**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF KENTUCKY**
**CENTRAL DIVISION**
**FRANKFORT**
***Electronically Filed***

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| COMMONWEALTH OF KENTUCKY, *et al.*,<br><br>Plaintiffs,<br>v.<br><br>JOSEPH R. BIDEN, *et al.*,<br><br>Defendants. | Civil No. 3:21-cv-00055-GFVT |

**DEFENDANTS' REPLY IN SUPPORT OF THEIR EMERGENCY MOTION FOR STAY PENDING APPEAL AND FOR IMMEDIATE ADMINISTRATIVE STAY**

Defendants have sought an emergency stay pending appeal of the Court's November 30, 2021 Opinion and Order, ECF No. 50 ("Order"). For the reasons explained in Defendants' stay motion, ECF No. 53 ("Mot."), the four factors governing their request tilt decisively in favor of issuing a stay of the Court's preliminary injunction pending appeal. At a minimum, Defendants have demonstrated that an immediate administrative stay of the Court's order is warranted to allow the Sixth Circuit time to meaningfully consider an emergency stay motion if one is not issued by this Court.[1] In opposition, ECF No. 57 ("Opp."), Plaintiffs offer no persuasive argument against a stay pending appeal. Defendants nevertheless submit this reply in support of their stay motion.

[1] Defendants respectfully request that the Court rule on their stay motion expeditiously. Defendants note that they intend to seek relief in the Sixth Circuit on December 10, 2021.

**1.** To begin, Plaintiffs appear to agree with Defendants' straightforward reading of the Court's preliminary injunction. As their stay motion makes clear from the outset, Defendants understand the Court's order to prevent federal agencies from *enforcing*, within Kentucky, Ohio, and Tennessee, those contract provisions described in its order that are included in certain categories of federal contracts pursuant to EO 14042, so long as the preliminary injunction remains in place. Mot. at 1–2. Plaintiffs evidently read the Court's order the same way, as they do not object to Defendants' understanding. Moreover, the harms that Plaintiffs describe in their opposition would only flow from the *enforcement* of a COVID-19 safety clause, as opposed to inclusion of such clause. *See, e.g.*, Opp. at 5 n.2 (describing purported harms that would result if the Task Force Guidance were made "ultimately applicable" to a federal contractor, such that its staff would be "require[d] . . . to comply with the vaccine mandate"); *id.* at 7 ("[A]llowing Defendants to *enforce*" the Task Force Guidance "against Ohio Tennessee, and Kentucky residents would permit the exact injury this suit aims to prevent." (emphasis added)); *id.* ("And if Defendants can *enforce* the mandate, they could place Plaintiff States . . . on a blacklist, another harm this suit aims to prevent." (emphasis added)).[2]

Plaintiffs also do not appear to oppose Defendants' request for clarification that this Court's preliminary injunction does not prohibit private federal contractors in

[2] Plaintiffs previously confirmed that they were not "trying to keep the federal government from including the provisions in their contracts." Transcript at 66 ("THE COURT: It doesn't sound like you're trying to keep the federal government from including the provisions in their contracts. You just want an injunction against the enforcement of that provision preliminarily pending the final resolution. [Counsel for Plaintiffs]: That's right."). Plaintiffs now backpedal and suggest in a footnote that they "did not consent to the federal government's mandatory inclusion of" COVID-19 safety clauses in federal contracts. Opp. at 7 n.4. In any event, Plaintiffs do not contend that this Court's order prevents anything more than Defendants' *enforcement* of the contract provisions described therein.

Kentucky, Ohio, and Tennessee from agreeing with Defendants to include COVID-19 safety clauses in their federal contracts, thus allowing those federal contractors to voluntarily comply with the Task Force Guidelines, including requiring their employees to be vaccinated. *See* Mot. at 9–10; *see also* Transcript at 65 ("[O]ur request for relief is not an injunction of any sort . . . that would enjoin private parties from doing whatever they want."); *id.* at 66 ("[W]e're not seeking any injunction that would keep a private party from signing any contract that they want."). Defendants thus respectfully reiterate their request that the Court clarify that its order does not enjoin private federal contractors from voluntarily entering such agreements.[3]

**2.** Plaintiffs do, however, try to support the application of this Court's preliminary injunction to non-parties by invoking *parens patriae* standing on behalf of "Ohio, Tennessee, and Kentucky residents." Opp. at 5–7. This argument is misguided and is likely to fail on appeal.

Plaintiffs start with the unenviable argument that the Supreme Court "misunderstood" its own decision in *Massachusetts v. Mellon*, 262 U.S. 447 (1923), *see* Opp. at 6, when it stated in *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592 (1982), that "a state does not have standing as *parens patriae* to bring an action against the federal government to vindicate the rights of its citizens." *Id.* at 610 n.16; *accord Mellon*, 262 U.S. at 485–86 ("While the state, under some circumstances, may sue" as *parens patriae* "for the protection of its citizens, it is no part of its duty or power to enforce their rights in respect of their relations with the federal government."). But Plaintiffs' contention finds little

[3] Contrary to Plaintiffs' suggestion, Defendants have not asked the Court "to modify its injunction to exclude the 'masking' and 'physical distancing' provisions of the vaccine mandate." *Contra* Opp. at 11. Defendants stated plainly that they "understand that the injunction is not limited to enforcement of the Safer Federal Workforce Task Force's vaccination requirements, but also prevents federal agencies from enforcing requirements related to masking and physical distancing." Mot. at 2.

company in the case law. Indeed, multiple Courts of Appeals have understood *Mellon* to stand for precisely the broad proposition adopted in *Alfred L. Snapp & Son*.[4] *See, e.g.*, *Gov't of Manitoba v. Bernhardt*, 923 F.3d 173, 179–183 (D.C. Cir. 2019) ("The traditional rule, the so-called '*Mellon* bar,' declares that a State lacks standing as *parens patriae* to bring an action against the federal government."); *accord Wyoming ex rel. Sullivan v. Lujan*, 969 F.2d 877, 883 (10th Cir. 1992); *Nevada v. Buford*, 918 F. 2d 854, 858 (9th Cir. 1990); *Citizens Against Ruining The Environment v. EPA*, 535 F.3d 670, 676 (7th Cir. 2008).

Plaintiffs next argue that "*Mellon* applies only when a State sues to invalidate a federal statute," and not when "States seek to invalidate" an action "of administrative *agencies*." *See* Opp. at 6. Plaintiffs cite two authorities for this assertion—*Abrams v. Heckler*, 582 F. Supp. 1155 (S.D.N.Y. 1984), and *Pennsylvania ex rel. Shapp v. Kleppe*, 533 F.2d 668 (D.C. Cir. 1976) (Lumbard, J., dissenting). On the other side of the ledger is, for example, the D.C. Circuit's decision in *Government of Manitoba* (2019), where the State of Missouri sought to challenge the Bureau of Reclamation's compliance with the National Environmental Policy Act on behalf of its citizens in its *parens patriae* capacity. 923 F.3d at 176. The D.C. Circuit held that Missouri "lack[ed] *parens patriae* standing to sue the federal government" and (unlike this Court, *see* Order at 6–7) was "unpersuaded by [the] argument that *Massachusetts v. EPA* alters [this] longstanding" rule. *Id.* at 183. As the D.C. Circuit explained, "*Massachusetts v. EPA* is not a *parens patriae* case" because the state there established a direct injury as a landowner. *Id.* at 182. Several other Courts of Appeals (including the Seventh, Ninth, and Tenth Circuits) have similarly held that states lack *parens patriae* standing to challenge actions by federal agencies. *See, e.g.*, *Wyoming*,

[4] Plaintiffs also seem to suggest that the rule stated in *Alfred L. Snapp & Son* is mere "dicta" that should not be taken at its word. *See* Opp. at 6. Dicta or not, a lower court should be "disinclined to 'blandly shrug . . . off'" Supreme Court guidance "simply because" it may not "comprise the holding of the Court." *See Boardman v. Inslee*, 978 F.3d 1092, 1107–08 (9th Cir. 2020) (quoting *United States v. Montero-Camargo*, 208 F.3d 1122, 1132 n.17 (9th Cir. 2000) (en banc)).

969 F.2d at 878 (holding that Wyoming lacked *parens patriae* standing to challenge Secretary of Interior's exchange of federal coal); *Nevada*, 918 F.2d at 854, 858 (holding that Nevada lacked *parens patriae* standing to challenge the Bureau of Land Management's grant of right-of-way under the Federal Land Policy and Management Act and the National Environmental Policy Act); *Citizens Against Ruining The Environment*, 535 F.3d at 672, 676 (holding that Illinois lacked *parens patriae* standing to challenge the Environmental Protection Agency's permitting decisions under the Clean Air Act).

Finally, Plaintiffs' reliance on *Massachusetts v. EPA*'s reference to "quasi-sovereign interests" is misplaced. *See* Opp. at 5. There (unlike here), the Supreme Court recognized the state's "quasi-sovereign interest in 'preserving its sovereign territory.'" *Gov't of Manitoba*, 923 F.3d at 182 (quoting *Massachusetts*, 549 U.S. at 519–20). As explained in Defendants' stay motion, Plaintiffs have identified no sovereign or quasi-sovereign interest implicated here. *See* Mot. at 7–9. Additionally, to the extent Plaintiffs attempt to rely on their "doctrinally barren" theory of the Tenth Amendment, *see Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 550 (1985), the D.C. Circuit has explained that "[t]here is no reason to treat *parens patriae* actions alleging constitutional claims against the federal government differently from those alleging federal statutory claims," *Gov't of Manitoba*, 923 F.3d at 183; *see also id.* ("It is the State's representation that usurps the role of the federal government, not the legal theory underlying its complaint."); *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966) ("Nor does a State have standing as the parent of its citizens to invoke these constitutional provisions against the Federal Government, the ultimate parens patriae of every American citizen.").[5]

[5] Plaintiffs incorrectly assert that "Defendants do not contend that Plaintiffs lack constitutional standing to maintain this suit to seek redress for their own contracts." *See* Opp. at 5. As Defendants argued in their opposition to Plaintiffs' motion for a preliminary injunction and during the hearing on that motion, *see* ECF No. 27 at 5–8; Transcript at 10–25, Plaintiffs did not carry their burden to establish standing because they failed to identify a single covered contract to which they are (or would soon be) a party.

**3.** Defendants also wish to inform the Court of the Eleventh Circuit's decision in *Florida v. Department of Health and Human Services*, --- F.4th ----, 2021 WL 5768796 (11th Cir. Dec. 6, 2021), which supports several arguments they made in opposition to Plaintiffs' motion for a preliminary injunction and in support of their motion for a stay pending appeal. In *Florida*, the Eleventh Circuit:

- rejected an argument—similar to one raised by Plaintiffs—that a federal vaccination requirement harms a state's sovereign interest, *id.* at *15 (relying on *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981)); *accord* Mot. at 5, 7–9 (citing *Hodel*, 452 U.S. at 291);
- found predictions that the vaccination requirement will lead to staffing shortages to be overly speculative and therefore insufficient to establish irreparable harm, *id.* at *16; *accord* ECF No. 27 at 15;
- reaffirmed (in the context of the Court's irreparable-harm discussion) that a state may not proceed *parens patriae* in a lawsuit against the Federal Government, *id.* ("But we agree with the district court that Florida does not face an irreparable injury if employees who choose to work in a federally funded healthcare facility are forced to abide by the rules that govern the administration of that federal program. (citing *Mellon*, 262 U.S. at 485–86)); *accord* Mot. at 9;
- rejected a line of reasoning similar to this Court's statutory analysis, *see* Order at 13, that a federal vaccination requirement "violates the major questions doctrine" and the principles applied in *Alabama Association of Realtors v. Department of Health and Human Services*, 141 S. Ct. 2485 (2021), and concluding that "a broad grant of authority such as Congress has given the Secretary here," *Florida*, 2021 WL 5768796, at *12–13—analogous to the "particularly direct and broad-ranging authority" the President has under the Federal Property and Administrative Services

> Act, *AFL-CIO v. Kahn*, 618 F.2d 784, 789 (D.C. Cir. 1979)—"does not require an indication that specific activities are permitted." *Florida*, 2021 WL 5768796, at *12; *see also id.* ("[I]t's no surprise that [the agency] has never enforced a vaccine mandate because vaccinations for healthcare employees have never been an issue of economic and political significance before now.").

**4.** As explained in Defendants' stay motion, the balance of the harms and public interest militate in favor of a stay. ECF No. 53 at 3–5. Plaintiffs disagree and ask this Court to depart from its determination that there is "ample support for the premise that a vaccine mandate will improve procurement efficiency." Opp. at 4 (quoting Order at 26). Plaintiffs suggest that a stay is not warranted because the Court's "paus[e]" does not itself "*cause* contracting inefficiencies." *Id.* But that is not the standard. To obtain a stay, Defendants must show that they will be irreparably harmed absent a stay of the preliminary injunction. *See Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). As this Court already found, the record indicates that federal government procurement would be more efficient if Defendants were able to enforce COVID-19 safety protocols among federal contractors. *See* Order at 26; *cf.* Transcript at 28 ("THE COURT: It's hard to imagine a condition or a safety requirement for a work site that would be more likely to reduce absenteeism and potentially reduce the cost of labor than the vaccine mandate, right? Because, you know, we've seen kind of in this pandemic environment how . . . devastating it is in terms of labor shortages, in terms of disruption of a workplace when somebody tests positive . . . . If everybody's vaccinated on that work site, you're much less likely to deal with the absenteeism that relates to COVID and either resulting in somebody getting sick, or even worse, someone dying."). It thus follows that without the ability to enforce this protocols, the improvements in economy and efficiency that would have been achieved absent the Court's preliminary injunction will be irreparably lost. *Cf.* Order at 27 (treating "nonrecoverable compliance" with an invalid

rule as "irreparable harm" (citation omitted)).[6] That showing alone is sufficient to establish irreparable harm.

**5.** Finally, contrary to Plaintiffs' suggestion, Defendants need not convince this Court to "revisit" or "second-guess" its ruling to obtain a stay. *See* Opp. at 1, 10. If that were the standard, district courts would rarely if ever stay their own rulings. *See, e.g.*, *Nat'l Ass'n for Advancement of Colored People v. Trump*, 321 F. Supp. 3d 143, 147 (D.D.C. 2018) ("[T]he fact that the Court has thus far been unpersuaded by that case does not preclude the issuance of a stay.").

Instead, "a movant's failure to demonstrate a likelihood of success on the merits does not preclude a stay if they have raised a 'serious legal question on the merits.'" *Ala. Ass'n of Relators v. U.S. Dep't of Health & Human Servs.*, No. 20-3377, 2021 WL 1946376, at *4 (D.D.C. May 14, 2021) (quoting *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*,

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[6] That the Government did not implement a federal contractor vaccination requirement until September 2021 is not surprising. In the months following the availability of the COVID-19 vaccine, vaccine doses were limited and there was a widespread rush to become vaccinated. It was not until later in 2021 that the highly transmissible Delta variant surged and vaccination rates slowed that further measures became necessary to ensure that federal contractor employees would become vaccinated. *See* Determination of the Acting OMB Director Regarding the Revised Safer Federal Workforce Task Force Guidance for Federal Contractors and the Revised Economy & Efficiency Analysis, 86 Fed. Reg. 63,418, 63,418-21 (Nov. 16, 2021) (discussing the emergence of the Delta variant).

Also, as Defendants have already explained, the deadline for federal contractor employees to be fully vaccinated was changed to January 18 to align with deadlines set under other federal vaccination requirements. *See* Transcript at 53–54; *see also* 86 Fed. Reg. at 63,418-21 (explaining how a January 18 deadline would benefit federal contractors).

Defendants also note the obvious inconsistency between (i) Plaintiffs' argument that Defendants cannot establish harms based on "what *could* happen to federal contracting" absent a stay and (ii) Plaintiffs reliance on the far more speculative assertion that Defendants "*could* place Plaintiff States . . . on a blacklist." Opp. at 3, 7 (second emphasis added).

559 F.2d 841, 844 (D.C. Cir. 1977)); *accord Luxshare, Ltd. v. ZF Auto. US, Inc.*, 15 F.4th 780, 783 (6th Cir. 2021). For example, when Judge Friedrich vacated the CDC's nationwide COVID-19 eviction moratorium on the merits, she still granted a stay pending appeal "to allow the D.C. Circuit time to review [her] ruling." *Id.* at *5. Even though Judge Friedrich "believe[d] . . . there [was] not a substantial likelihood" that the government would "succeed on appeal," and even though "a majority of courts that ha[d] addressed the lawfulness of the" eviction moratorium "reached the same conclusion," she concluded that the "serious legal questions" raised and "the public health consequences" of the COVID-19 pandemic "justif[ied] a stay." *Id.* at *4–5. This Court should do the same.

**CONCLUSION**

Defendants respectfully request that the Court stay its order pending appeal and enter an immediate administrative stay while this motion is under consideration.

DATED: December 9, 2021

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

On December 9, 2021, I electronically submitted the foregoing document with the Clerk of Court for the U.S. District Court, Eastern District of Kentucky, using the Court's electronic case filing system. I hereby certify that I have served all parties electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

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