Case No. 21-6147

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

COMMONWEALTH OF KENTUCKY, *et. al.*

Plaintiffs-Appellees

v.

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

Defendants-Appellants

On Appeal from the United States District Court
for the Eastern District of Kentucky
Case No. 3:21-cv-55

PLAINTIFFS-APPELLEES' RESPONSE TO MOTION FOR STAY PENDING APPEAL

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INTRODUCTION

President Biden's administration has interpreted a 70-year-old procurement statute, which Congress passed to modernize federal contracting shortly after World War II, to empower the federal government to issue a nationwide vaccine mandate for federal contractors and subcontractors (the "Vaccine Mandate"). This unprecedented action, done under the guise of procurement, regulates the private health-care decisions of one in five American workers, imposes meaningful administrative burdens on their employers, and affects billions of federal-contracting dollars.

This is not the first time during the COVID-19 pandemic that the federal government has tried to use an old statute in a previously unthinkable way. That prior effort failed. *Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485 (2021) (per curiam). This one should too. In fact, in defending the Vaccine Mandate, President Biden's administration simply repeats the many errors it made in *Alabama Realtors*.

This appeal primarily concerns the Federal Government's authority under the Federal Property and Administrative Services Act (the "Procurement Act"). The Federal Government invokes that statute's prefatory language about providing an "economical and efficient system" for contracting. 40 U.S.C. § 101. But agency action imposing vast economic and political consequences requires a clear statement from Congress, as does agency action intruding on areas traditionally regulated by the States, like vaccination policies. Yet the Procurement Act's "economical and efficient" language

comes nowhere close to authorizing, much less unambiguously so, the Vaccine Mandate. And the Federal Government cannot identify any prior use of the Procurement Act that is even marginally similar to the Vaccine Mandate. Worse still, the Federal Government's interpretation of the Procurement Act has no limiting principle. Additionally, its boundless reading raises other statutory and constitutional issues.

The district court, correctly recognizing that "[t]his is not a case about whether vaccines are effective," entered a preliminary injunction against the Vaccine Mandate. *Kentucky v. Biden*, --- F. Supp. 3d ---, 2021 WL 5587446, at *1, 5–7 (E.D. Ky. Nov. 30, 2021). The Court should deny the Federal Government's motion to stay this preliminary injunction.

BACKGROUND

President Biden announced his public-health initiative to boost vaccination rates on September 9, 2021. Remarks at the White House (Sept. 9, 2021), https://perma.cc/GQG5-YBXK. His intent was clear: "[W]e must increase vaccinations among the unvaccinated with new vaccination requirements." *Id.* So he issued several different vaccine mandates. As President Biden explained, his goal is "to protect vaccinated workers from unvaccinated workers" and to "reduce the spread of COVID-19 by increasing the share of the workforce that is vaccinated in businesses all across America." *Id.*

One part of President Biden's public-health initiative to increase vaccinations "in businesses all across America" is Executive Order 14042, 86 Fed. Reg. 50,985 (Sept. 9,

2021). This order requires three federal agencies to create and implement a vaccine mandate for all federal contractors and subcontractors. *Id.*

First, President Biden ordered the Safer Federal Workforce Task Force to issue guidance establishing mandatory COVID-19 safety protocols. *Id.* The Task Force issued its guidance on September 24, 2021, requiring covered contractors and subcontractors to ensure their employees are fully vaccinated. *See* Safer Federal Workforce Task Force, *COVID–19 Workplace Safety: Guidance for Federal Contractors and Subcontractors*, at 5, https://perma.cc/2R27-9J4U ("Task Force Guidance"). This guidance covers employees working in outdoor areas, employees not directly engaged in performing covered work, and even employees working entirely from home. *Id.* at 9–14. Only for an employee "legally entitled to an exception" does the guidance not require vaccination. *Id.* at 5.

Second, President Biden, purportedly pursuant to his authority under the Procurement Act, ordered the Director of the Office of Management and Budget ("OMB") to determine whether the Task Force Guidance "will promote economy and efficiency in Federal contracting." 86 Fed. Reg. at 50,985. If OMB so concluded, the President directed it to adopt the Guidance and publish its determination in the Federal Register. *Id.* at 50,985–86. OMB adopted the Guidance wholesale four days after the Task Force issued it. Determination of the Promotion of Economy and Efficiency in Federal Contracting Pursuant to Executive Order No. 14042, 86 Fed. Reg. 53,691, 53,692 (Sept. 28, 2021). It did so with a 210-word perfunctory statement that the vaccine mandate "will

improve economy and efficiency by reducing absenteeism and decreasing labor costs" in contracting. *Id.* at 53,692.

Perhaps realizing its original determination was insufficient, OMB later published a post hoc rationalization for the Vaccine Mandate. Determination of the Acting OMB Director, 86 Fed. Reg. 63,418 (Nov. 16, 2021). OMB again claimed that the Vaccine Mandate "will promote economy and efficiency in Federal contracting by reducing absenteeism and decreasing labor costs." *Id.* at 63,418. In doing so, OMB provided no concrete data about productivity losses or increased costs for federal contractors before the Vaccine Mandate, nor did it provide data about the marginal efficiency or productivity increases that the mandate could be expected to produce. *Id.* at 63,421–23. And yet OMB also entirely discounted contracting inefficiencies that would be caused by the mandate, even dismissing the likelihood of worker shortages as "anecdotal." *Id.* at 63,422.

Third, the President ordered the Federal Acquisition Regulatory Council (the "FAR Council") to implement the Task Force Guidance by amending the Federal Acquisition Regulation to include the mandatory safety protocols and by directing the acquisition offices of federal agencies to begin incorporating the mandatory protocols into their contracts. 86 Fed. Reg. at 50,986. On September 30, 2021, the FAR Council issued a memorandum to government officials responsible for contracting. *See* Memorandum from FAR Council to Chief Acquisition Officers et al. re: Issuance of Agency Deviations to Implement Executive Order 14042 (Sept. 30, 2021),

https://perma.cc/9BQ8-XBT6. That memorandum directs acquisition officers to begin incorporating the mandatory protocols into contracts entered into or renewed after October 15, 2021. *Id.* at 2.

Once the Task Force, OMB, and the FAR Council implemented the commands of Executive Order 14042, the expected happened. Federal agencies began demanding that their contractors incorporate the Vaccine Mandate into contracts. [*See* Stevens Decl., R.12-2, PageID#274; University Emails, R.57-2 & 57-3, PageID#949–53; GSA Emails, R.57-7, PageID#996–1141]. As both the agencies and their contractors saw it, the President's Vaccine Mandate was fully operational.

The plaintiffs—the Commonwealth of Kentucky, the State of Ohio, the State of Tennessee, and two Ohio sheriffs (together, the "States")—filed suit challenging the Vaccine Mandate. The States also moved for a preliminary injunction, which the district court granted. It held that the States will likely succeed on the merits because the Federal Government cannot use its congressionally delegated authority in a procurement statute to issue the Vaccine Mandate. *Kentucky*, 2021 WL 5587446, at *5–7. The court also concluded that the States will likely succeed on their claims under the Competition in Contracting Act, the nondelegation doctrine, and the Tenth Amendment. *Id.* at *7–10. The court subsequently denied the Federal Government's motion to stay the injunction. [Order, R.59, PageID#59–60].

ARGUMENT

Four considerations govern whether the Court should stay the district court's preliminary injunction: (i) whether the Federal Government has made a "strong showing" it will prevail on the merits; (ii) whether the Federal Government established irreparable harm absent a stay; (iii) whether a stay will "substantially injure" other parties; and (iv) "where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009). All four factors cut against the Federal Government.

I. The Federal Government is unlikely to prevail on the merits.

A. The States have standing.

The States have standing in three independent capacities.

1. At a minimum, the States have standing as federal contractors. To establish standing in this context, a plaintiff need only make "an adequate showing that sometime in the relatively near future it will bid on another Government contract" subject to the objectionable condition. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995). This does not require identifying a specific contract that the plaintiff intends to bid on or renew. *Id.* at 211–12. Rather, a plaintiff can demonstrate based on past performance that there is a substantial likelihood it will seek an additional contract in the "near future." *Id.*; *see also Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 386 (6th Cir. 2020) (discussing standing at preliminary-injunction phase).

The States have made that showing in spades. Tennessee, for example, "routinely" enters into contracts with federal agencies that are otherwise covered by the

Vaccine Mandate and "expects to continue pursuing government contracts in the future." [Niknejad Decl., R.12-1, PageID#270]. Some of those contracts are "subject to renewal or the exercise of options" after the date on which the Federal Government requires inclusion of the Vaccine Mandate. [*Id.*]. Kentucky has identified a specific contract subject to yearly renewals that the Federal Government can exercise in the near future. [Lease, R.22-7, PageID#594]. And two state universities received notice of their obligations under the Vaccine Mandate. [Amendment, R.22-2, PageID#534; Emails, R.57-2 & 57-3, PageID#949–53]. The Federal Government also has directed an Ohio sheriff to "provide signature" on a contract modification incorporating the Vaccine Mandate into an existing contract. [Stevens Decl., R.12-2, PageID#274; E-mail Instructions, R.27-2, PageID#703]. Each of these examples establishes Article III standing. *See Horne v. Flores*, 557 U.S. 433, 445 (2009) (holding that only one plaintiff needs standing).

The Federal Government faults the States for (allegedly) not identifying a specific contract they intend to renew or seek. Mtn. 8. That is wrong on the facts and the law. On the facts, the States have identified a current contract up for renewal in the near future. [Lease, R.22-7, PageID#594]. Even still, Article III does not require that level of specificity. In *Adarand*, the Supreme Court said a pattern of bidding on contracts with the likelihood of bidding on similar contracts in the "near future" is enough.

Adarand, 515 U.S. at 211–12. The States have produced similar, uncontroverted evidence here. [Niknejad Decl., R.12-1, PageID#270].[1]

2. The States also have standing as separate sovereigns. States are "entitled to special solicitude in [the] standing analysis." *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007). The Federal Government's invasion of state sovereignty constitutes an injury in fact to the States. *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, 153–54 (5th Cir. 2015), *aff'd* 136 S. Ct. 2271 (2016); *Ohio ex rel. Celebrezze v. U.S. Dep't of Transp.*, 766 F.2d 228, 232–33 (6th Cir. 1985). The Vaccine Mandate imposes such an injury because "the regulation of health and safety matters is primarily, and historically, a matter of local concern." *See Hillsborough Cnty., Fla. v. Automated Med. Lab'ys, Inc.*, 471 U.S. 707, 719 (1985). By preempting the States' policy choices with health-and-safety measures that are ordinarily reserved to the States, the Federal Government intruded on state sovereignty. *See BST Holdings, L.L.C. v. OSHA*, 17 F.4th 607, 618 (5th Cir. 2021). And when the Federal Government does so unlawfully—by acting beyond its authority—the States have standing to seek relief for the resulting injury.

3. Finally, the States have standing as *parens patriae* to represent the interests of their citizens. Vendors in Kentucky, Ohio, and Tennessee (many of which are state

[1] Tennessee additionally established standing through the financial burdens imposed by the Vaccine Mandate. [Niknejad Decl., R.12-1, PageID#271]; *see Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019).

agencies) held around $30 billion in federal contracts in 2020. *Kentucky*, 2021 WL 5587446, at *3. The Federal Government even admits to "procur[ing] over $2.5 billion in goods and services each month in Ohio, Tennessee, and Kentucky." [Field Decl., R.53-1, PageID#922]. And there is no dispute that the Vaccine Mandate affects contractors, subcontractors, and their employees within the States. So the district court correctly found that the States "are permitted 'to litigate as *parens patriae* to protect quasi-sovereign interests—i.e., public or governmental interests that concern the state as a whole.'" *Kentucky*, 2021 WL 5587446, at *3 (citing *Massachusetts*, 549 U.S. at 520 n.17).

The Federal Government contends that the States cannot maintain *parens patriae* actions against it. Mtn. 8–10, 20–21. Not so. The Federal Government has identified no decision from this Court or the Supreme Court that prohibits the States from asserting *parens patriae* claims against a federal *agency* that is unlawfully administering an otherwise lawful statute. Instead, the Federal Government relies on dicta from *Snapp* to argue that "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government." Mtn. 9 (quoting *Snapp*, 458 U.S. at 610 n.16). And that dicta, in turn, relied on *Massachusetts v. Mellon*, 262 U.S. 447 (1923), a decision limited to its facts in part because it predates modern standing doctrine and the administrative state. *See Pennsylvania ex rel. Shapp v. Kleppe*, 533 F.2d 668, 682 (D.C. Cir. 1976) (Lumbard, J., dissenting).

The distinction between challenging the legality of a statute and challenging an agency's implementation of that statute "is pivotal." *Id.* "The former is clearly and

obviously a fundamental threat to the federal sovereign power," while "the latter seeks only to vindicate the will of the people as it has been expressed by their duly elected representatives in the national legislature." *Id.* So the rule from *Mellon* at most applies only when a State sues to invalidate a federal statute. *See Abrams v. Heckler*, 582 F. Supp. 1155, 1159 (S.D.N.Y. 1984) (collecting sources). Almost six decades after *Mellon*, the Second Circuit held that "New York has standing in its capacity as parens patriae" to sue federal officials for actions relating to the U.S. Census. *Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980) (per curiam). And the Fifth Circuit has recognized that a State may sue a federal official due to an impending injury to "disadvantaged citizens for whom it stands parens patriae." *Florida v. Weinberger*, 492 F.2d 488, 492, 494 (5th Cir. 1974).

B. The Procurement Act does not authorize the Vaccine Mandate.

The district court concluded that "it strains credulity that Congress intended the [the Procurement Act], a procurement statute, to be the basis for promulgating a public health measure such as mandatory vaccination." *Kentucky*, 2021 WL 5587446, at *6. The Federal Government has not made a strong showing that the district court was wrong in this regard.

The Federal Government has identified two provisions in the Procurement Act that purportedly authorize its actions: 40 U.S.C. §§ 101 and 121(a). These two provisions, by their text, concern procurement, not public health. For the following reasons, they do not authorize the Federal Government to impose the Vaccine Mandate.

1. Start with the scope and effect of the Vaccine Mandate. The Department of Labor reports that "workers employed by federal contractors" comprise "approximately *one-fifth* of the entire U.S. labor force." *Kentucky*, 2021 WL 5587446, at *1 (emphasis added). And for just the three plaintiff States, "federal contracting is a *multi-billion* dollar industry." *Id.* (emphasis added); [*see also* Amend. Compl., R.22, PageID#417–19; Field Decl., R.53-1, PageID#920, 922–23]. In sum, the Vaccine Mandate affects billions of contracting dollars, applies to a large swath of American workers, and burdens their employers.

Supreme Court precedent requires unambiguous approval from Congress before an agency can impose such far-reaching economic and political consequences.[2] That is, Congress must "speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance.'" *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 (citation omitted); *see Kentucky*, 2021 WL 5587446, at *7, 10. The Vaccine Mandate is one such far-reaching and politically significant measure. *Georgia v. Biden*, --- F. Supp. 3d ---, 2021 WL 5779939, at *9 (S.D. Ga. Dec. 7, 2021), *appeal filed*, 21-14269 (11th Cir.). The mandate applies nationwide to an enormous group of employers and employees; it affects

[2] The controversy surrounding federally imposed vaccine mandates matters here. *BST Holdings*, 17 F.4th at 617. Reports show that many workers will quit their jobs if forced to vaccinate. [Amend. Compl., R. 22, PageID#420]. Numerous lawsuits have been filed to challenge President Biden's vaccine mandates. And even the U.S. Senate has voted, on a bipartisan basis, to overturn the OSHA vaccine mandate. Brian Naylor, *In a Largely Symbolic Move, the Senate Votes to Block Biden's Vaccine-or-Test Mandate*, NPR (Dec. 8, 2021), https://perma.cc/5JSH-U9K5.

billions of federal contracting dollars; and it implicates an issue subject to vigorous political debate, including in the halls of Congress.

The Procurement Act does not clearly authorize the Vaccine Mandate. The Federal Government invokes the law's prefatory clause, which simply mentions an "economical and efficient system" for procurement. 40 U.S.C. § 101. Even assuming this prefatory language is a source of regulatory authority,[3] this procurement-focused provision does not unambiguously authorize the Federal Government to impose the Vaccine Mandate. *See Ala. Ass'n of Realtors*, 141 S. Ct. at 2489. The Federal Government cannot "bring about an enormous and transformative expansion in [its] regulatory authority without clear congressional authorization." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014).

2. The fact that the Vaccine Mandate "intrudes into an area that is the particular domain of state law" bolsters this conclusion. *See Ala. Ass'n of Realtors*, 141 S. Ct. at 2489. It has long been "a traditional exercise of the States' 'police powers to protect the health and safety of their citizens.'" *Hill v. Colorado*, 530 U.S. 703, 715 (2000) (citation and quotation marks omitted). "And to mandate that a person receive a vaccine . . . falls squarely within the States' police power." *BST Holdings*, 17 F.4th at 617 (collecting

[3] *See Dist. of Columbia v. Heller*, 554 U.S. 570, 578 (2008) ("[A]part from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause.").

sources). The Federal Government protests that "federal contracts are not an area traditionally reserved to the states." Mtn. 18. But that ignores the reality of the Vaccine Mandate.

When, as here, the Federal Government tries to regulate an area traditionally left to the States, Congress must have used "exceedingly clear language if it wishe[d] to significantly alter the balance between federal and state power . . . ." *Ala. Realtors*, 141 S. Ct. at 2489 (citation omitted). For the reasons already explained, the Procurement Act's "economical and efficient" language does not meet this demanding clear-statement rule.

3. The Federal Government does not even try to offer a limiting principle for its assertion of authority. As the district court recognized, if the Procurement Act authorizes the Vaccine Mandate, "then the statute could be used to enact virtually any measure at the [P]resident's whim under the guise of economy and efficiency." *Kentucky*, 2021 WL 5587446, at *7. The district court thus wondered "what would stop [the Procurement Act] from being used to permit federal agencies to refuse to contract with contractors and subcontractors who employ individuals over a certain BMI for the sake of economy and efficiency during the pandemic? After all, the CDC has declared that 'obesity worsens the outcomes from Covid-19.'" *See id.* (citation omitted). Or "[w]hy couldn't the federal government refuse to contract with contractors and subcontractors who work in crowded indoor office spaces or choose to engage in indoor activities

where Covid-19 is more likely to spread?" *Id.* The Federal Government has no answer to these questions.

The Federal Government's only attempt to supply a limiting principle is to claim that the Vaccine Mandate does not "regulate employers generally." Mtn. 14. But that assertion only validates the district court's concerns: the Federal Government apparently believes that, under the Procurement Act, it can regulate federal contractors and subcontractors in the boundless ways that the district court (and the States) fear. *See Ala. Realtors*, 141 S. Ct. at 2489 (rejecting interpretation of statute that would give federal agency a "breathtaking amount of authority" and make it "hard to see what measures th[e] interpretation would place outside the [agency's] reach"). In short, the Procurement Act is a "wafer-thin reed on which to rest such sweeping power." *See id.*

4. Rather than grapple with *Alabama Realtors* and cases like it, the Federal Government relies on a nexus standard derived from *AFL-CIO v. Kahn*, 618 F.2d 784 (D.C. Cir. 1979) (en banc). But unlike this case, *Kahn* did not involve a sweeping and altogether unprecedented application of the Procurement Act. *Cf. id.* at 793 n.50. Nor did *Kahn* involve so direct an incursion on the States' police power. *Kahn* instead concerned whether ordering compliance with "voluntary wage and price standards" for some contracts fell within the Procurement Act. *Id.* at 785. And *Kahn* recounted that historically "the most prominent use of the President's authority under [the Procure-

ment Act] has been a series of anti-discrimination requirements for Government contractors." *Id.* at 790. These applications of the Procurement Act bear no similarity to the Vaccine Mandate.

The same is true for the Federal Government's other examples of prior uses of the Procurement Act. The Federal Government notes that the statute has been applied to "requir[e] employers to hang posters" regarding union participation. Mtn. 11. But requiring a contractor to post a notice in a breakroom is altogether unlike a vaccine mandate that covers one-fifth of the workforce and associated employers. *Kahn*, and the other cases on which the Federal Government relies, involved applications of the Procurement Act that were different in kind from the Vaccine Mandate. So even if the Court concludes that a nexus requirement governs here, the Vaccine Mandate still exceeds the bounds of the Procurement Act. *Kentucky*, 2021 WL 5587446, at *7; *Georgia*, 2021 WL 5779939, at *10.

Noticeably absent from the Federal Government's examples of Procurement Act applications is any instance of an agency regulating the private health-care decisions of anyone. *See Kentucky*, 2021 WL 5587446, at *9. This absence counsels against reading the Procurement Act as expansively as the Federal Government does. *See Ala. Realtors*, 141 S. Ct. at 2489 ("This claim of expansive [statutory] authority . . . is unprecedented. Since that provision's enactment in 1944, no regulation premised on it has even begun to approach the size or scope of the eviction moratorium.").

The Federal Government counters that the President is allegedly acting as a "market participant" under the Procurement Act. Mtn. 15. But that is just another way of saying that procurement law empowers the President to leverage the federal government's market power to regulate workers' personal health-care decisions. If Congress intended for the Procurement Act to regulate public health through the federal government's market power, it needed to say so. Regardless, even as a market participant, the Federal Government "does not have unlimited authority to make decisions [it] believes will likely result in savings to the government." *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1330 (D.C. Cir. 1996). The Procurement Act is not a "blank check for the President to fill in at his will." *Kahn*, 618 F.2d at 793; *see also Liberty Mut. Ins. Co. v. Friedman*, 639 F.2d 164, 169–72 (4th Cir. 1981) (finding executive order beyond scope of the Procurement Act). The President wields only limited, delegated power from Congress with respect to contracting.

* * *

Congress passed the Procurement Act to respond "to the recommendation of the Hoover Commission in 1949 that the Government's method of doing business be streamlined and modernized." *Kahn*, 618 F.2d at 787. A statute Congress enacted shortly after World War II to update procurement cannot be read to authorize an unprecedented nationwide vaccine mandate affecting a multi-billion dollar industry and covering about 20 percent of the workforce and their employers.

C. The Vaccine Mandate violates the Competition in Contracting Act.

The Federal Government's boundless reading of the Procurement Act also violates the Competition in Contracting Act. *Kentucky*, 2021 WL 5587446, at *7–8. That statute requires "full and open competition through the use of competitive procedures" in procurement. 41 U.S.C. § 3301(a)(1). The President's Procurement Act authority must comply with that requirement. *See* 40 U.S.C. § 121(a); 40 U.S.C. § 111. The Vaccine Mandate violates Section 3301(a)(1) because it "effectively exclud[es] an offeror from winning an award, even if that offeror represents the best value to the government." *See Nat'l Gov't Servs., Inc. v. United States*, 923 F.3d 977, 990 (Fed. Cir. 2019). While "a solicitation requirement (such as a past experience requirement)" can be lawful as an evaluation criteria, *see id.* at 985, a requirement operating as a categorical ban on contractors is unlawful, *see id.* at 986. The Federal Government's categorical exclusion of contractors that do not follow the Vaccine Mandate, even though they may be the best value to the government, therefore violates the Competition in Contracting Act.

D. The Vaccine Mandate is unconstitutional.

The district court also identified two "concerning . . . constitutional implications" associated with the Vaccine Mandate. *Kentucky*, 2021 WL 5587446, at *7.

1. First, the district court relied on the nondelegation doctrine, *id.* at *8–9, which "bars Congress from transferring its legislative power to another branch of Government." *Gundy v. United States*, 139 S. Ct. 2116, 2121 (2019) (plurality opinion). Under

current precedent, the operative question is whether "Congress has supplied an intelligible principle to guide the delegee's use of discretion." *Id.* at 2123.

The Procurement Act contains no intelligible principle if it is read to permit the Vaccine Mandate. The Federal Government's inability to articulate a limiting principle reinforces this point. Such a capacious and limitless grant of authority contains no intelligible principle. In fact, it would allow the Federal Government, acting as a contractor, to "do anything it can conceive of to prevent the spread of disease." *See Tiger Lily, LLC v. U.S. Dep't of Housing & Urban Dev.*, 5 F.4th 666, 672 (6th Cir. 2021).

2. Second, the district court expressed "serious concern that Defendants have stepped into an area traditionally reserved to the States." *Kentucky*, 2021 WL 5587446, at *10. As explained above, this concern is well-founded. And importantly, "the States but not . . . the federal government" possess the police power. *Nat'l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012).

II. The other relevant factors do not support a stay.

1. The Federal Government cannot demonstrate any concrete harm—much less irreparable injury—that will follow if the Court does not take the extraordinary step of staying the district court's injunction. Instead, the Federal Government offers speculation about what *could* happen to federal contracting without the Vaccine Mandate's immediate implementation. Mtn. 19–20. For example, the Federal Government makes the conclusory claim that delaying the Vaccine Mandate "will cause significant productivity losses." *Id.* at 19. These losses, the government cryptically says, "will affect" the

billions of dollars in federal contracts held within the States. *Id.* But the Federal Government does not bother to explain what those specific productivity losses might look like. Instead, it speculates about "mission disruptions" that (apparently) cannot be quantified or even specifically identified and have not otherwise occurred during the past two years of the pandemic. This abject speculation does not establish irreparable injury, particularly when the district court's injunction maintains the status quo that has existed since vaccines became available. *See Abney v. Amgen, Inc.*, 443 F.3d 540, 552 (6th Cir. 2006) ("To demonstrate irreparable harm, [a party] must show that . . . [it] will suffer 'actual and imminent' harm rather than harm that is speculative or unsubstantiated." (citations omitted)); *Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 669 (6th Cir. 2016) (finding "of particular significance" that "the district court's grant of a preliminary injunction maintained the status quo").

To be clear, the Federal Government has roughly a year of relevant experience with federal contractors—contractors with vaccine mandates, contractors without vaccine mandates, and so on. Despite this experience, the Federal Government has not identified *even one* past contracting disruption as grounds for speculating about what may occur if the Vaccine Mandate remains on hold. Instead, the Government vaguely asserts that new disruptions will overtake federal procurement without a stay. If the Govern-

ment cannot identify even one productivity loss caused by the lack of the Vaccine Mandate, on what basis can it claim that it will experience significant losses "[e]very month that the injunction remains in place"? Mtn. 19.

The Federal Government's assertions about irreparable harm are betrayed by its own decision to unilaterally postpone the Vaccine Mandate by 41 days (after already delaying for months once COVID-19 vaccines became available). 86 Fed. Reg. at 63,420. The Federal Government first proposed the Vaccine Mandate more than three months ago. And then it delayed the compliance deadline—first until December 8, 2021, and now until January 18, 2022. *See id.* If its injury is in fact irreparable, the Federal Government has inflicted irreparable harm on itself for months.

2. In contrast to the Federal Government's lack of irreparable harm, the States' injuries are obvious. To begin with, "complying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs." *BST Holdings*, 17 F.4th at 618. But the stakes go beyond compliance costs. The Vaccine Mandate forces on some of the States' citizens "a choice between their job(s) and their jab(s)"—a choice that "substantially burden[s] . . . [their] liberty interests." *Id.*; *see also* Tina Bellon and Eric Johnson, *From Boeing to Mercedes, a U.S. worker rebellion swells over vaccine mandates*, Reuters (Nov. 2, 2021), https://www.reuters.com/world/us/boeing-mercedes-us-worker-rebellion-swells-over-vaccine-mandates-2021-11-02/. And it does so while invading the States' "constitutionally reserved police power over public health policy." *See BST Holdings*, 17 F.4th at 618. Finally, if the Court enters a stay, employees

and employers who have justifiably relied on the district court's injunction will be harmed as they rush to figure out what they must do to comply with the Vaccine Mandate, including with deadlines that have now passed or will soon pass. Importantly, in another challenge to the Vaccine Mandate, the Federal Government has refused to delay re-implementation of the mandate for "any fixed period" if it again becomes enforceable. *See Brnovich v. Biden*, No. 2:21-cv-1568, R.119-1 (D. Ariz.).

3. "For similar reasons, a stay is firmly in the public interest." *Id.* The Federal Government cannot identify a concrete contracting disruption caused by staying the Vaccine Mandate. By contrast, staying the injunction will subject federal contractors, subcontractors, and their employees to a draconian mandate that the Federal Government has no legal authority to authorize. *See Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 252 (6th Cir. 2005) ("[T]he public interest lies in a correct application" of federal law (citation omitted)).

CONCLUSION

The Court should deny the motion for a stay pending appeal.

Respectfully submitted by,

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(g) and 6th Cir. R. 32(a), I certify that this response contains 5,083 words.

This response complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in 14-point Garamond font using Microsoft Word.

s/ Matthew F. Kuhn

CERTIFICATE OF SERVICE

I certify that on December 16, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Matthew F. Kuhn