). It gave the President power to issue

only "policies and directives," not binding rules. 40 U.S.C. §121(a). It required federal agencies to provide for "full and open competition through the use of competitive procedures" in procurement, rather than anti-competitive procedures that disqualify contractors who cannot comply with a medical rule but remain exceptionally capable of providing goods or services. 41 U.S.C. §3301(a)(1). And it prohibited agencies from enacting procurement rules without notice-and-comment unless "urgent and compelling circumstances" exist. 41 U.S.C. §1707(d). Here, they do not.

If Congress had authorized the Mandate, it is unconstitutional. Because "the regulation of health and safety matters is primarily, and historically, a matter of local concern," *Hillsborough Cty., Fla. v. Automated Med. Lab'ys, Inc.*, 471 U.S. 707, 719 (1985), "our Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States.'" *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurral). The Contractor Vaccine Mandate unconstitutionally usurps that power because it creates a "*de facto* authority to dictate public health measures for sizeable portions of the plaintiff states' populations." *Kentucky*, 23

F.4th at 610 n.17. It also unconstitutionally "conscript[s] state [agencies] into the national bureaucratic army" by coercing them to enact and enforce vaccine mandates. *NFIB v. Sebelius*, 567 U.S. 519, 585 (2012).

Finally, the Mandate is arbitrary and capricious because it was enacted based on conclusory recitations void of substantive reasoning, ignored costs to the States, was a pretext for a massive vaccination agenda lacking any connection with federal contracting, and failed to account for necessary considerations such as reliance interests and the effects of widespread resignations.

For these reasons, and because the equitable factors plainly warrant an injunction, this Court should affirm.

STANDARD OF REVIEW

This Court "review[s] a preliminary injunction for abuse of discretion, reviewing findings of fact for clear error and conclusions of law de novo." *Texans for Free Enter. v. Texas Ethics Comm'n*, 732 F.3d 535, 537 (5th Cir. 2013). "Under the clearly erroneous standard, th[e] court upholds findings by the district court that are plausible in light of the record as a whole." *Moore v. Brown*, 868 F.3d 398, 403 (5th Cir. 2017). "[A]n appellate court may not reverse" district court fact findings "even

if it is convinced that it would have weighed the evidence differently in the first instance." *Texas v. Biden*, 20 F.4th 928, 966 (5th Cir. 2021).

And of course, this Court may "affirm the district court's judgment on any grounds supported by the record." *Texas v. United States*, 809 F.3d 134, 178 (5th Cir. 2015).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT THE CONTRACTOR VACCINE MANDATE IS LIKELY UNLAWFUL.

A. The Mandate Exceeds the Executive Branch's Authority.

The district court's injunction should be upheld on the ground that the Mandate is beyond the Executive Branch's powers. The district court acknowledged a myriad of statutory issues with the Mandate before enjoining it on constitutional grounds. Op. 16-17, 20-22. "Although the district court enjoined [the Mandate] on the basis of the [Tenth Amendment], 'it is an elementary proposition, and the supporting cases too numerous to cite, that this court may affirm the district court's judgment on any grounds supported by the record.'" *Texas*, 809 F.3d at 178. If this Court would like to avoid the constitutional issues presented in this case, the most straightforward ground for affirmance is that

Congress never authorized anything resembling the Contractor Vaccine Mandate.

1. The Major Questions Doctrine applies.

This case begins and ends with the Major Questions Doctrine. Because "[a]dministrative agencies are creatures of statute[, t]hey accordingly possess only the authority that Congress has provided." *NFIB. v. OSHA*, 142 S. Ct. at 665. And agencies can "exercise powers of vast economic and political significance" only if Congress has clearly authorized them to do so. *Id.* Because the Contractor Vaccine Mandate is indisputably an action of vast significance and there is no statute expressly authorizing it, it is beyond the federal government's powers.

The Contractor Vaccine Mandate's vast impact on the economy and society cannot seriously be questioned. According to the Department of Labor's own statistics, "workers employed by federal contractors" make up about "one-fifth of the entire U.S. labor force." *Kentucky*, 23 F.4th at 591 (citing Dep't of Labor, History of Executive Order 11246, perma.cc/6ZXJ-WGR8). And as the district court found, "[i]t is undisputed that the national government has nearly $100 million dollars in contracts with the States of Louisiana, Mississippi, and Indiana." Op.

13. Moreover, the Mandate sweeps in not only employees directly performing a contract, but "also sweeps in employees merely working 'in connection with' such contracts, and even 'employees of covered contractors who are not themselves working on or in connection with a covered contract.'" *Kentucky*, 23 F.4th at 591. Indeed, "[g]iven" the Mandate's "expansive scope," the Sixth Circuit has noted that the trouble "is not figuring out who's 'covered,'" but figuring out who "could possibly *not* be covered." *Id.* Like the OSHA Mandate, "[t]his is no 'everyday exercise of federal power.'" *NFIB v. OSHA*, 142 S. Ct. at 665.

Appellants try to portray the Mandate as a mine-run procurement measure to distinguish it from "regulatory" measures. Br. 27-28. But, as discussed above, the Mandate can be considered a purely procurement measure only by "ignoring its real-world effects, which would include a *de facto* authority to dictate public health measures." *Kentucky*, 23 F.4th at 610 n.17. And there are reasons that the Contractor Vaccine Mandate falls even more comfortably within the Major Questions Doctrine than the OSHA Mandate did. For one, OSHA had a "long history of regulating workplace safety" under the Occupational Safety and Health Act. *Id.* at 607. But no such authority has been exercised pursuant to the

Procurement Act. *See id.* ("[T]he government has propounded no relevant history showing that it has ever wielded the Property Act to mandate 'vaccination and medical examinations' or to 'control[ ] the spread of disease.'").

In downplaying the significance of the Mandate, Appellants re-urge the same four examples that the Sixth Circuit rejected as irrelevant to the Contractor Vaccine Mandate: "instances in which the federal government said federal contractors (1) could not discriminate, (2) had to abide by wage and price [rules], (3) had to hang posters advising employees that they could not be forced to join a union, and (4) had to confirm employees' immigration status." *Id.* But none of these examples "comes even *close* to the deployment of the Property Act to mandate a medical procedure for one-fifth (or more) of our workforce." *Id.* at 607-08.

Instead, all four instances have a "close nexus" to ordinary procurement activities such s "hiring, firing, and management of labor." *Id* at 607 (citing *AFL-CIO v. Kahn*, 618 F.2d 784, 793 (D.C. Cir. 1979) (en banc)). They are "modest, 'work-anchored' measure[s] with an inbuilt limiting principle." *Id.* at 608. By contrast, the Contractor Vaccine Mandate is not "even 'anchored' to the work of federal contractors." *Id.*

Far from handing them the blank check in procurement that Appellants read into *Kahn*—their leading precedent—the D.C. Circuit there stressed that the Procurement Act "does not write a blank check for the President to fill in at his will." *Kahn*, 618 F.2d at 793; *see also id.* at 797 (Tamm, J., concurring) ("Lest we later be construed as having broadly interpreted the Procurement Act, I write separately only to emphasize my belief that the opinion we issue today is a narrow one. It does not allow the President to exercise powers that reach beyond the Act's express provisions.").

Additionally, the lack of historical precedent is starker than it was with respect to the OSHA Mandate. Before the Contractor Vaccine Mandate, "reducing absenteeism" never was a rationale deployed under the Procurement Act. *See Kentucky*, 23 F.4th at 590. And the Act had never been deployed to address viral transmission in the workplace. By contrast, OSHA had in the past acted to promote workplace safety from viruses. Although "there is a first time for everything ... sometimes 'the most telling indication of [a] severe constitutional problem ... is the lack of historical precedent.'" *NFIB**Error! Bookmark not defined.** *v. Sebelius*, 567 U.S. at 549.

Finally, the breadth of the authority claimed by the government demonstrates that the Mandate implicates the Major Questions Doctrine. There is simply no limiting principle to the government's authority under Appellants' interpretation of the Procurement Act. As the Sixth Circuit observed:

> Even vaccinated employees may contract the flu (or COVID-19) at family gatherings, concerts, sporting events, and so on. May the President, in the name of the Property Act, mandate that covered employees also wear masks in perpetuity at each of those events to reduce the chances of contracting an airborne communicable disease and later spreading it to coworkers, thus creating absenteeism? Such off-the-job conduct very well may threaten to cause on-the-job absenteeism. So why, if the government's interpretation is correct, does the Property Act not confer a de facto police power upon the President to dictate the terms and conditions of one-fifth of our workforce's lives?

Kentucky, 23 F.4th at 608. The government still "has never reckoned with the implications of its position or proposed any limiting principle." *Id.* For all these reasons, the Major Questions Doctrine applies.

2. There is no clear statement of congressional authority for the Contractor Vaccine Mandate.

The Major Questions Doctrine reflects the Supreme Court's long-held "expect[ation that] Congress [will] speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance." *Util. Air Regul. Grp.*, 573 U.S. at 324. It follows that the Executive cannot

"bring about an enormous and transformative expansion in [its] regulatory authority without clear congressional authorization." *Id.*; *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (rejecting Executive claim to "jurisdiction to regulate an industry constituting a significant portion of the American economy" absent clear congressional authorization). Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001). Yet Appellants identify no clear statutory authority authorizing the Contractor Vaccine Mandate. Instead, the government relies upon a federal contracting statute that implicates no public health concerns at all.

Tellingly, Appellants point only to the Procurement Act's statement that its purpose is to "provide the Federal Government with an economical and efficient system" for procurement activities. Br. 17 (quoting 40 U.S.C. §101). But a prefatory purpose statement like this is not a grant of authority. *See D.C. v. Heller*, 554 U.S. 570, 578 (2008) ("[A]part from [a] clarifying function, a prefatory clause does not limit or

expand the scope of the operative clause."); *see also Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 n.9 (D.C. Cir. 1995).

Applying these principles, the Sixth Circuit rejected the government's reliance on §101's statement of purpose: "Statements of purpose may be useful in construing enumerated powers later found in a statute's operative provisions[,] [b]ut statements of purpose are not themselves those operative provisions, so they cannot confer freestanding powers upon the President unbacked by operative language elsewhere in the statute." *Kentucky*, 23 F.4th at 604 (citing *Sturgeon v. Frost*, 139 S. Ct. 1066, 1086 (2019); *Gundy v. United States*, 139 S. Ct. 2116, 2127 (2019)). Yet the government here "relies almost exclusively on §101, leaving unexplained the link between its statement-of-purpose language and some other operative provision of the Property Act." *Id.* Such a perfunctory statement of purpose whose legal operation is questionable at best is not the clear statement required to authorize the Mandate.

Even if it did constitute a grant of authority, the term "economical and efficient system" cannot bear the weight Appellants try to place on it. The Procurement Act "does not write a blank check for the President to fill in at his will." *Kahn*, 618 F.2d at 793. Appellants must demonstrate

a "nexus" between economy and efficiency and the Mandate. *Chrysler Corp. v. Brown*, 441 U.S. 281, 304, 306 (1979). *Chrysler* confirms as much by rejecting the Executive's reliance on the Procurement Act to require disclosure of woman- and minority-employment statistics because "nowhere in the Act is there a *specific reference to employment discrimination*." *Id.* at 306 n.34. Just as the Act contains no reference to remedying employment discrimination, it never remotely refers to contractor vaccination or public health more generally. *See also Liberty Mut. Ins. Co. v. Friedman*, 639 F.2d 164, 171 (4th Cir. 1981) (President lacks Procurement Act authority to impose affirmative action mandate on subcontractors).

Appellants hardly even try to connect the Procurement Act's stated purpose and the Mandate. Instead, they rest on the conclusory statement, unsupported by any citation, that requiring vaccination will reduce "absenteeism and decreas[e] labor costs for contractors and subcontractors working on or in connection with a Federal Government contract." 86 Fed. at 53,692. This fails to carry Appellants' burden of identifying a "specific reference to" vaccination, *Chrysler Corp.*, 441 U.S. at 306 n.34, and making "findings that suggest what percentage of the

total price of federal contracts may be attributed" to the effect of COVID-19 vaccination, *Liberty Mut. Ins. Co.*, 639 F.2d at 171. Because "[t]he connection ... is simply too attenuated to allow a reviewing court to find the requisite connection between procurement costs and social objectives," the Mandate is not authorized by the Procurement Act. *Id.*

Appellants' lack of authority to set social policy through the Act's general-purpose statement is confirmed by Congress's specific directives setting social policies in procurement. 41 U.S.C. §8302(a)(1) (requiring the procurement of American-made materials unless the "head of the Federal agency . . . determines their acquisition to be inconsistent with the public interest" or "their cost to be unreasonable"); *id.* §6703(1) (requiring contractors to pay employees a minimum wage set by the Secretary of Labor); *see also* 34 U.S.C. §10102(a)(6) (discussing the Department of Justice's authority to "plac[e] special conditions on all grants"). Congress knows how to set social policy through procurement—and it has not authorized the President to use procurement authority to advance the public-health goal of increasing vaccination. *Cf. W. Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 99 (1991).

Additionally, §101 is not, as Appellants portray, a blank check authorizing the President to take any necessary measures to procure economical and efficient nonpersonal services. Instead, it "permits him to employ an 'economical and efficient *system*'" to "*procur[e]*" those nonpersonal services. *Kentucky*, 23 F.4th at 604. As the Sixth Circuit observed in *Kentucky*, the plain meaning of these terms is to authorize the President to "implement an 'economical and efficient' method of contracting—a 'system,' in other words—to obtain nonpersonal services." *Id.* But this provides "no textual warrant to suggest that *after* the President or his agents have 'economical[ly] and efficient[ly]' acquired those services that they then may impose whatever medical procedure deemed 'necessary' on the relevant services personnel to make *them* more 'economical and efficient.'" *Id.*

Finally, Appellants' reliance on the "performing related functions including contracting" clause of §101 does not extend to imposing ex-post Mandates. For one, the "'contracting' within §101 refers to the government's initial entry into a contractual agreement to procure nonpersonal services—not all the subsequent tasks performed in connection with the contract." *Id.* at 605 (citing *Contracting*, 2 *The Oxford*

English Dictionary 914 (1933)). Additionally, construing "contracting" as covering subsequent performance makes no sense in the statutory context because such subsequent actions "are 'perform[ed]' by the private employees of the contractors whom the government procured—not by the government itself." *Id.*

Accordingly, §101 unambiguously "authorizes the President to implement systems making *the government's* entry into contracts less duplicative and inefficient" and unambiguously "does not authorize him to impose a medical mandate directly upon contractor employees themselves because he thinks it would enhance *their* personal productivity." *Id.* Even shorn of the clear statement rules, the Procurement Act unambiguously does not authorize the Mandate. The Procurement Act is "a wafer-thin reed on which to rest such sweeping power." *Alabama Ass'n of Realtors*, 141 S. Ct. at 2489.

3. Three more independent rules of statutory interpretation counsel the same result.

The Contractor Vaccine Mandate triggers three additional clear-statement rules. Any of the three suffices to establish that the Mandate exceeds the Executive Branch's authority.

First, Congress will "not be deemed to have significantly changed the federal-state balance" unless it "conveys its purpose clearly." *United States v. Bass*, 404 U.S. 336, 349 (1971); *see also Boelens v. Redman Homes, Inc.*, 748 F.2d 1058, 1067 (5th Cir. 1984) ("Absent a clear statement of intention from Congress, there is a presumption against a statutory construction that would significantly affect the federal-state balance.").

The Mandate both intrudes upon the States' traditional police power over public health, *see, e.g.*, *Hillsborough Cty.,* 471 U.S. at 719 ("[T]he regulation of health and safety matters is primarily, and historically, a matter of local concern."), and commandeers States to enforce a federal policy, *NFIB v. Sebelius*, 567 U.S. at 577 (the federal government cannot "commandeer[] a States' ... administrative apparatus for federal purposes"). Accordingly, nothing short of an unambiguous directive in the Act is sufficient to authorize the Mandate. *See Bond v. United States*, 572 U.S. 844, 857-58 (2014) ("'[I]t is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' the 'usual constitutional balance of federal and state

powers.'"). Congress provided no such authority in the Procurement Act. *See Kentucky*, 23 F.4th at 609-10; *see also BST Holdings*, 17 F.4th at 617.

Second, because the Executive cannot unilaterally "push the limit of congressional authority," courts require a clear statement before adopting an Executive interpretation that would raise serious constitutional issues. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engr's*, 531 U.S. 159, 172-73 (2001). The Contractor Vaccine Mandate pushes the federal government's limits under both the Commerce Clause, *see NFIB**Error! Bookmark not defined.** *v. Sebelius*, 567 U.S. at 558 ("[T]he Commerce Clause is not a general license to regulate an individual from cradle to grave."), and the Spending Clause, *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously," so "States [can] exercise their choice knowingly"). Because the Executive's "administrative interpretation of [the Act] invokes the outer limits of Congress' power" under the Commerce Clause and Spending Clause, the Court must demand "a clear indication that Congress intended that result." *Solid Waste Agency of N. Cook Cty.*, 531 U.S. at 172.

Third, if the Procurement Act is as broad as required to authorize the Mandate, it would raise grave concerns under the Nondelegation Doctrine. Congress must clearly delegate power to the Executive to address issues of "deep economic and political significance." *King v. Burwell*, 576 U.S. 473, 486 (2015). Vaccine mandates are the very definition of such an issue. The Contractor Vaccine Mandate affects hundreds of billions of dollars in federal contracts, *see, e.g.*, Federal Government Awards Record-Breaking $145.7 Billion in Contracting to Small Businesses, U.S. Small Business Admin. (July 28, 2021), bit.ly/3H0Zqfd, and reaches one-fifth of the entire United States workforce, *see* Dep't of Labor, History of Executive Order 11246, Office of Contract Compliance Programs, bit.ly/2ZEmLC8. Accordingly, "the sheer scope of [Appellants'] claimed authority under [the Act] counsel[s] against the Government's interpretation." *Alabama Ass'n of Realtors*, 141 S. Ct. at 2489; *see also Kentucky*, 23 F.4th at 607 n.14 ("If the government's interpretation were correct—that the President can do essentially whatever he wants so long as he determines it necessary to make federal contractors more 'economical and efficient'—then that certainly would present non-delegation concerns."); *BST*, 17 F.4th at 611.

The statutory authorization of an "economical and efficient system" simply cannot run this gauntlet of clear statement rules. And the Contractor Vaccine Mandate is an unprecedented use of the President's power under FPASA. If Congress wishes to alter federal-state relations; press its Article I powers; and regulate an area of immense political, social, and economic importance, it must do so clearly. "It is up to Congress," not Appellants, "to decide whether the public interest merits further action here." *Alabama Ass'n of Realtors*, 141 S. Ct. at at 2490.

B. The Mandate Violates the Statutory Framework Governing Federal Procurement.

The Mandate also violates several other independent restraints in federal law.

First, the Mandate violates 41 U.S.C. §1303(a), which vests exclusive authority in the FAR Council to "issue and maintain ... a single Government-wide procurement regulation." Section 1303 is clear that "[o]ther regulations relating to procurement issued by an executive agency" must be "limited to" agency-specific regulations. *Id.* §1303(a)(2). By mandating that OMB approve a government-wide procurement regulation, and by approving such a regulation, the Executive Order and OMB Rule violate §1303(a)'s exclusive vesting of such power in the FAR

Council. Neither OMB nor the Task Force are the FAR Council and thus they have acted beyond their statutory authority and in conflict with 41 U.S.C. §1303(a) by approving and promulgating a government-wide procurement regulation. The Executive Order's attempt to circumvent §1303(a) by delegating power to the OMB director does not cure this violation; the President himself lacks power to issue government-wide procurement regulations. *See, e.g.*, U.S. Dep't of Justice, Office of Legal Counsel, Centralizing Border Control Policy Under the Supervision of the Attorney General, 26 Op. OLC 22, 23 (2002) ("Congress may prescribe that a particular executive function may be performed only by a designated official within the Executive Branch, and not by the President.").

Second, the Mandate violates the Procurement Act's vesting of authority in the President to issue only "policies and directives" to the Executive Branch (as opposed to regulations binding upon private contractors and subcontractors). 40 U.S.C. §121(a). The Contractor Vaccine Mandate imposes obligations upon private parties and is thus a "regulation" rather than a "policy or directive." The very same statute demonstrates the difference in meaning between the power to issue

policies and directives and the power to issue regulations, for Congress has separately vested the GSA Administrator with the power to "prescribe regulations." *Id.* §121(c). And elsewhere in the Procurement Act, Congress specifically vested the President with power to "prescribe regulations" to carry out a provision related to motor vehicle pools, 40 U.S.C. §603, demonstrating both that there is a difference in meaning between the terms "policy or directive" and "prescribe regulation," *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."), and that Congress knows how to vest the President with power to prescribe regulations binding on private parties but declined to do so in §121, *cf. W. Virginia Univ. Hosps.*, 499 U.S. at 99.

Appellants assert that the "policies and directives ... necessary to carry out this subtitle" provision of §121 broadly permits the President to dictate medical decisions to employees of federal contractors. Br. 17, 31. But, as in *Kentucky*, "the government reads too much into §121(a)," which confers authority only to "carry out" powers that the Procurement Act actually confers. *Kentucky*, 23 F.4th at 606. As discussed above, the

Act nowhere confers power for a vaccine mandate. "So while [the President] may enjoy a modest valence of necessary and proper powers surrounding those powers enumerated in §101, he cannot wield a supposedly necessary and proper power without showing how it clearly stems from a power enumerated." *Id.* Because there is no standalone power to impose a vaccine mandate anywhere in the Procurement Act, §121 does not vest the President with any independent authority to do so in carrying out the Act.

Third, the Mandate violates the Competition in Contracting Act, which requires federal agencies to provide for "full and open competition through the use of competitive procedures" in procurement. 41 U.S.C. §3301(a)(1). By categorically excluding entities that do not comply with the Mandate, the federal government "effectively exclude[es] an offeror from winning an award, even if that offeror represents the best value to the government." *Nat'l Gov't Servs., Inc. v. United States*, 923 F.3d 977, 990 (Fed. Cir. 2019). This violates the Competition Act's mandate of full and open competition, which Congress expressly applied to the President's Procurement Act authority. *See* 40 U.S.C. §121(a) (requiring

"policies" issued by the President under FPASA to be "consistent with this subtitle"); *id.* §111 (defining "this subtitle" to include §3301).

C. The Mandate Unconstitutionally Usurps State Power.

The Contractor Vaccine Mandate is an unprecedented federal encroachment on State police power. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. No clause of the Constitution authorizes the federal government to impose the Contractor Vaccine Mandate.

Public health—and vaccinations in particular—have long been recognized as an aspect of police power reserved to the States, not the federal government. *See, e.g.*, *Jacobson v. Commonwealth of Mass.*, 197 U.S. 11, 24 (1905); *see also Hillsborough Cty.*, 471 U.S. at 719 ("[T]he regulation of health and safety matters is primarily, and historically, a matter of local concern."); *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. at 1613 (Roberts, C.J., concurral) ("[O]ur Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect'"); *Florida v. Becerra*, 2021 WL 2514138, at *15 (M.D. Fla. June 18) ("The history shows ... that the public health power ... was traditionally

understood—and still is understood—as a function of state police power.").

Appellants assert that the Tenth Amendment provides no protection to traditional State police powers. But federal actions that encroach powers long held by the States are consistently held to be beyond the federal government's powers under the Commerce Clause. This Court's holding in *BST Holdings v. OSHA* is on point. 17 F.4th 604 (5th Cir. 2021). In examining the OSHA Vaccine Mandate, this Court held that "a person's choice to remain unvaccinated and forgo regular testing is noneconomic inactivity." *Id.* at 617. This Court also held that "to mandate that a person receive a vaccine or undergo testing falls squarely within the States' police power." *Id.* Although the "Commerce Clause power may be expansive," this Court affirmed that it was transgressed by federal attempts to "regulate noneconomic inactivity traditionally within the States' police power." *Id.*

Similarly, the Sixth Circuit examined the Contractor Mandate and noted its tension with the Tenth Amendment in *Kentucky v. Biden*, 23 F.4th 585. The court there observed that "the power to regulate the public health has been 'part and parcel' of states' 'traditional police power'" since

the Founding and that "'the States, not the Federal Government, are the traditional source of authority over safety, health, and public welfare." *Id.* at 609. Beyond that, the Supreme "Court has also reiterated this point twice 'in the specific context of compulsory vaccination.'" *Id.* (citing *Zucht v. King*, 260 U.S. 174, 176 (1922); *Jacobson*, 197 U.S. at 24-25). Accordingly, the Sixth Circuit recognized that "[w]hat the contractor mandate seeks to do, in effect, is to transfer this traditional prerogative from the states to the federal government under the guise of a measure to make federal contracting more 'economical and efficient.'" *Id.*

Because the Contractor Mandate usurps the States' traditional police power, and does so without clear authorization from Congress, the district court correctly held that the federal government exceeded its authority and violated the Tenth Amendment. *See BST Holdings*, 17 F.4th at 617 ("[T]he Mandate likely exceeds the federal government's authority under the Commerce Clause because it regulates noneconomic inactivity that falls squarely within the States' police power.").

Appellants only answer is, in effect, that contracting is different from the OSHA Mandate because contracting is not within the States' traditional police power over compulsory vaccination. *See, e.g.*, Br. 35.

But as the Sixth Circuit observed in rejecting this same argument, "the government frames the issue at the wrong level of generality." *Kentucky*, 23 F.4th at 609-10. Although States lack "power to dictate what and how much of something the federal government may buy," they "certainly have a traditional interest in regulating public health and, specifically, in determining whether to impose compulsory vaccination on the public at large." *Id.* at 610. It is only by "ignoring [the Mandate's] real-world effects, which would include a *de facto* authority to dictate public health measures for sizeable portions of the plaintiff states' populations," that Appellants can claim that the Mandate does not intrude on State police powers. *Id.* at 610 n.17.

The Supreme Court has made clear that "agencies cannot skirt the federalism implications of their actions by pretending that 'decades-old statute[s]' somehow 'indirectly' grant them novel powers to intrude into 'particular domain[s] of state law.'" *Id.* (quoting *Alabama Ass'n of Realtors v. HHS.*, 141 S. Ct. 2485, 2488-89 (2021)). Accordingly, the federal government's attempt to invoke its proprietary contracting power is no shield to this exercise of the regulatory power to impose compulsory vaccination—a power always held by the States. *Id.* at 610 (Contractor

Mandate "usurp[s]" States role in public health by "doing something that [the federal government] has no traditional prerogative to do—deploy the Property Act to mandate an irreversible medical procedure").

What's more, Appellants assert that the existence of a pretextual reason (efficiency) rebuts any argument that the Mandate infringes on traditional State police powers. Br. 35. But the presence of a clearly pretextual reason hurts rather than helps Appellants' case. The Contractor Vaccine Mandate is "of course, simply a pretext to increase vaccination, as [the federal government's] own documents confirm." *Kentucky*, 23 F.4th at 609 n.15; *see also* Op. 18 ("EO 14042, although supported upon a nexus of economy and efficiency, was clearly and unequivocally motivated by public health policy first and foremost."). Such "naked pretext" cannot justify invading "traditional state prerogatives." *Kentucky*, 23 F.4th at 609; *accord BST Holdings*, 17 F. 4th at 614 (noting "pretextual basis" of OSHA Mandate).

Finally, the Contractor Vaccine Mandate violates the Tenth Amendment for another independent reason: it commandeers the States. As Appellants acknowledge, Br. 34, the Tenth Amendment and the structure of the Constitution deprive Congress of "the power to issue

direct orders to the governments of the States," *Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018), and forbid the federal government to commandeer State officers "into administering federal law," *Printz v. United States*, 521 U.S. 898, 928 (1997). The Contractor Vaccine Mandate violates this doctrine by requiring the States to enforce the Mandate against State employees, including employees with no connection to federal contracts and those who work outside and remotely, and against the States' subcontractors. *See* Op. 7-8; 13-15. The Mandate directly compels States and state entities to implement a federal vaccination policy with no nexus to contracting and to State employees who do not work on federal contracts. By "conscript[ing] state [agencies] into the national bureaucratic army," the Mandate violates the Anti-Commandeering Doctrine. *NFIB v. Sebelius*, 567 U.S. at 585.

D. The FAR Guidance, OMB Rule, and Task Force Guidance Violate Statutory Notice-and-Comment Requirements.

The Procurement Policy Act requires that procurement policies must be published for public comment in the Federal Register 60 days before taking effect if the policy "relates to the expenditure of appropriated funds" and either "has a significant effect beyond the internal operating procedures of the agency issuing the policy" or "has a

significant cost or administrative impact on contractors." 41 U.S.C. §1707(a)(1). The FAR Guidance, OMB Rule, and Task Force Guidance relate to the expenditure of appropriated funds and have a significant effect beyond any agency's internal operating procedures because they force an irreversible medical procedure upon a large sector of the American workforce. Beyond that, those actions impose a significant cost and administrative impact on contractors and offerors such as Plaintiff States. And, as discussed below, Appellants cannot hide behind the label "guidance" because agencies have treated the actions as binding and have attempted to impose it upon contractors. *See* ROA.277; *Texas v. EEOC*, 933 F.3d 433, 441 (5th Cir. 2019) (guidance is a legislative rule if it is "applied by the agency in a way that indicates it is binding").

The Procurement Policy Act does contain an exception to its notice-and-comment requirement, but the exception applies only when "urgent and compelling circumstances make compliance with the requirements impracticable." 41 U.S.C. §1707(d). Appellants' good-cause explanation falls far below those exacting standards. In claiming that it must immediately implement the Vaccine Mandate, OMB ignored that it waited months after President Biden's directive before formally issuing

the Mandate. *Cf. BST Holdings*, 17 F.4th at 611-12 (staying OSHA ETS mandate and noting same two-month delay). Beyond that, OMB's finding that the Contractor Vaccine Mandate is necessary was undermined by that same delay. *See id.* at 611 n.11 ("One could query how an 'emergency' could prompt such a 'deliberate' response."). Vaccines had a Food & Drug Administration Emergency Use Authorization for almost a year, yet Appellants did not impose this Mandate until two months after the President instructed it to do so as part of his "six-point plan" to federalize public-health policy.

Here, no "urgent and compelling circumstances" sufficient to justify Appellants' dispensing with proper rulemaking exist. *See, e.g.*, *BST Holdings*, 17 F.4th at 611-12 ("The Mandate's stated impetus—a purported 'emergency' that the entire globe has now endured for nearly two years, and which OSHA itself spent nearly two months responding to—is unavailing as well."); *Florida v. Becerra*, 2021 WL 2514138, at *45 (concluding that the COVID-19 pandemic was insufficient for "good cause"); *Regeneron Pharms. v. HHS*, 510 F. Supp. 3d 29, 48 (S.D.N.Y. 2020) (similar). The pandemic is a feeble excuse for avoiding transparency and public input considering the year-long public debate

over mandatory vaccines. *See BST Holdings*, 17 F.4th at 611 n.10 ("'[I]f human nature and history teach anything, it is that civil liberties face grave risks when governments proclaim indefinite states of emergency.'"); *see also Chamber of Commerce of the U.S. v. DHS*, 2020 WL 7043877, at *8 (N.D. Cal. Dec. 1); *Ass'n of Cmty. Cancer Ctrs. v. Azar*, 509 F. Supp. 3d 482, 496 (D. Md. 2020). Accordingly, the FAR Guidance, OMB Rule, and Task Force Guidance must be vacated for failing to comply with "procedure required by law." 5 U.S.C. §706(2)(D).[2]

Additionally, to the extent the FAR Council Guidance, OMB Rule, and Task Force Guidance do not involve procurement and contracting, they would be subject to the APA's own notice-and-comment procedures. For the reasons stated, the government has treated them as binding, and they alter private parties' and States' rights and obligations. And for the reasons discussed above, they do not qualify for the APA good-cause

[2] Appellants' purported concern with harmonizing deadlines also does not justify invoking the exception, which is designed for emergencies, not achieving regulatory uniformity. *Cf. Sorenson Commc'ns Inc. v. F.C.C.*, 755 F.3d 702, 706 (D.C. Cir. 2014) ("In the past, we have approved an agency's decision to bypass notice and comment where delay would imminently threaten life or physical property."). And if regulatory uniformity were the goal, then Appellants would have withdrawn this Mandate when the Supreme Court held its private-employer mandate unlawful. *NFIB v. OSHA*, 142 S. Ct. 661.

exception to notice and comment. *See Sorenson Commc'ns Inc. v. F.C.C.*, 755 F.3d 702, 706 (D.C. Cir. 2014). Accordingly, these actions are legislative rules that were required to undergo notice and comment. *See Texas*, 933 F.3d at 441-42.

Appellants resist those conclusions primarily by asserting that the FAR Guidance is not final agency action and that the OMB Rule is not subject to §1707's procedural requirements.

First, Appellants elevate form over substance in asserting that the FAR Guidance is not final agency action. Br. 37-41. Appellants are correct that an agency action must satisfy two requirements to be judicially reviewable final agency action. "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 597 (2016). But far from the formalistic test advanced by Appellants, "the Supreme Court has 'long taken' a 'pragmatic approach ... to finality', viewing 'the APA's finality requirements as flexible.'" *Texas v. EEOC*, 933 F.3d 433, 441 (5th Cir. 2019).

The FAR Guidance meets both finality prongs. First, it is the Administration's final word on what should be in federal contracts *right now*. And the fact that the government could reverse course in the future does not undo the finality of its decision regarding current contracts. Indeed, "[t]he Government's rule would render any agency action nonreviewable so long as the agency retained its power to undo that action or otherwise alter it in the future." *Texas v. Biden*, 20 F.4th 928, 949 (5th Cir. 2021). As in *Texas*, "[t]hat accords with neither common sense nor the law." *Id.*

Second, the evidence is clear that the government is treating the Guidance as binding. As the district court found after hearing live testimony, the government was applying the FAR Guidance in contractual negotiations before it issued this injunction:

> During oral argument, the Defendants posited that any interpretation of EO 14042 to apply to current contracts and grants did not come from EO 14042, and they simultaneously claimed the FAR Memo was non-final agency action not subject to review. The Defendants hope that this strategic arrangement will simultaneously shield both an Executive order and "initial" agency action forcefully imposed beyond the order's scope. Dr. Henderson testified to feeling powerless against the NIH's "request" and afraid of losing funding; thus he and ULL felt compelled to sign. The FAR Memo is in no way only a sample of what contracting officers might use to implement the ·Executive Order, and it clearly extends far

> beyond the reach of EO 14024 by encouraging the strong-arming of contractors to include deviation clauses into existing contracts and grants.

Op. 14; *see also* Op. 19-20. The FAR Guidance thus practically withdraws agency discretion, which "is final agency action under the principle that, 'where agency action withdraws an entity's previously-held discretion, that action alters the legal regime, binds the entity, and thus qualifies as final agency action' under the APA." *Texas*, 20 F.4th at 948.

Accordingly, contrary to Appellants' assertions, the district court did not misunderstand the finality test. Rather it faithfully applied this Court's and the Supreme Court's precedents and refused to indulge the government's linguistic games. Had it done so, it would have ignored precedent, the basic presumption of judicial review, and common sense.

Second, Appellants argue that the OMB Rule is not subject to §1707's procedural requirements because OMB is not an "executive agency." But aside from two out-of-circuit district court opinions addressing different issues, Appellants offer no support whatsoever for this novel theory. Br. 42-43. To the contrary, it has long been held that OMB is an "agency." *See Meyer v. Bush*, 981 F.2d 1288, 1294 (D.C. Cir. 1993) ("Despite OMB's closeness to the President, it is a permanent

agency with a significant staff and broadly delegated powers."). And the President could shield his actions from judicial review by merely delegating them to an agency that then stands in his shoes. Accordingly, OMB is subject to §1707's requirements, and, for the reasons discussed above, its Rule did not comply with them.

E. The Contractor Vaccine Mandate Is Arbitrary and Capricious.

The APA commands courts to "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. §706 (2)(A). "The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). In the Fifth Circuit, "[t]his review 'is not toothless.'" *Texas*, 20 F.4th at 989. Quite the contrary, "after *Regents*, it has serious bite." *Wages & White Lion Invs., LLC v. FDA*, 16 F.4th 1130, 1136 (5th Cir. 2021). And "[b]ecause it is generally arbitrary or capricious to depart from a prior policy *sub silentio*, agencies must typically provide a detailed explanation for contradicting a prior policy, particularly when the prior policy has engendered serious reliance interests." *BST Holdings,* 17

F.4th at 614 (cleaned up). The Contractor Vaccine Mandate is arbitrary and capricious for four independently sufficient reasons.

First, Appellants have provided no reasons for the Mandate. The OMB Rule's conclusory parroting of the statutory factors is not the type of serious analysis of statutory factors that agencies must provide. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016) ("[C]onclusory statements do not suffice to explain [an agency's] decision."). OMB's Rule contains no substantive reasoning or quantitative analysis to support its conclusion that the Contractor Vaccine Mandate would further economy and efficiency in federal procurement. *State v. Biden*, 10 F.4th 538, 556 (5th Cir. 2021) ("'Stating that a factor was considered ... is not a substitute for considering it.'"). And the Task Force Guidance upon which OMB passed did not itself provide any justification. Nor did the Executive Order. Because neither the OMB Rule nor any of the actions underlying the Contractor Vaccine Mandate contain any reasoning grounded in the statutory factors, the OMB Rule is arbitrary and capricious. *See Louisiana v. Biden*, 2021 WL 2446010, at *18 (W.D. La. June 15) ("A command in an Executive Order

does not exempt an agency from the APA's reasoned decisionmaking requirement.").

Second, the Mandate is arbitrary and capricious because it ignores a "centrally relevant factor"—costs to the States. *Michigan v. EPA*, 576 U.S. 743, 752-53 (2015). As discussed *infra*, Plaintiff States have overwhelming reliance interests in their existing federal contracts and ability to compete for future contracts. The OMB Rule is arbitrary and capricious because it utterly ignores those reliance interests. *See State v. Biden*, 10 F.4th at 553 ("In its seven-page June 1 Memorandum, DHS does not directly mention any reliance interests, especially those of the States.").

Third, the Mandate is arbitrary and capricious because its rationales are pretextual. As recounted above, the President has stated several times that the Contractor Vaccine Mandate is part of a broader program aimed at increasing vaccination rates. But as the Sixth Circuit explained, the OMB Rule eschews this rationale and tries to pigeonhole the Mandate into the Procurement Act's statutory factors:

> The federal government's actions are, of course, simply a pretext to increase vaccination, as its own documents confirm. *See, e.g.*, Off. Fed. Procurement Pol'y, Memorandum for Chief Acquisition Officers 3 (Sept. 30,

> 2021) ("To maximize the goal of getting more people vaccinated"—rather than to enhance the goal of efficient procurement—"the Task Force strongly encourages agencies to apply the requirements of its guidance broadly[.]") (emphasis added); *see Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575 (2019) ("[W]e are 'not required to exhibit a naiveté from which ordinary citizens are free.' " (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977))).

Kentucky, 23 F.4th at 610 n.15. The presence of such pretext is enough to render the Contractor Vaccine Mandate arbitrary and capricious. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575-76 (2019); *see also BST*, 17 F.4th at 614 ("pretextual basis" is a "hallmark[] of unlawful agency action[]").

Fourth, given its scant explanation and lack of quantitative analysis, the OMB Rule fails to consider several important aspects of the problem, including the effect of large-scale resignations; the impact on State budgets, pension funds, and bond obligations; other State reliance interests; natural immunity; contractors who work from home or outside; or whether a religious exemption would ease compliance and displace less State law.

For all those reasons, the Contractor Vaccine Mandate is neither "reasonable" nor "reasonably explained." *Prometheus Radio Project*, 141

S. Ct. at 1158. Accordingly, it is arbitrary and capricious, which provides yet another separate basis on which to affirm the district court's injunction.

II. THE STATES WILL SUFFER IRREPARABLE HARM ABSENT AN INJUNCTION.

"To show irreparable injury if threatened action is not enjoined, it is not necessary to demonstrate that harm is inevitable and irreparable." *Humana, Inc. v. Avram A. Jacobson, M.D., P.A.*, 804 F.2d 1390, 1394 (5th Cir. 1986). Instead, the States need show only that it "cannot be undone through monetary remedies," *Burgess v. FDIC*, 871 F.3d 297, 304 (5th Cir. 2017), and that they are "*likely* to suffer irreparable harm in the absence of preliminary relief," *Pendergest-Holt v. Certain Underwriters at Lloyd's of London*, 600 F.3d 562, 569 (5th Cir. 2010). The district court correctly found that the States are entitled to an injunction because the Mandate irreparably harms their judicially cognizable interests. *See* Op. 22-23; *see also cf. Massachusetts v. E.P.A.*, 549 U.S. 497, 518-520 (2007); *see also Texas v. United States*, 809 F.3d at 151-55.

First, as the district court held, "Plaintiff States have an interest in seeing their constitutionally reserved authority over public health policy defended from federal overreach." Op. 23 (citing *Texas v. EPA*, 829 F.3d

405, 433 (5th Cir. 2016)). The Mandate puts Plaintiff States to an untenable choice: suffer widespread economic harm through lost contracts or change state laws and policies. *See Texas v. United States*, 787 F.3d 733, 752 n.38 (5th Cir. 2015) ("Texas's interest in not being pressured to change its law is more directly related to its sovereignty than was Massachusetts's interest in preventing the erosion of its shoreline."); *Texas v. United States*, 497 F.3d 491, 497 (5th Cir. 2007). As discussed above, each Plaintiff State regularly contracts with the federal government. And each Plaintiff State would have to change its laws and policies to require vaccination. The district court specifically found that as a result of the Mandate, the States "face a Hobson's choice in that they must decide whether to maintain current contracts and whether they want to be a bid on future contracts." Op. 14-15.

The immediate pressure that the Mandate places on Plaintiff States—indeed, is *intended* to place on them—to "abandon [their] laws and policies" by requiring vaccination is a quintessential irreparable harm to Plaintiff States' sovereign interests. *Texas*, 933 F.3d at 447. And Fifth Circuit courts have held that injuries to Plaintiff States' sovereign power are "necessarily" irreparable. *See, e.g.*, *Planned Parenthood of*

Greater Tex. Surgical Health Servs. v. Abbott, 734 F.3d 406, 419 (5th Cir. 2013); *Texas*, 2021 WL 3683913, at *59; *Nevada v. DOL*, 218 F. Supp. 3d 520, 532 (E.D. Tex. 2016). Beyond that, Plaintiff States have an irreparable procedural harm because they were denied the ability to defend this concrete interest by submitting comments. *See, e.g.*, *Massachusetts v. E.P.A.*, 549 U.S. at 518.

Second, the Mandate will inflict financial injury upon Plaintiff States by depriving them of the ability to compete for contracts on an even playing field and by placing a strain on State agencies to produce proof of vaccination documentation. Such compliance costs are immediate and irreparable. *BST Holdings*, 17 F.4th at 618 ("The Mandate places an immediate and irreversible imprint on all covered employers in America, and 'complying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs.'"); *see also Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring) ("[A] regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs.").

Additionally, the Mandate will naturally and predictably lead to increased unemployment, which will place a greater burden on Plaintiff

States' unemployment insurance funds. *See State v. Biden*, 10 F.4th at 548. And the district court found that "[a]t a minimum, compliance by contractors requires the diversion of resources necessary to identify covered employees and manage their vaccination status." Op. 22. Fifth Circuit courts have uniformly held that the very types of economic and fiscal harms Plaintiff States will suffer are irreparable because States cannot recover money damages from the federal government. *See Texas v. United States*, 809 F.3d at 186 (financial injury from federal government irreparable); *Louisiana*, 2021 WL 2446010, at *21 (financial and *parens patriae* injury irreparable); *Texas*, 2021 WL 5154219, at *12 (resource reallocation and harm to industry irreparable); *Texas v. United States*, 2021 WL 3683913, at *58 (S.D. Tex. Aug. 19) (financial and *parens patriae* harm irreparable); *State v. Biden*, 2021 WL 3603341, at *26 (N.D. Tex. Aug. 13) (financial injuries irreparable).

Third, the imminent loss of federal funds for Louisiana's and Mississippi's ICAC Task Forces *will* lead to an increase in sex crimes against children in those States. In Louisiana alone, the ICAC Task Force received 6,731 CyberTips this year, leading to 116 arrests. *See* ROA.160-63. The Louisiana Task Force's ability to investigate those tips and arrest

perpetrators will be undermined if the Task Force loses federal funds and thus cannot continue paying its employees—or if its employees resign in lieu of complying with the Mandate.

III. THE INJUNCTION DOES NOT HARM THE GOVERNMENT OR DISSERVE THE PUBLIC INTEREST.

The public interest and balance of harms weigh heavily in favor of maintaining the district court's injunction. Respondents have no legitimate interest in the implementation an unlawful measure. *See, e.g.*, *Alabama Ass'n of Realtors*, 141 S. Ct. at 2490 ("[O]ur system does not permit agencies to act unlawfully even in pursuit of desirable ends."); *see also State v. Biden*, 10 F.4th at 559 ("[T]he 'public interest [is] in having governmental agencies abide by the federal laws that govern their existence and operations.'"). And "[t]here is generally no public interest in the perpetuation of unlawful agency action." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016). Finally, the injunction safeguards federalism and "the public interest plainly lies in not allowing" Respondents "to circumvent those federalism concerns." *State v. Biden*, 10 F.4th at 559. Simply put, "[t]he public interest is also served by maintaining our constitutional structure ... even, or perhaps

particularly, when those decisions frustrate government officials." *BST Holdings,* 17 F.4th at 618-19.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's injunction in full.

Respectfully submitted,

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/s/Elizabeth B. Murrill

TYLER R. GREEN
JEFFREY S. HETZEL
CONSOVOY MCCARTHY PLLC
222 S. Main Street, 5th Floor
Salt Lake City, UT 84101
(703) 243-9423

TODD ROKITA
Attorney General
THOMAS M. FISHER
Solicitor General
INDIANA ATTORNEY GENERAL'S OFFICE
Indiana Government Center South
302 W. Washington St., 5th Floor
Indianapolis, IN 46204
Tom.fisher@atg.in.gov
Counsel for the State of Indiana

LYNN FITCH
Attorney General
JOHN V. COGHLAN
Deputy Solicitor General
OFFICE OF THE MISSISSIPPI ATTORNEY GENERAL
P.O. Box 220
Jackson, MS 39205
john.coghlan@ago.ms.gov
Counsel for the State of Mississippi

JEFF LANDRY
Attorney General
ELIZABETH B. MURRILL
Solicitor General
JOSEPH S. ST. JOHN
Deputy Solicitor General
LOUISIANA DEPARTMENT OF JUSTICE
1885 N. Third Street
Baton Rouge, LA 70802
Tel: (225) 326-6766
murrille@ag.louisiana.gov
stjohnj@ag.louisiana.gov

Counsel for Appellees

CERTIFICATE OF SERVICE

I filed a true and correct copy of this brief with the Clerk of this Court via the CM/ECF system, which will notify all counsel.

/s/ Elizabeth B. Murrill
Counsel for Appellees
Dated: June 13, 2022

CERTIFICATE OF COMPLIANCE

This brief complies with Rule 32(a)(7)(B) because it contains 10,623 words, excluding the parts that can be excluded. This brief also complies with Rule 32(a)(5)-(6) because it has been prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Century Schoolbook font.

/s/ Elizabeth B. Murrill
Counsel for Appellees
Dated: June 13, 2022