**No. 21-14269**

**IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

STATE OF GEORGIA, et al.,

Plaintiffs-Appellees,

v.

PRESIDENT OF THE UNITED STATES, et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Georgia

# REPLY IN SUPPORT OF MOTION FOR STAY PENDING APPEAL

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**AMENDED CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to Eleventh Circuit Rule 26.1-1, counsel for Defendants-Appellants certify that the following have an interest in the outcome of this appeal:

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Alabama Department of Public Health

Alabama Department of Rehabilitation Services

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*American Academy of Family Physicians

*American Academy of Pediatrics

*American College of Chest Physicians

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*American College of Physicians

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## INTRODUCTION AND SUMMARY

Plaintiffs' responses confirm that the Procurement Act's text plainly authorizes the challenged vaccination requirements. Plaintiffs cannot dispute that the statute clearly and broadly empowers the President to make determinations that advance economy and efficiency in the performance of federal contracts. Nor do they contest the basic proposition that a COVID-19 vaccination requirement for contractor employees advances those goals, or that countless private employers have voluntarily adopted the same requirement to advance the same ends. Plaintiffs instead insist that a variety of inapplicable constitutional doctrines require this Court to disregard the Procurement Act's broad grant of authority simply because the statutory text does not specifically mention vaccination. This Court, however, recently rejected an argument of that nature. *Florida v. Department of Health & Human Servs.*, __ F.4th __, 2021 WL 5768796, at *12 (11th Cir. Dec. 6, 2021). And no decision of the Supreme Court supports plaintiffs' atextual approach or suggests that the federal government is precluded from adopting the same safety measures widely adopted by the private sector.

Plaintiffs' arguments on the equities fare no better. The injunction negatively affects billions of dollars in federal contracts. By contrast, this Court recently concluded in a similar case that plaintiffs' injuries—potential compliance costs and the fear that some employees will give up their jobs rather than be vaccinated—are too speculative to establish irreparable harm. *Florida*, 2021 WL 5768796, at *15-16 & n.6.

Besides, the record and the experience of private employers establish that plaintiffs' dire prediction of an employee exodus is unfounded.

Finally, no plaintiff has attempted to defend the district court's decision to enjoin the policy as to all contractors everywhere in the Nation. Because there is no legal basis to extend relief to nonparties or to parties that have not demonstrated Article III standing, this Court should at a minimum narrow the injunction's scope.

## ARGUMENT

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

**A.** The critical question in this case is whether requiring federal contractors' employees to be vaccinated falls within the President's power to "prescribe policies and directives" that he "considers necessary" to "provide the Federal Government with an economical and efficient system" of procurement. 40 U.S.C. §§ 101, 121(a). As the government explained (Mot. 8-14), the answer to that question is yes. The determination that requiring vaccination directly advances economy and efficiency in federal contracting by decreasing absences and reducing transmission of a virulent disease among the federal contractor workforce is not only well-founded and reasonable, but also supported in the record.

Plaintiffs' oppositions do not come to grips with the nature of the Procurement Act or with the challenged policy. Plaintiffs do not dispute that, in the midst of an unprecedented pandemic, measures to avoid extended absences and the infection of coworkers advance economy and efficiency. Nor do they present any other textual

argument for why the Procurement Act's plain text does not authorize the policy they challenge.

Plaintiffs instead urge this Court to ignore the statutory text simply because, in their view, the Executive Order implicates a question of "vast economic and political significance" and so requires a clear statement of congressional intent. State Opp. 10 (quoting *Alabama Ass'n of Realtors v. U.S. Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021)); *see* ABC Opp. 11. But plaintiffs do not contest that the doctrine is inapplicable in contexts where the government acts as a market participant rather than as a regulator. *See* Mot. 13. And the Supreme Court has never suggested that a plaintiff's characterization of an agency action as politically controversial triggers a clear-statement requirement. *See, e.g.*, *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2380 (2020) (analyzing whether agency's contraceptive-mandate rule complied with the statutory text without any heightened-clarity requirement).

To the contrary, as the cases plaintiffs cite confirm, the Supreme Court demands greater clarity only where it has concluded—after extensive analysis of text, context, and structure—that the "text [is] ambiguous" and that the agency's interpretation would undercut the statutory scheme. *Alabama Ass'n of Realtors*, 141 S. Ct. at 2489; *see, e.g.*, *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 321-24 (2014); *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 131-60 (2000). In this case, no such ambiguity exists, and no structural feature of the Procurement Act

or any other statute suggests the President lacks the authority to require these terms as a condition for contracting with the federal government. The district court thus erred in "imposing limits on [the President's] discretion that are not supported by the text." *Little Sisters of the Poor*, 140 S. Ct. at 2381.

Nor do plaintiffs advance their case by casting the Executive Order as a "public health measure," State Opp. 12; *see* ABC Opp. 10, or by likening it to requirements that contractor employees "exercise[] more, smoke[] less, and [eat] healthy." State Opp. 12; *see* ABC Opp. 16. As OMB explained, and as plaintiffs acknowledge, private employers across the country have voluntarily required their employees to be vaccinated. State Opp. 11. Those companies have not done so to regulate public health; instead, they have done so to ensure that their workplaces are as economical and efficient as possible in the face of a deadly and contagious disease. The federal government is entitled to insist that contractors who want to work with the federal government follow that same model.[1] Vaccination requirements, moreover, are not new, but "have been common in this nation," *Klaassen v. Trustees of Indiana Univ.*, 7 F.4th 592, 593 (7th Cir. 2021) (Easterbrook, J.), and remain so among employers and educational institutions throughout the plaintiff States. Whatever the outer limits of

[1] It is of no relevance that federal contractors are not federal employees. *See* State Opp. 11. As plaintiffs themselves note, federal contractors perform significant aspects of the federal government's work, and their ability to perform that work effectively and efficiently diminishes when their employees are at greater risk for contracting a highly transmissible virus. Miller Decl., Dkt. No. 97-1, ¶ 3.

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

By the same token, plaintiffs' theory that the Executive Order is "staggeringly overbroad" (because employees not working on a federal contract are subject to the same requirements if they physically interact with employees working on a federal contract), State Opp. 12, disregards the nature of COVID-19, which is highly transmissible and spreads quickly in closed indoor spaces, *see* 86 Fed. Reg. 63,418, 63,421-22 (Nov 16, 2021). Again, numerous private and public entities have responded to that reality by requiring proof of vaccination for all employees, contractors, vendors, and guests at a given workplace. Jessica Mathews, *The Major Companies Requiring Workers to Get COVID Vaccines*, Fortune (Aug. 23, 2021), https://perma.cc/2WQZ-SUCA. Nothing in the Procurement Act disables the President from taking the same measures. Ultimately, it is only by trivializing the immediate and devastating effects of this pandemic—and by doubting "the effectiveness of the vaccine to prevent disease transmission by those vaccinated"—that plaintiffs can question the economy-and-efficiency interests advanced by the vaccination requirement. ABC Opp. 25 (quotation marks omitted).

**B.** Plaintiffs' constitutional arguments fare no better. As every court of appeals to consider the question has held, the Procurement Act does not violate nondelegation principles. The Act's economy-and-efficiency standard supplies an

intelligible principle that can be applied "to determine whether [the President's] actions are within the legislative delegation." *AFL-CIO v. Kahn*, 618 F.2d 784, 793 n.51 (D.C. Cir. 1979) (en banc); *see* Mot. 14. Plaintiffs offer no basis to distinguish or reject the reasoning in those cases.

Nor does the vaccination requirement "significantly alter[] the balance between federal and state power," State Opp. 10 (quoting *Alabama Ass'n of Realtors*, 141 S. Ct. at 2489). States have no power to set conditions on federal contracts or to police the behavior of federal contractors within their borders. *See United States v. Virginia*, 139 F.3d 984, 987 (4th Cir. 1998). Plaintiffs do not dispute this basic principle.

**C.** Finally, plaintiffs mistakenly argue that the Task Force Guidance and the FAR Memo are procedurally defective because they did not undergo the notice-and-comment procedures described in 41 U.S.C. § 1707. State Opp. 15-17. The district court did not reach these issues, and this Court need not to do so in the first instance. *See Wilkerson v. Grinnell Corp.*, 270 F.3d 1314, 1322 n.4 (11th Cir. 2001).[2] In any event, there are no procedural infirmities. *See Kentucky v. Biden*, 2021 WL 5587446, at *10-12 (E.D. Ky. Nov. 30, 2021). The FAR Memo—and the sample clause within it—is not subject to § 1707 because it is at most nonbinding guidance that has no independent effect unless an agency chooses to incorporate it into a contract. Procurement

[2] ABC attempts in a footnote to incorporate by reference alternative grounds for affirmance, ABC Opp. 10 n.3, but this Court has rejected that practice, *see Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr S.A.*, 377 F.3d 1164, 1167 n.4 (11th Cir. 2004).

policies, moreover, need not undergo notice-and-comment procedures if "urgent and compelling circumstances" make compliance with those requirements impracticable. 41 U.S.C. § 1707(d). Here, OMB explained that waiving the notice requirements was critical to providing federal contractors and subcontractors needed regulatory certainty to implement the Executive Order's requirements.

## II. The remaining factors heavily favor a stay.

As the government previously explained (Mot. 19-21), even a short delay in the Executive Order's implementation "will cause significant productivity losses" from "schedule delays," "leave and health care costs for workers who are sick, isolating, or quarantined and unable to perform," and "reduced performance." Miller Decl., Dkt. No. 97-1, ¶ 9; *see also* U.S. Gov't Accountability Office, GAO-20-662, *Observations on Contractor Paid Leave Reimbursement Guidance and Use* (Sept. 2020), https://perma.cc/TPF7-9VN4 (finding the Department of Energy alone reimbursed federal contractors for nearly $550 million in paid leave costs related to COVID-19 during the first half of 2020). Although plaintiff States characterize the government's interest in avoiding such harms as "minimally increased contracting efficiency," State Opp. 21, they do not dispute that the nationwide injunction will seriously hinder "the

Federal Government's procurement of essential services that are required to support the American people," Miller Decl., Dkt. No. 97-1, ¶ 3.[3]

By contrast, plaintiffs have identified no irreparable harm that will result from a stay pending appeal. Plaintiffs complain about the costs associated with complying with the challenged provisions, State Opp. 19-20; ABC Opp. 7, but this Court recently found analogous compliance costs insufficient to establish irreparable harm, *Florida v. Department of Health & Human Servs.*, __ F 4th __, 2021 WL 5768796, at *16 n.6 (11th Cir. Dec. 6, 2021). Indeed, "[o]rdinary compliance costs are typically insufficient to render harm irreparable." *LabMD, Inc. v. FTC*, 678 F. App'x 816, 821 (11th Cir. 2016); *American Hosp. Ass'n v. Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980) (same). And the costs plaintiffs incur preparing bids for contracts containing the challenged provisions could be recovered pursuant to the Tucker Act, 28 U.S.C. § 1491(b)(1)-(2), a remedial option plaintiffs entirely ignore in their briefing.

Plaintiffs' dire prediction that large numbers of contractor employees will give up their jobs rather than be vaccinated finds no support in the record. State Opp. 22; ABC Opp. 4. They cite a handful of declarations stating that the implementation of the challenged provisions could result in employees leaving work or facing discipline.

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[3] Contrary to plaintiffs' suggestion, nothing in Federal Rule of Appellate Procedure 8 requires a party seeking a stay to wait for the district court to rule before filing a motion in the court of appeals. *See* Fed. R. App. P. 8(a)(2)(A)(ii) (appellate filing appropriate if "the district court denied the motion *or* failed to afford the relief requested" (emphasis added)). The district court has still not acted on the government's stay motion.

But "declarations say[ing] nothing more than that 'some employees' may resign rather than be vaccinated" are "entirely speculative" and do not "show[] an irreparable injury is likely." *Florida*, 2021 WL 5768796, at *16. Plaintiffs' declarations also do not establish that contractor employees nationwide will refuse to comply with vaccination requirements. In fact, "the experience of private companies is to the contrary," 86 Fed. Reg. at 63,422, with one recent study noting that only "1% of all adults … say they left a job because an employer required them to get vaccinated," Kaiser Family Found., *The KFF COVID-19 Vaccine Monitor* (Oct. 28, 2021), https://perma.cc/ENL7-E7HE. Indeed, many federal contractors have voluntarily agreed to add the COVID-19 safety clause. *See* Mot. 21.

**III. The nationwide injunction should be narrowed.**

At a minimum, the Court should grant a stay to narrow the nationwide injunction's scope, which no plaintiff fully defends. *See Louisiana v. Becerra*, 2021 WL 5913302 (5th Cir. Dec. 15, 2021) (granting stay to limit nationwide injunction).

**A.** The States offer no defense of the nationwide injunction. State Opp. 20 n.1. They do not contest that relief to a plaintiff is appropriate only to the extent that the plaintiff has demonstrated Article III standing. And they do not dispute the government's showing (Mot. 19 & n.4) that they lack *parens patriae* standing to sue on behalf of private businesses within their borders. Instead, they argue only that each State has standing based on its own federal contracts. An injunction could thus extend only to those contracts. But the district court found that only Georgia had pointed to

a contract that will imminently be affected by the vaccination requirement. Unless the other plaintiff States can make that showing, they are not entitled to relief.

**B.** For its part, ABC does not respond to the government's claim (Mot. 15-18) that nationwide injunctions are inconsistent with Article III and equitable principles. ABC does not argue that an injunction in this case should benefit nonparties. Rather, ABC asserts that all of its members should benefit from an injunction because all of its members will be harmed by the contractor vaccination requirement. ABC Opp. 21-22. As the government explained (Mot. 18), the evidence presented to the district court shows only that two ABC members face imminent harm from the vaccination requirement and granting an injunction as to ABC members who have not demonstrated that harm would be inconsistent with bedrock scope-of-relief principles. But even if this Court concludes that all ABC members have shown imminent harm, there is still no basis to extend relief to entities that are not members of ABC and that have not sought to participate in this suit. *See* ABC Opp. 24 (contending only that relief should extend "*to plaintiffs* whose harms are nationwide" (emphasis added)).[4]

[4] ABC's argument that the Administrative Procedure Act (APA) requires nationwide relief, ABC Opp. 21, ignores that the action the district court enjoined—the President's Executive Order—is not an agency action and so is not subject to the APA. *See Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992). In any event, "[n]o statute expressly grants district courts the power to issue universal injunctions," and any statute purporting to do so would need to comply with the limits of Article III. *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 & n.2 (2018) (Thomas, J., concurring).

## CONCLUSION

The district court's preliminary injunction should be stayed pending appeal.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(C) because it contains 2,559 words. This brief also complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

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## CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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