UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION AT FRANKFORT
Electronically filed

COMMONWEALTH OF KENTUCKY, *et. al.*

Plaintiffs

v.

JOSEPH R. BIDEN in his official capacity as President of the United States, *et. al.*

Defendants

Civil Action No. 3:21-cv-00055-GFVT

PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION[1]

INTRODUCTION

The federal government believes COVID-19 vaccines are a good idea, and indeed the prior administration dedicated enormous federal resources on developing the vaccine because of the same premise. But whether vaccines are a net positive is a question for the FDA in reviewing and approving vaccines. The question for this court is whether the administration has wildly overstepped its statutory and constitutional authority in attempting to regulate individual health decisions through procurement laws, all while discarding the basic procedural protections

[1] To be clear, Plaintiffs only request an injunction of the mandate as it applies to all federal contractors and subcontractors located within or doing business within Kentucky, Ohio, and Tennessee.

under both administrative and procurement laws. This administration has demonstrated its consistent willingness to overstep its authority under the assumption that COVID-19 upsets the normal presumption of the rule of law. *See generally Ala. Ass'n of Realtors v. Dep't of Health and Human Servs.*, 141 S. Ct. 2485, 2490 (2021) (per curiam); *BST Holdings, L.L.C. v. OSHA*, --- F.4th ---, 2021 WL 5279381 (5th Cir. Nov. 12, 2021). This is a dangerous road.

ARGUMENT

I. The Plaintiffs possess the requisite constitutional standing to maintain this action.

A. The Plaintiffs have suffered direct injuries.

"Well before the creation of the modern administrative state, [the Supreme Court] recognized that States are not normal litigants for the purposes of invoking federal jurisdiction. . . . [States are] entitled to special solicitude in [a] standing analysis." *Massachusetts v. E.P.A.*, 549 U.S. 497, 518, 520 (2007). Even without a recognition of such "special solicitude," the States satisfy the constitutional standing requirement in at least two ways.

First, the federal contractor vaccine mandate invades the States' sovereignty by regulating a matter that our Constitution reserves to the States. The federal government's invasion of States' sovereignty constitutes an injury in fact. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 601 (1982); *Texas v. United States*, 809 F.3d 134, 153 (5th Cir. 2015), *aff'd* 136 S. Ct. 2271 (2016); *Celebrezze v. U.S. Dep't of Transp.*, 766 F.2d 228, 232–33 (6th Cir. 1985). "[T]he regulation of health and safety matters is primarily, and historically, a matter of local

concern." *Hillsborough Cnty, Fla. v. Automated Med. Lab'ys, Inc.*, 471 U.S. 707, 719 (1985); *see Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012) (referring to the police power as a "general power of governing, possessed by the States but not by the Federal Government"). Through the issuance of its federal contractor vaccine mandate, the federal government grabbed for itself a power the Constitution reserves for the States. *See BST Holdings,* 2021 WL 5279381, at *7–8 (recognizing that, to the extent that the government would actually have the power to institute a vaccine mandate, such power would be belong to the States).

Second, the States themselves, through their agencies and political subdivisions, are federal contractors and subcontractors subject to the mandate. *See generally* DNs 12–1, –4; 22–2, –3, –4, –5, –6, –7. Plaintiff sheriffs have these relationships, too. *See generally* DNs 12–2, –3. The Plaintiffs, therefore, will suffer financial injuries, including from lost workers who must quit to escape the mandate and from overseeing costly compliance with the mandate. *See* Post Hoc OMB Determination, 86 Fed. Reg. at 63,422 (conceding the mandate imposes administrative and turnover costs on federal contractors and subcontractors). The States and sheriffs, just like all other litigants, have standing to seek redress for these proprietary injuries. *See Snapp*, 458 U.S. at 601–02.

Further, "if the complainant is an object of the action . . . at issue—as is the case usually in review of a rulemaking . . . —there should be little question that the action . . . has caused him injury." *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 733–34 (D.C. Cir. 2003) (internal quotation marks omitted). Because the Plaintiffs

are federal contractors and subcontractors, *see generally* DNs 12–1, –2, –3, –4; 22–2, –3, –4, –5, –6, –7, they are the "object[s]" of the action they seek to challenge. *Norton*, 322 F.3d at 733–34.

The contract modification notice sent to Sheriff Stevens and the state-run university in Ohio provide examples of notices and amendments federal contractors and subcontractors have received and can expect to receive in the imminent future. *See* DN 12–2 at 16–18; DN 22–2 at 2, 8–9. The federal contracting business is a multi-billion-dollar industry in Kentucky, Ohio, and Tennessee, *see* First Am. Compl. ¶¶ 49–51,[2] and the Task Force Guidance as adopted by the Post Hoc OMB Determination has always "strongly encouraged" federal agencies to incorporate the Deviation Clause, *see* Task Force Guidance at 5. As such, the States' agencies should expect to receive similar modification notices soon, if they have not yet already. *See* National Science Foundation Cooperative Agreement, Section 56, *available at* https://perma.cc/T3AC-P788 (noting that the mandate will apply to all research cooperative agreements with the National Science Foundation). Indeed, filings in another lawsuit, *see Brnovich v. Biden*, No. 2:21-cv-01568-MTL, reveal such federal government pressure, *see id.* at DN 48–2 at ¶¶ 4–8; DN 58–1 at ¶¶ 1–12; DN 62, DN 62–1. Moreover, under some current contracts between Kentucky contractors and the United States, Kentucky contractors are required to "comply with applicable federal . . . laws, regulations and standards for public health and safety," *see* DNs 22–

[2] As Defendants note, "[t]he Court may take judicial notice of factual information available on government websites." DN 27 at 2 n.1 (citing *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322–23 (2007)).

3, 22–4, 22–5, which Defendants could decide to interpret as requiring insertion of the Deviation Clause into such contracts.

Despite Defendants' suggestion that federal contractors and subcontractors can reject proposed contract modifications incorporating the Deviation Clause, *see* DN 27 at 6–7, neither the contract modifications themselves nor the related federal government correspondence to those modifications received by Sheriff Stevens and the state-run university in Ohio indicate any such ability. *See* DN 12–2 at 16–18; DN 22–2 at 2, 8–9. Indeed, Defendants' own submissions in this case confirm this. In the same breath that Defendants argue that "ICE has . . . requested that the Seneca County Jail[] in Tiffin, Ohio, agree to a *bilateral* modification that implements EO 14042 and requires compliance with Task Force Guidance[,]" DN 27 at 7, Defendants' own exhibits confirm that the Jail "is required to sign th[e modification]." DN 27–3; *see also* DN 27–2 ("Please provide signature . . . and return."). Nowhere in the correspondence between ICE and the Jail or the contractual modification itself is there any indication that the Jail may refuse to consent to this modification. *See generally* DNs 27–2, –3. And regardless, any rejection would undoubtedly result in termination of the contract, *see* DN 12–2 at PageID# 281 (providing for termination of the contract upon 60 days' notice),[3] which is the very injury that Plaintiffs are suing to avoid—Plaintiffs sue to prevent the Hobson's choice between illegal terms and the

[3] Other contracts submitted by Plaintiffs contain similar termination provisions. *See, e.g.,* DN 22–3 at 4 ("This lease may be revoked at the discretion of the [federal government] when in the public interest."); DN 22–4 at 4 ("This easement may be terminated by the [federal government] upon 30 days written notice to [Kentucky].").

loss of a valuable contract. A command from the federal government is still a command, even when it includes the word "please." As the President has made abundantly clear, "If you want to work with the federal government, vaccinate your workforce." Remarks of President Joseph Biden, Remarks at the White House (Sept. 9, 2021), available at https://perma.cc/GQG5-YBXK. A rejection would also blacklist the rejecting entity or individual from obtaining future federal contracts, which must now contain the Deviation Clause. *See* 86 Fed. Reg. at 50986; FAR Council Guidance at 2. Some basic common sense seems in order. A true "option" would not accomplish what the federal government straightforwardly seeks—that federal contractors comply with the Task Force Guidance—so it strains credulity to assume that contractors can simply decline the option and continue business as usual. The government has imposed a "decision" to force entities and individuals who depend on federal contracting to accept the terms or abandon their lifeblood.

As Defendants admit, "[w]hen a claim involves a challenge to a future contracting opportunity, the pertinent question is whether Plaintiffs 'ha[ve] made an adequate showing that sometime in the relatively near future [they] will bid on another Government contract.'" DN 27 at 6 (quoting *Adarand Contractors, Inc. v. Pena*, 515 U.S. 200, 211 (1995)). As mentioned, the federal contracting business is a multi-*billion*-dollar industry in Kentucky, Ohio, and Tennessee. *See* First Am. Compl. ¶¶ 49–51. Federal contractors and subcontractors throughout the States bid throughout the year on new contracting opportunities with the federal government,

now subject to the mandatory inclusion of the Deviation Clause. *See* FAR Council Guidance at 2; 86 Fed. Reg. at 50,986.

II. Defendants' attempt to insulate themselves from judicial review is untenable.

Defendants claim judicial review of a nationwide mandate promulgated by bureaucrats is unavailable. They are wrong.

The D.C. Circuit's decision in *Chamber of Commerce of United States v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996), explicitly refutes Defendants' arguments against reviewability. In that case, the plaintiffs "challenge[d] President Clinton's Executive Order barring the federal government from contracting with employers who hire permanent replacements during a lawful strike." *Id.* at 1324. As is the case here, President Clinton's order cited his purported authority under the Federal Property Administrative Services Act (FPASA). *Id.* Similarly, President Clinton charged another executive branch official "with implementing and enforcing the Order." *Id.* To stop the implementation of the Executive Order, the plaintiffs challenged the Executive Order itself on constitutional and statutory grounds, including under the FPASA. *Id.* at 1325.

The D.C. Circuit first questioned the plaintiffs' strategy of not bringing their claims under the APA. *Id.* at 1326–27. The court recognized that the Department of Labor regulations were not insulated from APA review merely because they were based on an executive order. *Id.* at 1327. But because the plaintiffs in *Reich* challenged the Executive Order directly, and not the resulting regulations, the court

found that the plaintiffs could *also* challenge the President's abuse of his authority under the Procurement Act.

The President, to be sure, is not an agency under the APA. In *Reich*, as here, the government hopes this means open season to impose whatever policy it wishes, using any agency it wishes. The D.C. Circuit "doubt[ed] the validity of [the government's] unsupported interpretation of the APA" in that regard, *id*. at 1327, and derided "the government's brief [as] advanc[ing] a breathtakingly broad claim of non-reviewability of presidential actions." *Id*. at 1329.

Rejecting the government's expansive argument, the court in *Reich* said that even "[i]f a plaintiff is unable to bring his case predicated on either a specific or a general statutory review provision, he may still be able to institute a non-statutory review action." *Id*. As the Court explained:

> That the "executive's" action here is essentially that of the President does not insulate the entire executive branch from judicial review. We think it is now well established that "[r]eview of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive. Even if the [executive branch official] were acting at the behest of the President, this "does not leave the courts without power to review the legality [of the action], for courts have power to compel subordinate executive officials to disobey illegal Presidential commands."

Id. at 1328 (citations omitted). The Court agreed with the government's concession "that a cause of action would lie and sovereign immunity be waived if the President issued an Executive Order under the Procurement Act that violated or caused others to violate an express prohibition of that Act or another statute." *Id*. at 1330. Also on the sovereign immunity point, "[t]he APA's waiver of sovereign immunity [under 5

U.S.C. § 702] applies to any suit whether under the APA or not." *Id*. (citations omitted). "[I]f [a] federal officer, against whom injunctive relief is sought, allegedly acted in excess of his legal authority, sovereign immunity does not bar a suit." *Id.* at 1329.

In sum, the D.C. Circuit found it "untenable to conclude that there are no judicially enforceable limitations on presidential actions, besides actions that run afoul of the Constitution or which contravene direct statutory prohibitions, so long as the President claims that he is acting pursuant to the Procurement Act in the pursuit of governmental savings." *Id*. at 1332. Defendants try to make the same futile claim here. Defendants' position "would permit the President to bypass scores of statutory limitations on governmental authority," and the Court should "therefore reject it." *Id*. Regardless of whether the propriety of the mandate here is reviewable under the APA or as an *ultra vires* action, *Reich* makes clear that the mandate *is reviewable*. *Id*. at 1326–32. At this preliminary injunction stage, that is all that matters.

IV. The FAR Council has not once tried to comply with 41 U.S.C. § 1707's procedural requirements, and the OMB botched compliance with them for a second time.

The FAR Council never even tried to comply with Section 1707's procedural requirements, and the OMB again botched them.

Section 1707 generally requires delayed-effectiveness during a mandatory notice-and-comment period when an agency implements not just procurement regulations, but all "procurement polic[ies], . . . procedure[s], or form[s]," as long as they "relate[] to the expenditure of appropriated funds" and either "ha[ve] a

significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure, or form" or "ha[ve] a significant cost or administrative impact on contractors or offerors." 41 U.S.C. § 1707(a)(1). Defendants acknowledge that the OMB Determination has such an impact. They only dispute that the "significant effect" requirement has not been satisfied with respect to the FAR Council Guidance. *See* DN 27 at 18. But Executive Order 14042 required the FAR Council to develop the Deviation Clause and "take initial steps to implement appropriate policy direction to [*all*] acquisition officers for use of the clause." 86 Fed. Reg. at 50,986. It was specifically promulgated to fulfill agencies' "requirements" under the Executive Order, and the FAR Council Guidance "remind[s]" agencies of that obligation. FAR Council Guidance at 2. In other words, as Defendants' own submissions recognize, and as Plaintiffs have experienced, the FAR Council's Deviation Clause must be used by federal agencies across the board in their contracting. *See* DN 27–4 at 5; *see also* DN 12–2 at 18.

As just explained, *Reich* debunks the only theory Defendants proffer for why the Post Hoc OMB Determination is unreviewable and not subject to the requirements of Section 1707, *see* DN 27 at 13–14. The OMB, in its Post Hoc Determination, also failed to properly invoke Section 1707(d), which provides that agencies may waive the notice-and-comment and delayed-effectiveness requirements of Section 1707 only "if urgent and compelling circumstances make compliance with the requirements impracticable." 41 U.S.C. § 1707(d). The Post Hoc OMB Determination's conclusion that a waiver is now urgent and compelling is facially

senseless when the OMB, through the same document, delayed the mandate compliance date from December 8, 2021, to January 14, 2022. One would think that an emergency that has, in Defendants' eyes, existed since July of 2021, *see* DN 27 at 2, would not permit such further delay. OMB's irrational and designed-for-litigation justification is further evidenced by the fact that it issued the Post Hoc Determination containing the 1707(d) waiver after being hammered with a slew of lawsuits pointing out its violation of Section 1707. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573–74 (2019) (Although "[a] court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record[,] . . . we have recognized a narrow exception to th[is] general rule . . . [o]n a 'strong showing of bad faith or improper behavior[.]'").

Additionally, *Reich* instructs that the FAR Council Guidance is reviewable. Executive Order 14042 itself characterizes the would-be "guidance" that the FAR Council eventually published as a procurement "policy" to which the procedural protections of 41 U.S.C. § 1707 apply. *See* 41 U.S.C. § 1707(a)(1) (emphasis added); 86 Fed. Reg. at 50,985–87. And Defendants do not dispute the fact that the FAR Council has never even tried to comply with Section 1707.

Abiding by the procedural requirements of Section 1707 "helps ensure fair treatment for persons to be affected by" the mandate. *United States v. Cain*, 583 F.3d 408, 420 (6th Cir. 2009) (citation and quotation marks omitted). It is not simply the vaccine receipt deadline that must be delayed and subject to notice-and-comment. The mandate's effectiveness date must be, as well, to ensure that federal contractors

and subcontractors maintain their "chance to participate" in the federal government's attempt to impose contractual modifications on them *now*. *See id*.

V. Defendants' actions run afoul of the FPASA and the Competition in Contracting Act.

The President cannot instruct the OMB to issue a government-wide procurement regulation because that power resides with the FAR Council. *See* 41 U.S.C. § 1303(a). But that is exactly what the President and OMB attempt to do. *See* Post Hoc OMB Determination, 86 Fed. Reg. 63,418 (Nov. 16, 2021). Moreover, Section 121(a) only authorizes the President to "prescribe policies and directives that the President considers necessary to carry out" the FPASA. 40 U.S.C. § 121(a) (emphasis added). The President and his delegees may only direct the exercise of procurement authority throughout the government. Yet here they try to use this authority to impose nationwide vaccine requirements on third parties.

As the executive branch has been told twice in recent months, it cannot further its agenda by exercising statutory authority it does not have. *See generally Ala. Ass'n of Realtors*, 141 S. Ct. at 2490; *BST Holdings*, 2021 WL 5279381, at *1. Regardless of how broadly Defendants attempt to characterize the scope of the President's authority under the FPASA, the D.C. Circuit in *Reich* curtailed such an expansive interpretation:

> [T]he President, even under the Procurement Act, does not have unlimited authority to make decisions he believes will likely result in savings to the government. We cautioned that our decision did not "write a blank check for the President to fill in at his will. The procurement power *must* be exercised consistently with the structure and purposes of the statute that delegates that power." Despite our expansive reasoning upholding President Carter's Executive Order, we

> stressed the importance of the "nexus between the wage and price standards and likely savings to the government."

Chamber of Commerce, 74 F.3d at 1330–31 (citations omitted). That nexus does not exist here. The FPASA does not give the President and his delegees unlimited power to write whatever government-wide procurement regulations they see fit, in the name of saving the government a future dollar. Even assuming the President can issue binding procurement orders to third parties solely because they may promote economy and efficiency, and the mandate does not, the link between the challenged actions and economy and efficiency is far too attenuated. Today, the mandate is vaccine related. Tomorrow, federal contractors may be required to implement the Green New Deal. The day after, they may be required to ensure their employees shed weight, refrain from drinking alcohol, or cancel ski vacations (skiing, after all, can lead to injuries which lead to missed days of work).

Moreover, the post hoc explanation for the mandate creating efficiencies in federal contracting only underscores its arbitrary and capricious nature. *See also* DN 12 at 17–19. For example, the analysis makes no mention of the minimal transmissibility of COVID–19 in outdoor settings and, in fact, concludes only that "COVID–19 is a highly communicable disease that tends to spread between people who are indoors, sharing space, and in close quarters[.]" *See* Post Hoc OMB Determination, 86 Fed. Reg. 63,421. Yet, the FAQs on the Task Force website, which the Post Hoc OMB Determination incorporates by reference, make clear that the mandate "applies to contractor or subcontractor workplace locations that are outdoors." *See* Safer Federal Workforce Task Force Website FAQs, *available at*

https://perma.cc/F7SM-KMCW (first question within the "Workplaces" tab). As another example, the analysis suggests that workers will not quit because of the vaccine mandate based on data reported by three major United States companies, one of which placed employees on administrative leave (Kaiser Permanente) and one of which did not report the number of employees who quit (Tyson). *See* Post Hoc OMB Determination, 89 Fed. Reg. 63,422. The Post Hoc OMB Determination does not explain why this data is an appropriate sample size of all federal contractors and subcontractors. And placing one or two percent of workers on leave has the potential of inflicting massive harm on federal contractors, who often operate on thin margins and cannot easily replace employees.

Finally, Defendants misconstrue Plaintiffs' argument to be that any exclusion of certain offerors violates the Competition in Contracting Act. DN 27 at 12. Plaintiffs' argument is instead that the exclusion violates the act because it is irrelevant to a contractor's ability to perform the contract. DN 12 at 17. Defendants misinterpret *National Government Services, Inc. v. United States* as finding that *any* solicitation requirement would be proper. DN 27 at 12 (citing 923 F.3d 977 (Fed. Cir. 2019)). This is not what the court said. Instead, the Federal Circuit noted that previously upheld contract exclusions involved "some capability or experience requirement." *Nat'l Gov't Servs.*, 932 F.3d at 986. Because the mandate has no rational relation to capability or experience, it violates the Competition in Contracting Act.

VI. Defendants' constitutional arguments fail.

A. *BST Holdings* confirms that Plaintiffs succeed on Counts VIII and IX of their Amended Complaint.

The Fifth Circuit had this to say about the current administration's continued use of statutes beyond what Congress intended:

> It lastly bears noting that the Mandate raises serious constitutional concerns that either make it more likely that the petitions will succeed on the merits, or at least counsel against adopting OSHA's broad reading of § 655(c) as a matter of statutory interpretation.
>
> First, the 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. A person's choice to remain unvaccinated and forgo regular testing is noneconomic inactivity. And to mandate that a person receive a vaccine . . . falls squarely within the States' police power. The Mandate, however, commandeers U.S. employers to compel millions of employees to receive a COVID–19 vaccine . . . . The Commerce Clause power may be expansive, but it does not grant Congress the power to regulate noneconomic inactivity traditionally within the States' police power. In sum, the Mandate would far exceed current constitutional authority.
>
> Second, concerns over separation of powers principles cast doubt over the Mandate's assertion of virtually unlimited power to control individual conduct under the guise of a workplace regulation. . . . [T]he major questions doctrine confirms that the Mandate exceeds the bounds of OSHA's statutory authority. Congress must "speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." The Mandate derives its authority from an old statute employed in a novel manner, imposes nearly $3 billion in compliance costs, involves broad medical considerations that lie outside of OSHA's core competencies, and purported to definitively resolve one of today's most hotly debated political issues. There is no clear expression of congressional intent in § 655(c) to convey OSHA such broad authority,

> and this court will not infer one. Nor can the Article II executive breathe new power into OSHA's authority—no matter how thin patience wears.
>
> At the very least, even if the statutory language were susceptible to OSHA's broad reading—which it is not—these serious constitutional concerns would counsel this court's rejection of that reading.

BST Holdings, 2021 WL 5279381, at *7–8. If OSHA's enabling statute, one that is meant to provide "every working man and woman in the Nation safe and healthful working conditions," *see* 29 U.S.C. § 651, does not contemplate a nationwide vaccine mandate, surely the FPASA, which is meant only "to provide the Federal Government with an economic and efficient" procurement system, *see* 40 U.S.C. § 101, does not either. Indeed, as *BST Holdings* confirms, if a vaccine mandate is even possible in the United States, it must come from the States, not the federal government.

B. The federal government cannot avoid constitutional review by invoking the Spending Clause.

Defendants suggest that courts must treat the government's invocation of the Spending Clause as precluding any constitutional challenges. DN 27 at 19. But our Constitution does not allow the federal government to tax the citizens of the states at unlimited levels, and offer it back with any ambiguous and shifting condition the government wishes, especially one that invades so deeply on the authority of a State. Although judicial standards are sometimes deferential, no precedent requires courts to rubber-stamp government violations of constitutional protections.

First, Defendant's misunderstand the Plaintiffs' Tenth Amendment challenge. Defendants cite *Wachovia Bank v. Watters* for the proposition that the Tenth Amendment does not bar executive branch action lawfully delegated by a validly enacted statute. DN 27 at 19 (citing 431 F.3d 556, 563 (6th Cir. 2005), *aff'd*, 550 U.S.

1 (2007)). But this assertion skips two key constitutional inquiries: first, whether Congress delegated to the President broad authority to regulate healthcare decision historically included in the state police power, and second, whether the federal government even possesses that power. Plaintiffs have consistently argued both questions must be answered in the negative. DN 12 at 20–23.

Second, the Spending Clause cannot be broadly interpreted in the manner Defendants suggest. Courts have long recognized that at some point, including certain conditions "'turns into compulsion.'" *South Dakota v. Dole*, 483 U.S. 203 (1987) (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)). This occurs when conditions attach to offers of funding that the States have no "legitimate choice" but to "accept." *NFIB v. Sebelius*, 567 U.S. 519 (2012). The federal government does not have the power to "drive the [states] under the whip of economic pressure into" doing "the bidding of the central government." *Steward Machine*, 301 U.S. at 587. The federal government cannot regulate the States directly, nor can it attach coercive conditions to funding to evade this requirement. *NFIB*, 567 U.S. at 577–78 (op. of Roberts, C.J.). Plaintiffs have been clear about the resulting harms employee resignations would visit on them. DN 1 at 11–12, DN 22 at 13–14 (discussing harm arising from forced resignations). The resulting injury will be particularly acute given the high employee quit rate of 3.0 percent in September 2021. U.S. Bureau of Labor Statistics, Job Openings and Labor Turnover Summary, *available at* https://perma.cc/6XMY-WTBL (Nov. 12, 2021).

Moreover, even the exercise of otherwise-facially-legitimate federal authority can violate the Constitution when it is a mere pretext to claim a power the federal government does not have. The Supreme Court has stated, "our review is deferential, but we are 'not required to exhibit a naivete from which ordinary citizens are free.'" *Dept. of Com. v. New York*, 139 S. Ct. 2551, 2575 (2019) (citation omitted). Even deferential review may bite when there is a "disconnect between the decision made and the explanation given." *Id.* "Accepting contrived reasons would defeat the purpose" of judicial review. *Id.* at 2576. While the record is still being developed in this case, the Fifth Circuit recently expressed concerns about pretextual explanations over the President's Chief of Staff's support for a tweet stating that OSHA's emergency temporary standard would be "the ultimate work-around" for the federal government to mandate vaccinations. *BST Holdings*, 2021 WL 5279381 at *6. Plaintiffs have been clear that this mandate is part and parcel to the federal government's unconstitutional attempt to claim powers it does not have. DN 12 at 2.

Third, Defendants' invocation of intergovernmental immunity is irrelevant. DN 27 at 20. Intergovernmental immunity holds that "federal contractors are treated the same as the federal government itself." *U.S. v. California*, 921 F.3d 865, 882 n.7 (9th Cir. 2019). But Plaintiffs are not suing federal contractors for violations of state law. Plaintiffs are suing, in part, *as* federal contractors, and they are suing the federal government for violations of federal law *as*, in part, federal contractors, albeit uniquely situated ones. Intergovernmental immunity has no impact on this suit.

In sum, the Defendants' attempts to evade judicial review are unavailing and incorrect.

VII. *BST Holdings* confirms that irreparable harm will befall upon Plaintiffs without a preliminary injunction, that no harm will befall upon Defendants, and that a preliminary injunction is in the public interest.

Apart from the reasons already stated, *see* DN 12 at 23–30, in response to many of the same arguments made by Defendants here, *see BST Holdings*, 21-60845, Resp. filed by LABR, *et al.*, at 17–22 (Nov. 8, 2021), *BST Holdings* confirms that a preliminary injunction is warranted:

> [T]he companies seeking a stay in this case will . . . be irreparably harmed in the absence of a stay, whether by the business and financial effects of a lost or suspended employee, compliance and monitoring costs associated with the Mandate, the diversion of resources necessitated by the Mandate, or by [the federal government]'s plan to impose stiff financial penalties on companies that refuse to punish or test unwilling employees. 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." . . .
>
> The States, too, have an interest in seeing their constitutionally reserved police power over public health policy defended from federal overreach.
>
> In contrast, a stay will do [the federal government] no harm whatsoever. Any interest [the federal government] may claim in enforcing an unlawful (and likely unconstitutional) [Mandate] is illegitimate. Moreover, any abstract "harm" a stay might cause the [federal government] pales in comparison and importance to the harms the absence of a stay threatens to cause countless individuals and companies.
>
> For similar reasons, a stay is firmly in the public interest. From economic uncertainty to workplace strife, the mere specter of the Mandate has contributed to untold economic upheaval in recent months. Of course, the principles at stake when it comes to the Mandate are not

> reducible to dollars and cents. The public interest is also served by maintaining our constitutional structure and maintaining the liberty of individuals to make intensely personal decisions according to their own convictions—even, or perhaps *particularly*, when those decisions frustrate government officials.

BST Holdings, 2021 WL 5279381 at *8.

CONCLUSION

For the aforementioned reasons, the Plaintiffs respectfully request the Court enjoin the Defendants' federal contractor vaccine mandate.

Respectfully Submitted,

Daniel Cameron
ATTORNEY GENERAL

/s/ Christopher L. Thacker
Barry L. Dunn (KBA No. 93787)
Christopher L. Thacker (KBA No. 91424)
Heather L. Becker (KBA No. 94360)
Jeremy L. Sylvester (KBA No. 92771)
Alexander Y. Magera (KBA No. 97708, *admission application submitted*)
Office of the Attorney General
700 Capital Avenue, Suite 118
Frankfort, Kentucky 40601
Phone: (502) 696-5300
Barry.Dunn@ky.gov
Christopher.Thacker@ky.gov
Heather.Becker@ky.gov
Jeremy.Sylvester@ky.gov
Alexander.Magera@ky.gov

Counsel for the Commonwealth of Kentucky

Dave Yost
ATTORNEY GENERAL

/s/ Benjamin M. Flowers
Benjamin M. Flowers (*pro hac vice application submitted*)
Carol O'Brien (*pro hac vice application submitted*)

May Davis (*pro hac vice application submitted*)
Office of the Attorney General
365 East Broad Street
Columbus, Ohio 43215
Phone: (614) 466-4986
bflowers@OhioAGO.gov

Counsel for the State of Ohio, Fredrick W. Stevens, and Scott A. Hildenbrand

James R. Flaiz (*pro hac vice application forthcoming*)
Prosecuting Attorney
Geauga County Prosecutor's Office
231 Main St., 3rd Floor
Chardon, OH 44024
Phone: (440) 279-2100

Counsel for Scott A. Hildenbrand

Herbert H. Slatery III
ATTORNEY GENERAL

/s/ Brandon J. Smith
Dianna Baker Shew (*pro hac vice application submitted*)
Brandon J. Smith (*pro hac vice application submitted*)
Office of the Attorney General
and Reporter
P.O. Box. 20207
Nashville, Tennessee 37202-0207
Phone: (615) 532-4081
dianna.shew@ag.tn.gov
brandon.smith@ag.tn.gov
Counsel for State of Tennessee

CERTIFICATE OF SERVICE

I certify that on November 17, 2021, the above document was filed with the CM/ECF filing system, which electronically served a copy to all counsel of record for:

Kiran Ahuja
United States Office of Personnel Management
1900 E Street, NW
Washington, D.C. 20415

National Aeronautics and Space Administration
Mary W. Jackson NASA Headquarters
300 E Street, SW
Washington, D.C. 20546

Randolph D. Alles
Department of Homeland Security
2707 Martin Luther King Jr. Avenue, SE
Washington, D.C. 20528

William W. Beach
Bureau of Labor Statistics
Postal Square Building
2 Massachusetts Avenue, NE
Washington, D.C. 20212

President Joseph R. Biden, Jr.
The White House
1600 Pennsylvania Avenue, NW
Washington, D.C. 20500

Bureau of Labor Statistics
Postal Square Building
2 Massachusetts Avenue, NE
Washington, D.C. 20212

Robin Carnahan
General Services Administration
1800 F Street, NW
Washington, D.C. 20405

Francis S. Collins
National Institutes of Health
One Center Drive
Bethesda, MD 20892

Consumer Product Safety Commission
4330 East-West Highway
Bethesda, MD 20814

Deanne Criswell
Federal Emergency Management Agency
500 C Street, SW
Room 828
Washington, D.C. 20472

National Institutes of Health
9000 Rockville Pike
Bethesda, MD 20892

Office of Management and Budget
The White House
1600 Pennsylvania Avenue, NW
Washington, D.C. 20500

United States Office of Personnel Management
1900 E Street, NW
Washington, D.C. 20415

L. Eric Patterson
Federal Protective Service
800 North Capitol Street, NW
Suite 500
Washington, D.C. 20002

Safer Federal Workforce Task Force
The White House
1600 Pennsylvania Avenue, NW
Washington, D.C. 20500

United States of America
Attn: President Joseph R. Biden, Jr.
The White House
1600 Pennsylvania Avenue, NW
Washington, D.C. 20500

SERVE: Merrick Garland
Attorney General
Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Rochelle Walensky
Centers for Disease Control and Prevention
1600 Clifton Road, NE
Room 5127
Atlanta, GA 30333

SERVE: Civil Process Clerk
U.S. Attorney's Office for the Eastern District of Kentucky
260 West Vine Street
Suite 300
Lexington, KY 40507

Federal Acquisition Regulatory Council
The White House
1600 Pennsylvania Avenue, NW
Washington, D.C. 20500

Food and Drug Administration
10903 New Hampshire Avenue
Silver Spring, MD 20993

Peter A. Feldman
Consumer Product Safety Commission
4330 East-West Highway
Bethesda, MD 20814

Lesley A. Field
Office of Management and Budget
The White House
1600 Pennsylvania Avenue, NW
Washington, D.C. 20500

General Services Administration
1800 F Street, NW
Washington, D.C. 20405

Department of Homeland Security
2707 Martin Luther King Jr. Avenue, SE
Washington, D.C. 20528

Janet Woodcock
Food and Drug Administration
10903 New Hampshire Avenue
Silver Spring, MD 20993

Shalanda Young
Office of Management and Budget
The White House
1600 Pennsylvania Avenue, NW
Washington, D.C. 20500

Jeffrey Zients
Safer Federal Workforce Task Force
The White House
1600 Pennsylvania Avenue, NW
Washington, D.C. 20500

Tae D. Johnson
Immigration and Customs Enforcement
500 12th Street, SW
Washington, D.C. 20536

Jeffrey A. Koses
General Services Administration
1800 F Street, NW
Washington, D.C. 20405

James M. Murray
United States Secret Service
245 Murray Drive, SW
Washington, D.C. 20223

Immigration and Customs Enforcement
500 12th Street, SW
Washington, D.C. 20536

/s/ Christopher L. Thacker
Counsel for the Commonwealth