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

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STATEMENT REGARDING ORAL ARGUMENT

The stay panel resolved almost all the issues in this appeal in a thorough published opinion. Even so, given the stakes of this appeal, the States agree that oral argument should be held.

STATEMENT OF JURISDICTION

The district court had jurisdiction over this matter under 28 U.S.C. §§ 1331, 1346, and 1361 and 5 U.S.C. §§ 702 and 703. The district court granted the States' motion for a preliminary injunction on November 30, 2021. [Op. & Order, R.50, PageID#872–900]. The federal government timely appealed on December 3, 2021. [Notice of Appeal, R.52, PageID#903]. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF ISSUES

1. Generally, whether the district court abused its discretion in preliminarily enjoining the federal government from enforcing the contractor mandate.

More specifically:

a. Whether the district court properly determined that the Federal Property and Administrative Services Act does not allow the federal government to issue the contractor mandate.

b. Whether the district court properly determined that the federal government likely violated the Competition in Contracting Act.

c. Whether the district court properly determined that the federal government's issuance of the contractor mandate likely creates constitutional issues.

d. Whether the district court properly determined that the other relevant factors favor issuing a preliminary injunction.

e. Whether the district court abused its discretion by applying the preliminary injunction to Kentucky, Ohio, and Tennessee.

STATEMENT OF THE CASE

Upon taking office, President Biden established the Safer Federal Workforce Task Force. Its mission is to "provide ongoing guidance to heads of agencies on the operation of the Federal Government, the safety of its employees, and the continuity of Government functions during the COVID-19 pandemic." Exec. Order 13991, *Executive Order on Protecting the Federal Workforce and Requiring Mask-Wearing*, 86 Fed. Reg. 7045, 7046 (Jan. 20, 2021).

After creating this task force, the President did not try to mandate vaccines for private companies or the general public. Instead, through last summer, the Biden Administration recognized that vaccine mandates are "not the role of the federal government." Office of Public Engagement, Transcript, *Press Briefing by Press Secretary Jen Psaki* (July 23, 2021), https://perma.cc/Q32Z-5S6M. The President even stated that he wanted to "work with states to encourage unvaccinated people to get vaccinated." The White House, *Remarks by President Biden Laying Out the Next Steps in Our Effort to Get More Americans Vaccinated and Combat the Spread of the Delta Variant* (July 29, 2021), https://perma.cc/8SV8-GUED. And the Administration instructed agencies not to "require federal employees or contractors to disclose" their vaccination status to comply with "legal requirements and bargaining obligations." Eric Yoder, *Biden administration tells federal agencies they should not require employees to be vaccinated to work on-site*, Washington Post (June 9, 2021).

On September 9, 2021, the President abruptly changed course. He declared that his "patience" with the "unvaccinated" was "wearing thin." President Joseph Biden, Remarks at the White House (Sept. 9, 2021), https://perma.cc/GQG5-YBXK ("Biden Remarks"). The President announced that the "time for waiting" to get vaccinated was "over" and that vaccination is "not about freedom or personal choice." *Id.* And the President promised to "take[] on elected officials and states" and "get them out of the way." *Id.* To this end, the President announced "a new plan to require more Americans to be vaccinated, to combat those blocking public health." *Id.* Under the President's plan, vaccines will be mandated for "about 100 million Americans—two thirds of all workers." *Id.*

The contractor mandate. Part of that plan is the contractor mandate at issue here. On the same day he announced his plan, the President signed Executive Order 14042. *See* Exec. Order 14042, *Ensuring Adequate COVID Safety Protocols for Federal Contractors*, 86 Fed. Reg. 50,985 (Sept. 9, 2021). Relying on the Federal Property and Administrative Services Act ("Procurement Act"), the President directed "[e]xecutive departments and agencies" to include a clause in virtually all new procurement contracts, extensions, and renewals requiring the contractor (and any subcontractors) to "comply with all guidance . . . published" by the Safer Federal Workforce Task Force for "the duration of the contract." *Id.* at 50,985–86. The President also ordered the Director of the Office of Management and Budget ("OMB") to "determine whether such [not-yet-existing] Guidance will promote economy and efficiency in Federal contracting," *id.*,

after the President had declared that it would, *id.* at 50,985. Finally, the President "strongly encouraged" agencies to amend existing contracts to include the same COVID-19 clause. *Id.* at 50,987.

On September 24, 2021, the Task Force issued its guidance. *COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors*, https://perma.cc/2R27-9J4U. Under that guidance, all "covered contractor employees" had to be fully vaccinated by December 8, 2021. *Id.* As this Court already recognized, "[g]iven th[e] expansive scope of the Guidance, the interpretive trouble is not figuring out who's 'covered'; the difficult issue is understanding who, based on the Guidance's definition of 'covered,' could possibly *not* be covered." *Kentucky v. Biden*, 23 F.4th 585, 591 (6th Cir. 2022).

Four days after the Task Force issued its guidance, OMB issued a 210-word "perfunctory 'determination,'" *id.* at 590, that the contractor mandate "will improve economy and efficiency by reducing absenteeism and decreasing labor costs" for federal contractors, OMB, *Determination of the Promotion of Economy and Efficiency in Federal Contracting Pursuant to Executive Order No. 14042*, 86 Fed. Reg. 53,691 (Sept. 28, 2021).

Perhaps recognizing its guidance lacked any analysis, and in the face of several lawsuits challenging it, OMB later revisited its determination. OMB, *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 (Nov.

16, 2021). Its revised determination includes boilerplate language claiming that the contractor mandate promotes economy and efficiency in contracting, supported by identifying a few private employers that voluntarily imposed a vaccine mandate. *Id.* at 63,421–22. But OMB provided no concrete data about productivity losses or increased costs for federal contractors operating under a vaccine mandate, nor did it provide data about the marginal efficiency or productivity increases that the mandate allegedly would produce. *Id.* at 63,421–23. And OMB discounted contracting inefficiencies from the mandate, even dismissing the likelihood of worker shortages as "anecdotal." *Id.* at 63,422.

Meanwhile, on September 30, 2021, the FAR Council[1] followed the President's executive order by issuing a "Class Deviation Clause" for inclusion in all agency contracts. *Issuance of Agency Deviations to Implement Executive Order 14042* (Sept. 30, 2021), https://perma.cc/9BQ8-XBT6. The operative language of the new clause reads: "The Contractor shall comply with all guidance, including guidance conveyed through Frequently Asked Questions, as amended during the performance of this contract, . . . published" by the Task Force. *Id.* The FAR Council also reminded federal agencies that they are "required" to include the clause in their contracts. *Id.*

[1] The FAR Council promulgates the Federal Acquisition Regulation, a set of policies and procedures governing the drafting and procurement processes for federal agencies. *See Kentucky v. Biden*, --- F. Supp. 3d ---, 2021 WL 5587446, at *2 (E.D. Ky. Nov. 30, 2021).

Predictably, many agencies promptly pressured federal contractors to incorporate this clause into their existing contracts. [*See, e.g.*, Stevens Decl., R.12-2, PageID#274; UL Emails, R.57-2, 57-3, PageID#949–52; GSA Emails, R.57-7, PageID#996–1141].

This lawsuit. The Commonwealth of Kentucky, the State of Ohio, the State of Tennessee, and two Ohio sheriffs (together, the "States") filed suit challenging the federal-contractor vaccine mandate ("contractor mandate"). [Compl., R.1, PageID#1–48; Am. Compl., R.22, PageID#405–60]. The States moved for a preliminary injunction, [PI Mtn., R.12, PageID#234–64], which the district court granted, *Kentucky v. Biden*, --- F. Supp. 3d ---, 2021 WL 5587446, at *1 (E.D. Ky. Nov. 30, 2021). Recognizing that "[t]his is not a case about whether vaccines are effective," *id.*, the district court held that the States will likely succeed on the merits because the Procurement Act does not grant the President authority to issue the contractor mandate, *id.* at *5–7. The district court also concluded that the States will likely succeed on their claims under the Competition in Contracting Act, the non-delegation doctrine, and the Tenth Amendment. *Id.* at *7–10.

This Court's stay ruling. The federal government appealed the district court's ruling and asked this Court to stay the preliminary injunction pending appeal. In a thorough published opinion, this Court denied that motion. *Kentucky*, 23 F.4th at 589. The Court found that the Procurement Act does not give the President authority to order mandatory vaccination for the employees of federal contractors. *Id.* at 603–06. And

even if the statute were ambiguous on that point, the Court found that the major-questions doctrine and the federalism canon foreclose the federal government's interpretation. *Id.* at 606–10.

On the other stay factors, the Court found that the federal government's delays in instituting and enforcing the contractor mandate "undercut" its claim of irreparable injury. *Id.* at 610–11. By contrast, the Court found that enforcing the contractor mandate would "deter [the States] from entering into economically valuable federal contracts" and might force employees of federal contractors to undergo an irreversible medical procedure. *Id.* at 611–12. Although the Court found the public-interest factor "equivocal at best," the Court recognized that the "public's true interest lies in the correct application of the law." *Id.* at 612. The Court also explained that "[e]mployees of contractors who choose to comply rather than resist may be compelled to submit to a potentially illegal mandate and suffer irrecoverable compliance costs." *Id.*

SUMMARY OF ARGUMENT

The reasoning in the Court's published decision denying the federal government's stay motion gets the Court almost all the way to affirming the district court's preliminary injunction.

On the merits, the Court already held that "[b]y its plain text, the [Procurement] Act does not authorize the contractor mandate." *Kentucky*, 23 F.4th at 604. Put differently, the Procurement Act does not grant the President sweeping authority to force federal contractors and their employees to do whatever the President believes will make

them more economical and efficient. At most, the Procurement Act allows the President to pursue an economical and efficient *system* for federal procurement. Other interpretive principles, including the major-questions doctrine and the federalism canon, reinforce this conclusion. And even if the Court could change its reading of the Procurement Act to follow the federal government's favored cases, the President would still lack authority to impose the contractor mandate.

The federal government has not shown that the district court abused its discretion by finding that the other preliminary-injunction factors favor the States. Enforcing the contractor mandate would irreparably harm the sovereign interests of Kentucky, Ohio, and Tennessee and would impose unrecoverable costs. The equities and the public interest likewise favor the States.

The federal government also has not shown that the district court abused its discretion by applying the preliminary injunction within the borders of Kentucky, Ohio, and Tennessee. As this Court's stay decision makes clear, this scope is necessary to protect the States from the sovereign and quasi-sovereign harms that the contractor mandate would otherwise cause. This scope also preserves the States' ability to pursue contracts with the federal government.

STANDARD OF REVIEW

"[T]he standard of review that this court must apply to the district court's findings on a preliminary injunction motion is highly deferential." *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000). The Court does not decide whether it "would grant a

preliminary injunction if [it] were acting in the place of the district court." *Id.* Instead, the Court reviews the decision to grant a preliminary injunction for an abuse of discretion. *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (en banc) (per curiam). All factual findings are reviewed for clear error, while the legal question of whether the movant is likely to succeed on the merits is reviewed de novo. *Id.*

As a point of clarification, the federal government suggests that the stay panel's published decision is not "strictly binding." [Br. at 23 n.3]. Different judges on this Court have taken different positions on whether and when a published motion-panel decision binds the later merits panel. *Compare Maryville Baptist Church, Inc. v. Beshear*, 977 F.3d 561, 563 (6th Cir. 2020) (per curiam), *and Priorities USA v. Nessel*, 860 F. App'x 419, 420–21 (6th Cir. 2021), *with Nessel*, 860 F. App'x at 423–24 (Cole, J., dissenting). But the issue is academic here: the Court's stay-stage decision correctly resolved the issues before it, and the federal government gives the Court no good reason to revisit its earlier conclusions.

ARGUMENT

I. The States are likely to succeed on the merits because the President lacks authority to impose the contractor mandate.

As the Court already held, the Procurement Act does not grant the President authority to require federal contractors to adopt whatever policies the President believes will improve their employees' economy and efficiency. The major-questions doctrine

and the federalism canon reinforce this conclusion. And even under the federal government's favored case law, the President still lacks authority to issue the contractor mandate.

A. The Procurement Act does not grant the President the authority he claims.

1. Statutory interpretation always starts with the text. *Van Buren v. United States*, 141 S. Ct. 1648, 1654 (2021). Courts "must give effect to the clear meaning of statutes as written." *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017) (citation omitted). To do so, each word receives "its 'ordinary, contemporary, common meaning.'" *Id.* (citation omitted). The text of the Procurement Act "is, ironically, likely the best evidence against the government's position." *Kentucky*, 23 F.4th at 603.

The federal government identifies only two statutory provisions to justify the contractor mandate. First, the Procurement Act's statement of purpose states that "[t]he purpose of this subtitle is to provide the Federal Government with an economical and efficient system for the following activities."[2] 40 U.S.C. § 101. The statute then lists, among other things, "[p]rocuring and supplying property and nonpersonal services, and performing related functions including contracting, inspection, storage, issue, setting specifications, identification and classification," and "establishment of inventory levels"

[2] The Court already held that the federal government's "heavy reliance" on this statement of purpose is problematic, given that "statements of purpose . . . cannot confer freestanding powers upon the President unbacked by operative language elsewhere in the statute." *Kentucky*, 23 F.3d at 604.

as the activities subject to the economical and efficient system. *Id.* § 101(1). The other statute on which the federal government relies states: "The President may prescribe policies and directives that the President considers necessary to carry out this subtitle. The policies must be consistent with this subtitle." 40 U.S.C. § 121(a). These two statutes are all that the federal government cites to justify "the imposition of an irreversible medical procedure without precedent in the history of the [Procurement] Act's application." *Kentucky*, 23 F.4th at 603.

The federal government's defense of the contractor mandate cannot overcome that Section 101 speaks in terms of providing an "economical and efficient *system*." 40 U.S.C. § 101 (emphasis added). As this Court recognized, a "system" refers to "[a] formal scheme or method of governing organization, arrangement." *Kentucky*, 23 F.4th at 604 (quoting *System*, *Webster's New International Dictionary* 2562 (2d ed. 1959)). So the Procurement Act implicates at most only the federal government's scheme or method for procuring nonpersonal services. The Procurement Act is a power to organize the federal government's internal operations, not a power to take control of contractors' internal operations. Or as this Court put it, "there is no textual warrant to suggest that *after* the President or his agents have 'economically and efficiently' acquired those services that they then may impose whatever medical procedure deemed 'necessary' to make *them* more 'economical and efficient.'" *Id.* (cleaned up).

Consider the issue this way. Assume the federal government needs to buy widgets from contractors. Under the Procurement Act, the President can ensure that the

federal government's "system" for procuring widgets is "economical and efficient." To this end, the federal government can streamline its internal processes for buying widgets—for example, by ensuring cross-agency collaboration. But the federal government cannot wield the Procurement Act to impose requirements directly on the employees of third-party widget makers. Such requirements go well beyond improving the federal government's "system" for procuring widgets.

This line of thinking fits nicely with the Supreme Court's recent decision staying the private-employer mandate in *NFIB v. Dep't of Labor, OSHA*, 142 S. Ct. 661 (2022) (per curiam). There, the Supreme Court differentiated between what the statute at issue allowed (setting "workplace safety standards") and establishing "broad public health measures." *Id.* at 665 (emphasis omitted). As the Court emphasized, "no provision" of the relevant statute "addresses public health more generally, which falls outside of OSHA's sphere of expertise." *Id.* The same is true of the Procurement Act. It focuses on obtaining an efficient and economical system for procurement, not on regulating the healthcare decisions of a large swath of the workforce.

This plain reading of the statutory phrase "economical and efficient system" has the added benefit of reflecting "the historical concerns that motivated the passage" of the Procurement Act. *Kentucky*, 23 F.4th at 605–06. As this Court noted, the fear shortly after World War II was not that federal contractors were themselves inefficient; it was that "the manner in which federal agencies were entering into contracts to procure goods and services was not economical and efficient." *Id.* at 606. With no procurement

coordination, "many agencies entered duplicative contracts supplying the same items and creating a massive post-war surplus." *Id.* The Procurement Act helped to solve that problem. But the President is trying to solve a different kind of problem here.

2. The federal government cannot escape the Procurement Act's plain text or this Court's prior reading of it. The government suggests that because the Procurement Act includes "setting specifications" as something related to an "economical and efficient system," the President can specify that he wants to utilize only vaccinated labor. [Br. at 25]. But this thinking skips over the Court's conclusion about the importance of the word "system" to defining the scope of the Procurement Act. Establishing an economical and efficient system for setting specifications is distinct from the President setting whatever specifications for third-party contractors he believes most economical and efficient. And the statutory phrase "setting specifications" is not nearly broad enough to encompass ordering that the federal government will only work with contractors that employ vaccinated employees. *See OSHA*, 142 S. Ct. at 665. No court, or the federal government for that matter, has ever interpreted "setting specifications" in the expansive way it now proposes. *See Kentucky*, 23 F.4th at 608 ("The dearth of analogous historical examples is strong evidence that § 101 does not contain such a power.").

The federal government also claims that Section 101's mention of "contracting" as one of the "related functions" assumes the power to establish a contract's terms. [Br. at 25–26]. But the Court already identified "two major problems" with that reading.

Kentucky, 23 F.4th at 604–05. First, the term "contracting" refers only to "the government's *initial entry* into a contractual agreement." *Id.* at 605. If "contracting" included "all subsequent tasks performed in connection with the contract," the other listed functions in Section 101 would be surplusage. *Id.* Second, Section 101 refers to "contracting" as being performed by the federal government, "not by the employees of federal contractors." *Id.*

The federal government counters that the other "related functions" listed in Section 101 "do not refer to aspects of a contractor's performance—they refer to tasks that the government performs as part of the procurement process." [Br. at 25]. But that's the point. As this Court reasoned, the Procurement Act "authorizes the President to implement systems making *the government's* entry into contracts less duplicative and inefficient, but it does not authorize him to impose a medical mandate directly upon contractor employees themselves because he thinks it would enhance *their* personal productivity." *Kentucky*, 23 F.4th at 605.

3. The federal government tries to overcome the plain text of the Procurement Act by arguing that Congress somehow acquiesced to the view that the President can order anything that makes federal contractors more economical and efficient. [Br. at 22–23]. In this regard, the federal government relies on the D.C. Circuit's divided decision in *AFL-CIO v. Kahn*, 618 F.2d 784 (D.C. Cir. 1979) (en banc), and a few decisions following it.

The federal government's favored case law does not support the sweeping proposition that the President can impose any requirement on contractors that he considers economical and efficient. For starters, *Kahn* did not wrestle with the importance of the word "system" to defining the President's Procurement Act authority. *See id.* at 788–89. Even still, the *Kahn* majority carefully emphasized the narrowness of its ruling, stating that its decision "does not write a blank check for the President to fill in at his will." *Id.* at 793. The two concurring opinions reiterated the narrow scope of the court's decision. *Id.* at 796–97 (Bazelon, J., concurring); *id.* at 797 (Tamm, J., concurring). The D.C. Circuit later took pains to reemphasize *Kahn*'s limits. *Chamber of Com. of U.S. v. Reich*, 74 F.3d 1322, 1330 (D.C. Cir. 1996) ("*Kahn* makes clear that the President, even under the Procurement Act, does not have unlimited authority to make decisions he believes will likely result in savings to the government.").

As this Court recognized, the executive actions considered in *Kahn* and the federal government's other favored cases bear no similarity to the contractor mandate. Instead, those executive actions "ha[d] a 'close nexus' to the ordinary hiring, firing, and management of labor." *Kentucky*, 23 F.4th at 607. None of those decisions considered a requirement that "comes even *close* to the deployment of the [Procurement] Act to mandate a medical procedure for one-fifth (or more) of our workforce." *Id.* at 607–08. So if Congress acquiesced to anything, it was not to the federal government's unprecedented assertion of authority here. In any event, silence from Congress cannot defeat the better reading of the statute. *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct.

1532, 1541 (2021). And the text here, this Court already held, is clear. *Kentucky*, 23 F.4th at 603–05.

In addition, the Court can only rely on congressional acquiescence to discern a statute's meaning when the "judicial consensus [is] so broad and unquestioned" that Congress must have "kn[own] of and endorsed it." *Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 349 (2005). That does not describe *Kahn* and the few other cases the federal government cites. The Supreme Court has not addressed *Kahn*'s interpretation of the Procurement Act. And Congress cannot be expected "to make an affirmative move every time a lower court indulges in an erroneous interpretation." *See Jones v. Liberty Glass Co.*, 332 U.S. 524, 534 (1947). In short, the federal government's favored case law about the Procurement Act "is too flimsy to justify presuming that Congress endorsed it when the text and structure of the statute are to the contrary." *See Jama Immigr.*, 543 U.S. at 352. There is no reason to think that Congress has noticed, much less acquiesced to, a handful of lower-court decisions that approved a much more modest use of power. *See BP P.L.C.*, 141 S. Ct. at 1541 ("It seems most unlikely to us that a smattering of lower court opinions could ever represent the sort of 'judicial consensus so broad and unquestioned that we must presume Congress knew of and endorsed it.'" (citation omitted)).

4. The federal government's interpretation of the Procurement Act poses another problem: an unharmonious construction of that statute with the Competition in

Contracting Act. *Kentucky*, 2021 WL 5587446, at *7–8. Under the Competition in Contracting Act, federal agencies must obtain "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 the Competition in Contracting Act. *See* 40 U.S.C. § 121(a) (requiring "policies" issued by the President to be "consistent with this subtitle"); 40 U.S.C. § 111 (defining "this subtitle" to include portions of title 41, including § 3301).

The federal government's reading of the Procurement Act conflicts with 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"—something Section 3301(a)(1) prohibits. *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)" might be lawful as an evaluation criterion, a similar requirement operating as a categorical ban on contractors violates Section 3301(a)(1). *See id.* at 985–86. For these reasons, the district court was justified in concluding that the federal government "may run into [a] problem" under the Competition in Contracting Act. *Kentucky*, 2021 WL 5587446, at *8.

B. The major-questions doctrine and the federalism canon also foreclose the federal government's assertion of authority.

In its stay decision, this Court recognized that the major-questions doctrine and the federalism canon "likely foreclose" the federal government's position. *See Kentucky*, 23 F.4th at 606. The federal government cannot overcome that conclusion.

1. The major-questions doctrine precludes the federal government's reading of the Procurement Act.

Even if the text of the Procurement Act were less clear, the major-questions doctrine would still preclude the federal government's limitless interpretation of it. *Id.* at 606–08. That doctrine requires "Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *OSHA*, 142 S. Ct. at 665 (citation omitted). And so when the executive branch claims the power to implement a policy that amounts to "a significant encroachment into the lives—and health—of a vast number of employees," it must point to clear statutory authority. *Id.* As this Court already held, no such authority exists in the Procurement Act. *Kentucky*, 23 F.4th at 606–08.

a. The federal government does not dispute that mandating vaccination for around one-fifth of the workforce is an issue of "vast economic and political significance." *See OSHA*, 142 S. Ct. at 665 (citation omitted). Nor could it. Although the Supreme Court has not articulated a bright-line test to distinguish major questions, cases applying the doctrine have pointed to several factors, including "the amount of money involved for regulated and affected parties, the overall impact on the economy, the

number of people affected, and the degree of congressional and public attention to the issue." *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 422–23 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc) (collecting cases). The contractor mandate checks all these boxes. *See Kentucky*, 23 F.4th at 606–07.

To recap, the United States Department of Labor recognizes that "workers employed by federal contractors" comprise "approximately one-fifth of the entire U.S. labor force." DOL, History of Executive Order 11246, Office of Federal Contract Compliance Programs, https://perma.cc/6ZXJ-WGR8. "For Kentucky, Ohio, and Tennessee, federal contracting is a multi-billion-dollar industry." *Kentucky*, 2021 WL 5587446, at *1. And reports show that many unvaccinated Americans would quit their jobs if a vaccine mandate were required and their exemption request were denied. [Am. Compl., R.22, PageID#420; PI Motion, R.12, PageID#241]. For these reasons, the contractor mandate is "no 'everyday exercise of federal power.'" *See OSHA*, 142 S. Ct. at 665 (quoting *In re MCP No. 165*, 20 F.4th 264, 272 (6th Cir. 2021) (Sutton, C.J., dissenting from denial of initial hearing en banc)). "It is instead a significant encroachment into the lives—and health—of a vast number of employees." *See id.*

Because the contractor mandate implicates a major question, Congress must "speak clearly" to authorize it. "Yet that is just what we lack." *Kentucky*, 23 F.4th at 607.

As explained above, the only textual hook that the federal government cites for its claimed authority is the phrase "economical and efficient system." 40 U.S.C. § 101. But this Court already held that this language is not "a clear statement from Congress

that it intended the President to use a property-and-services procurement act, for a purpose never-before recognized, to effect major changes in the administration of public health." *Kentucky*, 23 F.4th at 607. That insight is right, and it forecloses the federal government's reliance on this language to say that the Procurement Act clearly authorizes the contractor mandate.

A statute authorizing the President to implement policies to obtain an "economical and efficient system" for procurement does not clearly encompass the power to institute "broad public health measures." *See OSHA*, 142 S. Ct. at 665. How could it be otherwise? The federal government's only argument is that the Procurement Act's language "is stated in unquestionably broad terms." [Br. at 41–42]. But that is precisely the problem. The text of the statute could only capture a significant public-health measure like the contractor mandate if the Court interprets the language as broadly as possible—the opposite of what the major-questions doctrine requires.

Two recent cases from the Supreme Court leave no doubt on this point. First, the decision in *OSHA*. There, the Supreme Court rejected a vaccine-or-test mandate issued under a statute that specifically referred both to establishing an "occupational safety or health standard" and protecting "employees" from "grave danger." *OSHA*, 142 S. Ct. at 665–66. That language, the Court held, was not enough to justify a general public-health measure when the statute concerns workplace safety. *Id.* at 665.

The same problem plagued the CDC in *Alabama Ass'n of Realtors v. Dep't of Health & Human Services*, 141 S. Ct. 2485 (2021) (per curiam), a case in which the Supreme

Court rejected an expansive statutory reading that would have allowed the CDC to regulate landlord-tenant relationships for millions of Americans. The statute there broadly authorized the government to promulgate regulations to "prevent the introduction, transmission, or spread of communicable diseases." 42 U.S.C. § 264(a). But that language, the Supreme Court explained, was not enough to allow the CDC to expand its footprint into an area of great economic and political significance, even if the CDC had determined that an eviction moratorium would—broadly speaking—"prevent the introduction, transmission, or spread of communicable diseases." *Ala. Realtors*, 141 S. Ct. at 2489. Both of these recent major-questions cases apply here.

As in *OSHA*, the federal government relies on a statute that has nothing to do with public health to implement a general public-health measure. But at least in *OSHA*, the enabling statute authorized the agency to regulate *some* health-related issues. *OSHA*, 142 S. Ct. at 665–66. Not so here. Nothing in the Procurement Act even hints at authorizing the President to implement public-health measures like the contractor mandate.[3]

[3] The federal government's reliance on *Biden v. Missouri*, 142 S. Ct. 647 (2022) (per curiam), is of no help. [Br. at 42]. In *Biden*, the Supreme Court allowed enforcement of a vaccination requirement promulgated by the Secretary of Health and Human Services that applied to healthcare providers. The Court did so after explaining that part of the "core mission" of the agency is "to ensure that the healthcare providers who care for Medicare and Medicaid patients protect their patients' health and safety." *Biden*, 142 S. Ct. at 650. No such "core mission" exists for the President under the Procurement Act. Unlike the Procurement Act, the statute at issue in *Biden* specifically referred to promulgating regulations "in the interest of the health and safety" of certain individuals. *Id.*

As in *Alabama Realtors*, the federal government has adopted an "unprecedented" and virtually limitless reading of its statutory authority to justify a whatever-it-takes approach. *See Ala. Realtors*, 141 S. Ct. at 2489. The federal government argues that the Procurement Act allows it to take whatever action it deems necessary to make its contractors more economical and efficient. [Br. at 41–42]. That was essentially the same argument the Supreme Court rejected in *Alabama Realtors* in part because it lacks any reasonable limiting principle. 141 S. Ct. at 2489. If the federal government were right about the Procurement Act, what would stop it from mandating that federal contractors "wear masks in perpetuity" while "at family gatherings, concerts, sporting events, and so on" during flu season each year? *See Kentucky*, 23 F.4th at 608. And "why, if the government's interpretation is correct, does the [Procurement] Act not confer a *de facto* police power upon the President to dictate the terms and conditions of one-fifth of our workforce's lives?" *Id.* The federal government still provides no good answer to these questions—precisely the problem in *Alabama Realtors*.

Also weighing against the federal government is that the President, in decades of exercising Procurement Act authority, "has never before adopted a broad public health regulation of this kind." *See OSHA*, 142 S. Ct. at 666; *see also Ala. Realtors*, 141 S. Ct. at 2489 ("This claim of expansive authority under § 361(a) is unprecedented. Since that

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at 652 (citation omitted). And unlike here, "healthcare facilities that wish to participate in Medicare and Medicaid have always been obligated to satisfy a host of conditions that address the safe and effective provision of healthcare." *Id.*

provision's enactment in 1944, no regulation premised on it has even begun to approach the size and scope of the eviction moratorium."). Indeed, the federal government does not address this problem. *Kentucky*, 23 F.4th at 607–08. And the Supreme Court has repeatedly emphasized that the "lack of historical precedent, coupled with the breadth of authority that the [executive branch] now claims, is a telling indication that the mandate extends beyond the agency's legitimate reach." *OSHA*, 142 S. Ct. at 666 (citation omitted) (cleaned up). That the federal government cannot point to any example of the President using the Procurement Act to impose a public-health policy only further undermines its claim that the statute clearly authorizes this kind of power.

b. The federal government's primary response is that the major-questions doctrine does not apply at all—or at the very least, it should apply less forcefully. For that proposition, the government makes three claims: First, the major-questions doctrine does not apply here because the contractor mandate is not "regulatory" in nature. Second, the doctrine does not apply because Congress delegated authority directly to the President, not an agency. And third, the concerns "animating" the major-questions doctrine are "diminished" because the President has inherent authority "to exercise general administrative control" of the executive branch. All three arguments fail because this Court already correctly held that the major-questions doctrine applies to the Procurement Act. *See Kentucky*, 23 F.4th at 606–07. Even still, each argument fails on its own.

First, the federal government is wrong to claim that the major-questions doctrine does not apply because the contractor mandate is not "regulatory." [Br. at 38–40]. Its

argument goes something like this: Because the contractor mandate is an exercise of the federal government's "proprietary authority[] as the purchaser of services," it has "a much freer hand" to impose conditions like the contractor mandate than when it exercises its regulatory authority. [*Id.* at 38–39]. And so, the federal government reasons, the major-questions doctrine does not apply.

But this argument conflates two distinct issues: whether Congress *could* authorize the President to issue the contractor mandate and whether it *did* authorize him to do so in the Procurement Act. Only the latter question is at issue, and there is no reason to think the major-questions doctrine vanishes when Congress is authorizing the federal government to spend money. In fact, the opposite should be true. Only Congress can appropriate money, *see Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937), and the major-questions doctrine is a canon of interpretation that fortifies the structure of the Constitution giving the legislative power to Congress, *see U.S. Telecom Ass'n*, 855 F.3d at 419 (Kavanaugh, J., dissenting). So if the executive branch is claiming that Congress gave it authority "to exercise powers of vast economic and political significance," *OSHA*, 142 S. Ct. at 665 (citation omitted), it matters not whether Congress purportedly did so through its spending power. What matters is whether Congress made the delegation the executive branch claims.[4]

[4] The federal government cites *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940), for the blanket proposition that the government has "unrestricted power" to set the terms

At any rate, the contractor mandate is regulatory. When federal action "operates on government procurement across the board, rather than being tailored to any particular setting, the order is regulatory under prevailing principles." *UAW-Lab. Emp. & Training Corp. v. Chao*, 325 F.3d 360, 363 (D.C. Cir. 2003). That is exactly what the contractor mandate does. It is an across-the-board requirement that "seeks to set a broad policy governing the behavior of thousands of American companies and affecting millions of American workers." *Reich*, 74 F.3d at 1337. So while the government overall may set general terms by which individuals and entities do business with it, Congress must authorize that kind of regulatory conduct. And when the executive branch uses that power to regulate issues of "vast economic and political significance," Congress must have spoken clearly. *OSHA*, 142 S. Ct. at 665. It has not done so here.

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of contracts. [Br. at 39]. But *Perkins*, a case about wage requirements, arose in the context of Congress "exercis[ing] . . . its authority to determine conditions under which purchases of Government supplies shall be made." *Perkins*, 310 U.S. at 116. In fact, two sentences after the passage the federal government cites, *Perkins* discussed what the relevant statute did. *Id.* at 127 ("It has done so in the Public Contracts Act."). In any event, *Perkins* has been deprived of much of its persuasive force, as this Court recognized more than 30 years ago. *Diebold v. United States*, 947 F.2d 787, 803–04 (6th Cir. 1991).

The federal government's reliance on *NASA v. Nelson*, 562 U.S. 134 (2011), fares even worse. *Nelson* was not a statutory-interpretation case, *id.* at 138, and so the Supreme Court had no reason to even consider how the major-questions doctrine would apply. *Nelson* simply held that the executive branch could require background checks for some federal contractors, *id.*—hardly a major question. *Nelson* emphasized that "[t]he Government itself has been conducting employment investigations since the earliest days of the Republic." *Id.* at 149. No such longstanding practice exists here. *See Kentucky*, 23 F.4th at 608. The contractor mandate is nothing like the "reasonable, employment-related inquiries" in *Nelson*. *See Nelson*, 562 U.S. at 151.

Second, the federal government argues that the major-questions doctrine does not apply when Congress delegates power directly to the President, rather than an agency, because he is "unquestionably" accountable to the people. [Br. at 42]. The federal government cites no authority supporting this distinction. Nor would such a rule make sense. The point of the major-questions doctrine is that courts must presume that Congress—the policymaking branch of government—would not hand over major policy decisions to the executive branch without clearly saying so. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160–61 (2000). This interpretative canon maintains the structural limits of the Constitution in which Congress is the ultimate policymaker. It is immaterial whether Congress grants that authority to an agency or to the President himself—both cases require the executive branch to show that Congress spoke clearly on an issue of vast economic and political importance.

Third, the federal government's final argument against applying the major-questions doctrine (or for applying a "diminished" version of it) is that the President has inherent power under Article II "to exercise general administrative control" over contracting decisions. [Br. at 42–43]. The federal government's argument seems to be that the President can impose contract conditions and that "Congress would have understood that" when it passed the Procurement Act. [Br. 42–43]. But the federal government provides no authority for the proposition that the President has inherent authority to implement a vaccine mandate covering roughly one-fifth of the American workforce so long as he does so as an addendum to a federal contract. Nor is that surprising. The

Supreme Court described the OSHA mandate as "no everyday exercise of federal power." *OSHA*, 142 S. Ct. at 665 (cleaned up) (citation omitted). It is impossible to square that conclusion with the federal government's contention that Congress in the Procurement Act assumed without saying that the President already had the power to impose the contractor mandate.

One final point: The federal government's interpretation of the Procurement Act, if sustained, would run into the non-delegation doctrine. That is yet another reason to side against the government. As this Court recognized, "[i]f the government's interpretation were correct—that the President can do essentially whatever he wants so long as he determines it necessary to make federal contractors more 'economical and efficient'—then that *certainly* would present non-delegation concerns." *Kentucky*, 23 F.4th at 607 n.14. The district court likewise found that the federal government's interpretation of the Procurement Act likely creates non-delegation concerns, *Kentucky*, 2021 WL 5587446, at *8–9—a conclusion this Court found "understandable," *Kentucky*, 23 F.4th at 607 n.14. And if "'a serious doubt' is raised about the constitutionality of an act of Congress, 'it is a cardinal principle that [courts must] first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018) (citations omitted). Thus, the constitutional-avoidance canon also counsels against the federal government's reading of the Procurement Act.

2. The federalism canon precludes the President's assertion of authority.

The major-questions doctrine ensures respect for the role each branch of government plays. The federalism canon, by contrast, ensures respect for the system of dual sovereignty that the Constitution establishes. As this Court already held, the federalism canon "undercut[s] the government's view" of the Procurement Act. *Kentucky*, 23 F.4th at 608–09.

When Congress wishes to legislate, it must point to a provision in the Constitution to justify the law. By contrast, the States "enjoy a residual authority to regulate within their borders—a power that pre-dates the Constitution and does not derive from it." *In re MCP No. 165*, 20 F.4th at 286 (Bush, J., dissenting from denial of initial hearing en banc). "'The states under our federated system thus enjoy a 'general power of governing'—what the Supreme Court has repeatedly termed their 'police power.'" *Id.* at 286–87 (citations omitted).

"Since the Framing, the power to regulate the public health has been 'part and parcel' of states' 'traditional police power.'" *Kentucky*, 23 F.4th at 609 (citation omitted). The Supreme Court has said so "time after time." *Id.* (collecting sources). As a result, the contractor mandate, which robs the States of their prerogative to regulate public health, significantly intrudes on the States' police power. More specifically, the contractor mandate "in effect" seeks "to transfer this traditional prerogative from the states to

the federal government under the guise of a measure to make federal contracting 'more economical and efficient.'" *Id.*

The federalism canon ensures that such an intrusion can occur only if Congress says so very clearly. As the Supreme Court recently put it, "[o]ur precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power . . . ." *Ala. Realtors*, 141 S. Ct. at 2489 (citation omitted). "This plain statement rule is nothing more than an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991).

For the reasons previously outlined, the Procurement Act does not authorize the contractor mandate in "exceedingly clear language." This Court already held as much. *Kentucky*, 23 F.4th at 608–10.

The federal government counters that "federal contracts are not an area traditionally reserved to the States." [Br. at 36]. But this Court already rejected that very argument. As the Court explained, the federal government "frames the issue at the wrong level of generality." *Kentucky*, 24 F.4th at 610. While it is true that the "States may have no power to dictate what and how much of something the federal government may buy," the States "certainly have a traditional interest in regulating public health and,

specifically, in determining whether to impose compulsory vaccination on the public at large." *Id.*

C. Alternatively, the contractor mandate fails because it does not have a close nexus to economy and efficiency.

Even if the federal government were correct that the President can impose his view of economy and efficiency directly on contractors, no court has blessed the view that any requirement that conceivably makes contractors more efficient is allowed under the Procurement Act.

If the Procurement Act allows the President to manage internal contractor operations, it has to be that "economy" and "efficiency" in procurement are limited to the traditional understanding of business-related decision-making—"modest, 'work-anchored' measure[s] with an inbuilt limiting principle." *Kentucky*, 23 F.4th at 608 (citation omitted). In *Kahn*, which is really the federal government's only supporting authority, the D.C. Circuit emphasized that the President does not have a "blank check" under the Procurement Act—he can impose policies only if they have a "close nexus" to "likely savings to the Government." *See Kahn*, 618 F.2d at 792–93.

The contractor mandate is a public-health regulation, not a "modest, 'work-anchored' measure" with a "close nexus" to economy and efficiency in procurement. The

federal government's attenuated theory is that improving employee health will eventually redound to its benefit. But even if the contractor mandate would accomplish that,[5] the federal government "has never reckoned with the implications of its position or proposed any limiting principle to allay our concerns." *Kentucky*, 23 F.4th at 608. At this point, both the district court and the stay panel have worried about the lack of a stopping point to the federal government's reading of the Procurement Act. *Id.*; *Kentucky*, 2021 WL 5587446, at *7. Yet the federal government still cannot offer a limiting principle.

The federal government's boundless interpretation of the Procurement Act does not satisfy *Kahn*. *See Kentucky*, 23 F.4th at 607–08. Even if *Kahn* is correct that there must be a "close nexus" between the President's action and economy and efficiency, that nexus must actually be *close*. The federal government's expansive view of the Procurement Act fails even under *Kahn*'s close-nexus requirement, as it would allow the President to impose any requirement on contractors and their employees—health-related or not—in the name of economy and efficiency. This interpretation grants the President the "blank check" that *Kahn* expressly disclaimed.

[5] The federal government emphasizes that some private businesses have voluntarily imposed vaccine mandates. [Br. at 1]. But in Kentucky, a public university at first followed the contractor mandate only to walk back that decision after the district court entered the preliminary injunction. [UL Emails, R.57-2, 57-3, PageID#949–52]. This university is not alone. Paul Ziobro, *GE, Union Pacific Suspend Covid-19 Vaccination Mandates After Injunction on Biden Order*, Wall Street Journal (Dec. 9, 2021)

It is no surprise that the contractor mandate is so unconnected to economy and efficiency in procurement. It was never meant to serve that purpose. As this Court held, "[t]he federal government's actions are, of course, simply a pretext to increase vaccination, as its own documents confirm." *Kentucky*, 23 F.4th at 609 n.15. What the federal government really cares about is not contractor efficiency and economy but vaccines. *See, e.g.*, *id.* (citing memorandum); 86 Fed. Reg. at 63,423 (emphasizing the "once in a generation pandemic" that threatens the "health and safety of the American people" and "reaches all Americans"). As President Biden explained when announcing the contractor mandate, "if you want to do business with the federal government, vaccinate your workforce." Biden Remarks, *supra*. For these reasons, the federal government's claim that the contractor mandate will increase economy and efficiency is "naked pretext." *Kentucky*, 23 F.4th at 609.

II. The States will suffer irreparable harm if the contractor mandate goes into effect.

1. If enforced, the contractor mandate will irreparably harm Kentucky, Ohio, and Tennessee by intruding on their sovereign authority to regulate public health within their borders. As President Biden made clear when he announced the contractor mandate, his plan "takes on elected officials and states." Biden Remarks, *supra*. Referring to any State that disagrees with his mandates, the President declared: "I'll use my power as President to get them out of the way." *Id.*

A State "suffers a form of irreparable injury" any time it is prevented from "effectuating statutes enacted by representatives of its people." *Thompson v. DeWine*, 976 F.3d 610, 619 (6th Cir. 2020) (per curiam) (quoting *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers)). This being so, Kentucky, Ohio, and Tennessee will suffer irreparable harm if the federal government intrudes on their sovereign authority to decide for themselves whether to impose a vaccine mandate. *See* Tenn. Code Ann. § 14-2-101(a); Tenn. Code Ann. § 14-2-102(a). As this Court already held, "some of the intangible harms asserted here—invasions of state sovereignty and coerced compliance with irreversible vaccinations—likely cannot be economically quantified, and thus cannot be monetarily redressed." *Kentucky*, 23 F.4th at 611 n.19; *see also BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021) ("The States, too, have an interest in seeing their constitutionally reserved police power over public health policy defended from federal overreach.").

2. Enforcement of the contractor mandate also will cause the States to suffer financial harms that are not recoverable. *See Overstreet v. Lexington-Fayette Urb. Cnty. Gov't*,

305 F.3d 566, 578 (6th Cir. 2002) ("A plaintiff's harm from the denial of a preliminary injunction is irreparable if it is not fully compensable by monetary damages.").

If the contractor mandate is enforced, the States will be put to the choice of firing unvaccinated employees or losing federal contracting opportunities.[6] [Maddox Decl., R.12-4, PageID#321–22; Niknejad Decl., R.12-1, PageID#270–71]. The district court so found. *Kentucky*, 2021 WL 5587446, at *13 ("Plaintiff agencies and contractors are now having to make tough choices about whether they will choose to comply with the vaccine mandate or lose out on future federal government contracts."). Not only that, but "it stands to reason that contractors who do not comply [with the contractor mandate] will likely be blacklisted from future contracting opportunities." *Id.* at *4. The States' inevitable loss of either employees or future contracting opportunities would be irreparable given the States' inability to remedy those harms with money damages. *See Kentucky*, 23 F.4th 611 n.19.

In addition, as the district court held, "complying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance." *Kentucky*, 2021 WL 5587446, at *13 (quoting *BST Holdings*, 17 F.4th at 618). The contractor mandate will no doubt impose meaningful compliance costs on the States.

[6] Despite what the federal government claims, [Br. at 46–47], the States presented plenty of evidence that the federal government has pressured its contractors to immediately include a vaccination requirement in existing contracts. [*See* Stevens Decl., R.12-2, PageID#274, 288–90; Flowers Decl., R.22-2, PageID#527, 533–34; UL Email, R.57-2, PageID#949–50; Cosby Decl., R.57-4, PageID#956].

[Niknejad Decl., R.12-1, PageID#271; UL Email, R.57-3, PageID#952]. OMB's revised determination puts the burden of ensuring compliance on contractors. 86 Fed. Reg. at 63,420 ("Covered contractors must ensure that all covered contractor employees are fully vaccinated for COVID-19, unless the employee is legally entitled to an accommodation."). The same is true for determining whether to grant an accommodation from the contractor mandate. *Id.* ("A covered contractor should review and consider what, if any, accommodation it must offer."). And the contractor must "designate a person or persons to coordinate implementation of and compliance with this Guidance and the workplace safety protocols detailed herein at covered contractor workplaces." *Id.* at 63,421.

3. Moreover, still more harms will occur if the contractor mandate goes into effect, including labor shortages, cost increases, and delays. [*See, e.g.*, Maddox Decl., R.12-4, PageID#321–22 (discussing staffing issues with Kentucky state contractors); Am. Compl., R.22, PageID#420 (discussing survey showing that almost 70 percent of unvaccinated Americans would quit their jobs if a vaccine were required and their exemption were denied and survey showing that 9 in 10 large employers fear reductions in their workforce if they have to implement a vaccine mandate)]. In fact, even the revised OMB determination cited a source in which five percent of unvaccinated adults have said they left a job because of a vaccine mandate. 86 Fed. Reg. at 63422 n.14.

The Court acknowledged these realities. Discussing the sheriffs who are parties here, the Court explained that "[t]hey either will be unable to comply with the mandate,

given anticipated resistance to it, and will lose the contracts, or they will comply with the contractor mandate but suffer serious hits to their workforces as employees resign in protest." *Kentucky*, 23 F.4th at 594. The Court also held that the States have "plausibly allege[d] that resistance to the contractor mandate will result in layoffs, further supply-chain issues, and rising prices, all to the detriment of their state economies." *Id.* at 601.

III. The public interest and equities favor the States.

1. "[T]he public's true interest lies in the correct application of the law." *Id.* at 612 (citation omitted). Because the Procurement Act does not grant the President the expansive authority he claims, the public interest favors a preliminary injunction.

A preliminary injunction also promotes the public interest by protecting the sovereign authority of Kentucky, Ohio, and Tennessee to respond to the COVID-19 pandemic based on each State's needs. It is "in the public interest" for a court to "give effect to the will of the people by enforcing the laws they and their representatives enact." *Thompson*, 976 F.3d at 619 (cleaned up). Such an interest is particularly strong when, as here, "considerable disagreement exists about how best to accomplish" a challenge confronting the nation. *See United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring). "In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *Id.*

The public interest also favors a preliminary injunction because "the contractor mandate itself may engender serious resistance and thus economic disruption." *Kentucky*, 23 F.4th at 612. Employers currently face enormous challenges responding to the COVID-19 pandemic while continuing to provide jobs, goods, and services to our economy. Imposing a vaccine mandate on federal contractors at this moment would not serve the public interest. *See BST Holdings*, 17 F.4th at 618 ("[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.").

Finally, an injunction merely preserves the status quo. *See Blaylock v. Cheker Oil Co.*, 547 F.2d 962, 965 (6th Cir. 1976) ("The general function of a preliminary injunction is to maintain the status quo pending determination of an action on its merits."). If the district court's preliminary injunction is lifted, the federal government will essentially obtain permanent relief as to those employees of federal contractors who obtain a vaccine that they otherwise would not get. *See Kentucky*, 23 F.4th at 612 (discussing how employees who are forced to comply with the contractor mandate "would incur the irrecoverable compliance cost of a coerced vaccination that could not be reversed if the contractor mandate were later held invalid").

2. The federal government, meanwhile, has not established that it will suffer meaningful harm from the preliminary injunction. The federal government insists that "[d]elaying implementation of the Executive Order will lead to productivity

losses . . . as well as leave and health care costs . . . .” [Br. at 47]. In making this argument, the federal government no longer relies on the declaration it submitted to the district court. [Field Decl., R.53-1, PageID#919–24]. With good reason. That self-serving declaration is deeply flawed. [Appellees’ Resp. to Mtn. for Emergency Stay, 6thCir.R.24, 18–20]. For example, although the declaration claims that the federal government will suffer economic losses without the contractor mandate, the declaration does not provide any examples of post-vaccine, pre-mandate losses. In any event, as this Court already recognized, any immediate harm claimed by the federal government is “undercut” by its decisions to delay imposing the contractor mandate. *See Kentucky*, 23 F.4th at 610–11.

IV. The district court did not abuse its discretion in establishing the scope of the preliminary injunction.

The district court did not abuse its “broad discretion” by applying its preliminary injunction to Kentucky, Ohio, and Tennessee. *See Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 979 F.3d 426, 438 n.2 (6th Cir. 2020). “Crafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents.” *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (per curiam). For two reasons, the scope of the district

court's injunction is necessary to address the harms the contractor mandate would impose on the States.

1. This Court already recognized that Kentucky, Ohio, and Tennessee can sue to protect their sovereign and quasi-sovereign interests. More specifically, they can protect their sovereign interests "when a federal regulation purports to preempt state law . . . . [or] when they believe that the federal government has intruded upon areas traditionally within states' control." *Kentucky*, 23 F.4th at 598. And they can protect their "quasi-sovereign interest in the health and 'economic well-being' of their populaces." *Id.* at 599. Such a sovereign or quasi-sovereign injury, this Court held, "is really an additional injury to the state *itself*" even though it "possibly overlap[s] with individual citizens' injuries." *Id.*

The only reasonable way to protect such sovereign and quasi-sovereign interests while this litigation proceeds is to enjoin the contractor mandate anywhere within Kentucky, Ohio, and Tennessee. That is to say, a preliminary injunction that only protects State contractors does not actually protect the States' sovereign and quasi-sovereign interests. Injuries to those interests would persist if the federal government could impose the contractor mandate on non-State contractors within the three States. The federal government does not really contest this point.[7] Instead, it tries to relitigate whether

[7] The federal government instead argues that "any such asserted injuries by plaintiff States cannot support the injunction's extension to non-parties." [Br. at 51 n.6]. But the stay panel correctly explained that the injury here is to the States themselves even if

the States can sue the federal government to vindicate their sovereign and quasi-sovereign interests. [Br. at 49–50]. But the Court decided this issue against the federal government, and nothing in the federal government's brief casts doubt on the Court's careful analysis. *Kentucky*, 23 F.4th at 598–601. So to protect the States' sovereign and quasi-sovereign interests while this litigation proceeds, the preliminary injunction properly applies across Kentucky, Ohio, and Tennessee.

2. The stay panel also held that the States "likely have standing to sue in their own proprietary capacities as contractors with the federal government." *Id.* at 594.

Because of the States' injuries in their "proprietary capacities," the district court did not abuse its discretion by applying its preliminary injunction across Kentucky, Ohio, and Tennessee. If the federal government were allowed to enforce the contractor mandate against non-State federal contractors in the three States, the federal government going forward would simply choose to do business with those against whom it could enforce the mandate. As President Biden put it, "[i]f you want to do business with the federal government, vaccinate your workforce." Biden Remarks, *supra*. The district court was quite right to worry that "contractors who do not comply with [the

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such an injury "possibly overlap[s] with individual citizens' injuries." *Kentucky*, 23 F.4th at 599. The federal government also argues that the district court did not premise its preliminary injunction on this theory of injury. [Br. at 51 n.6]. But the district court expressed "concern[] that the vaccine mandate intrudes on an area that is traditionally reserved to the States." *Kentucky*, 2021 WL 5587446, at *10. In any event, the Court can affirm "the district's court decision on any ground supported by the record." *In re Ohio Execution Protocol*, 860 F.3d 881, 887 (6th Cir. 2017) (en banc).

contractor mandate] will likely be blacklisted from future contracting opportunities." *Kentucky*, 2021 WL 5587446, at *4. As a result, a preliminary injunction that only applies to State contractors would do little to nothing to protect the States as they pursue future contracting opportunities with the federal government.

CONCLUSION

The Court should affirm the district court's decision granting the States' motion for a preliminary injunction.

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(g) and 6th Cir. R. 32, I certify that this brief complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(B) because it contains 10,099 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 6th Cir. R. 32(b)(1).

This brief 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 a proportionally spaced typeface, Garamond, in 14-point font using Microsoft Word.

s/ Matthew F. Kuhn

CERTIFICATE OF SERVICE

I certify that on March 2, 2022, I electronically filed this brief 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 the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Matthew F. Kuhn

ADDENDUM

The States designate the following as relevant documents from the district court record:

1. Complaint, R.1, PageID#1–50
2. Motion for temporary restraining order and preliminary injunction and attached exhibits, R.12, PageID#234–366
3. Amended complaint and attached exhibits, R.22, 22-1, 22-3, 22-4, 22-5, 22-6, 22-7, PageID#405–612
4. Response in opposition to motion for preliminary injunction and attached exhibits, R.27, 27-1, 27-2, 27-3, 27-4, PageID#655–712
5. Reply in support of motion for preliminary injunction, R.32, PageID#727–46
6. Transcript of November 18, 2021 hearing, R.49, PageID#799–871
7. Opinion & Order, R.50, PageID#872–900
8. Notice of Appeal, R.52, PageID#903
9. Emergency motion for stay pending appeal and for immediate administrative stay, R.53, PageID#906–15
10. Response to emergency motion for stay pending appeal and for immediate administrative stay and attached exhibits, R.57, 57-1, 57-2, 57-3, 57-4, 57-5, 57-6, 57-7, PageID#934–1141

11. Reply in support of emergency motion for stay pending appeal and for immediate administrative stay, R.58, PageID#1143–51

12. Order, R.59, PageID#1153–54