IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
No. 21-3091

ERICH SMITH, FRANK E. GARWOOD, MARIBEL LORENZO, AND DR. DANIEL DONOFRIO,

Plaintiffs-Appellants

v.

President JOSEPH R. BIDEN, in his official capacity and any successors for the Office of President,
Defendant-Appellees,

On appeal from the United States District Court of New Jersey's denial of a preliminary injunction pursuant to *Fed. R. Civ. P.* 65

APPELLANTS' REPLY BRIEF IN SUPPORT OF REVERSE AND REMAND FOR ENTRY OF A PRELIMINARY INJUNCTION

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PROCEDURAL UPDATE

The District Court granted Appellants' motion for leave to amend and the Amended Complaint is being filed December 15, 2021.

RELATED CASES UPDATE

The Contractor Mandate stemming from Executive Order 14042 has been enjoined by two courts since the Workers' filed their appeal. In *Kentucky v. Biden* 3:21-cv-00055, a District Court judge enjoined the government from enforcing the Contractor Mandate in Kentucky, Ohio, and Tennessee. In *Georgia v. Biden* 1:21-cv-00163, a District Court judge issued a nationwide injunction, enjoining all the defendants, including the President, from enforcing Executive Order 14042. The opinions and orders for both decisions are annexed hereto.

The mandate for federal employees, stemming from Executive Order 14043, is now the only federal mandate that has not been enjoined nationwide.

ARGUMENT

The ultimate issue in this case is whether Executive Orders 14042 and 14043 are constitutional because if they are not, then the government's arguments concerning ripeness, the Civil Service Reform Act, and the Court's purported lack of jurisdiction to enjoin the president are moot. The Mandates are unconstitutional for two reasons: 1) the President does not have the authority to enact them, and 2)

they are an unconstitutional government intrusion on individual liberty and privacy rights protected by the substantive due process clause of the Fifth Amendment.

I. The President lacks authority for the Mandates

With regard to authority[1], the government has now had multiple opportunities to state the basis for the President's purported authority, and has failed to do so. The government's brief is bereft of any statutory or constitutional language that confers the President with the authority to condition government employment and contracts on workers' medical status. The government provides no analogous case law or executive orders where such federal authority has been exercised or recognized before. There is no legislative history supporting the President's claim of authority. The government did not even attempt to refute the Workers' arguments that 5 U.S.C. § §3301, 3302, and 7301 are inapplicable on their face because they pertain to new hires and employee conduct, not medical status. The President makes conclusory claims that he has the authority for these Mandates, but does not cite a basis for it.

[1] In its opposition, the government represents to the Court that Plaintiffs never raised the lack of authority argument in the district court, but this is false. *Plaintiff's Brief in Support of Temporary Restraining Order or Preliminary Injnction*, Dkt. 4 at pg. 8 (stating "[n]ever before in history has a president claimed the legal or moral authority to force American workers to submit to a medical procedure...There is no such authority" and "The President claims this sweeping authority over peoples' bodies based on bureaucratic regulatory duties delegated to the executive branch by Congress. He also claims authority in the Constitution, though he has not shared where his purported constitutional authority is in the actual document. It is Plaintiffs' position that there is no such authority").

The President's failure to state the specific statutory or constitutional language from which he claims the authority to issue Executive Orders 14042 and 14043 is a glaring red flag that he lacks the authority. The federal government possesses only the powers explicitly granted to it in the Constitution. The Executive Orders are unconstitutional because they are outside the President's and federal government's power.[2]

II. The Mandates are subject to and fail strict scrutiny analysis

Strict scrutiny applies to the Mandates because they condition employment and federal contracts on individuals submitting to a medical procedure. The right to decline medical procedures is fundamental and triggers strict scrutiny. *Regents of Univ. of C*alifornia v. *Bakke*, 438 *U.S.* 265, 357 (1978).

Here, the Mandates fail strict scrutiny because the individual rights to liberty and privacy outweigh the government's interest.[3] As set forth in the Workers' opening brief, the liberty and privacy rights to decline an unwanted medical intervention are extremely strong when: 1) the mandated pharmaceutical's ability to

[2] In its opposition, the President did not dispute the Workers' points that the Mandates are in the realm of public health and that the federal government does not possess police power.

[3] The government represented that the Workers' "concede that the government's interests in combatting spread of Covid-19 is not merely legitimate, but compelling." Pg. 39. The Workers explicitly did NOT concede this. *See Plaintiffs' Brief in Support of Preliminary Injunction* Dkt. 4 at 12, n. 4 ("Plaintiffs do not concede that the President has stated a compelling interest...")

stop infection and transmission is uncertain or unknown; 2) the pharmaceuticals are novel themselves and are produced and delivered *via* a novel technology; 3) being injected with the pharmaceuticals carries risk; 4) the majority of people experience symptoms of illness after taking the pharmaceuticals; 5) the pharmaceuticals are manufactured by corporations with either extensive criminal records and product safety failures or no track record having never brought a product to market before; and 6) the agency tasked with overseeing the safety of the pharmaceuticals has a public image of failing in its mission due to actual high-profile failures to keep people safe.

The government has not asserted an interest in its opposition that outweighs the Workers' strong liberty and privacy interests to make their own medical decisions concerning these pharmaceuticals. The government did not even attempt to refute the Workers' arguments concerning the unconstitutional invasion of their rights to keep their medical information and religious beliefs private.

The government also did not rebut the Workers' arguments that the Mandates are not narrowly tailored because: 1) there exists a wide range of treatments for the targeted virus; 2) the virus has an objectively low mortality rate, especially among working-age people who are targeted by the Mandates; 3) the federal government has navigated other viruses throughout history without these measures; and 4) the

Mandates do not account for natural immunity gained from previous infection, only "vaccination."

Because the Executive Orders are unconstitutional under strict scrutiny analysis, the government tries to argue that *Jacobson v. Massachusetts*, 197 *U.S.* 11 (1905) applies. However, *Jacobson* is plainly distinguishable for the reasons articulated in the Workers' opening brief, namely: 1) the Mandates are not direct legislative enactments, 2) the Mandates were not enacted pursuant to police power of a state, 3) Covid-19 is not as deadly as smallpox, 4) the mandated pharmaceuticals have existed for less than 2 years while the smallpox vaccine had existed for more than 100 years when *Jacobson* was decided, a fact the Court specifically relied upon in its reasoning (*Id.* at 23-34), 5) the "reasonable" consequences under the Massachusetts statute was a modest fine while the Mandates here deprive people of their means of income and relegate them to a broadly unemployable caste of people, and 6) the government has not shown that the mandated pharmaceuticals are "vaccines" within the meaning of *Jacobson*.

The government makes no argument as to why these pharmaceuticals should be treated the same as the smallpox vaccine in *Jacobson* other than that the mandated pharmaceuticals have been given the same label by the FDA.

III. The case is proper for adjudication by this Court

The government argues that the Court should not hear the case for three reasons. First, the government argues that the case is unripe because the Workers have not faced adverse employment action. Second, the government argues that the federal employees are obligated to wait for adverse employment action and then adjudicate the constitutionality of Executive Order 14043 through the Merit System Protection Board pursuant to the Civil Service Reform Act. Finally, the government argues that the Court lacks jurisdiction to enjoin the President. However, as the District Court found, this case is ripe for adjudication and the Civil Service Reform Act is inapplicable. Moreover, the President can be, and has been, enjoined from executing Executive Order 14042 since the filing of this appeal.

A. Ripeness and the Civil Service Reform Act

If the Mandates are unconstitutional, then the government's arguments concerning ripeness and preclusion by the Civil Service Reform Act are moot. This is because if the Mandates violate the constitution, then the doctrine of unconstitutional conditions applies and the unconstitutional condition is itself a harm, making the case ripe and justiciable outside the CSRA.

The issues of ripeness and the CSRA are also intertwined because to advance both of these arguments, the government ignores the doctrine of unconstitutional conditions and instead tries to frame the case through the lens of an employer/employee relationship. Specifically, the government asserts that the

claims are not ripe because no adverse employment action has been taken and that if adverse employment action were taken, the CSRA applies and the district court lacks jurisdiction. The government thus seeks to avoid judicial review on the issue of the Executive Orders' constitutionality. Ultimately, both arguments fail because the federal employees are not asserting any rights as to their employment or the employee/employer relationship and they are not asserting that they have been subject to any of the adverse actions listed in the CSRA. *See* 5 U.S.C. §7502 (subchapter applies to removal, suspension, pay reductions, grade reductions, and furloughs). Nor are they asserting that they are being harmed by an agency action. Unlike the cases cited by the government in its opposition, the Workers here are not challenging an agency action or an adverse employment action, they are challenging the constitutionality of an executive order issued by the president. The CSRA does not preclude the federal employees' claims concerning their liberty to decline medical procedures any more than it would preclude a personal injury claim because they fell on their employer's property. The claims do not arise from the employer/employee relationship, an agency action, or an adverse employment action, so the CSRA is inapplicable, as the District Court correctly found.[4]

[4] The government, ignoring the doctrine of ripeness, frets that if the Workers' are allowed to proceed it will mean that "a federal employee who anticipated potential future discipline on *any* basis could...preemptively bring[] suit in federal courts so long as she went to court before actually facing discipline." However,

B. The President can be enjoined

All harm to the Workers would be abated by enjoining the President and/or government from enforcing Executive Orders 14042 and 14043. The harms the Workers are suffering are traceable directly to the President's Executive Orders and are redressable by enjoining his actions. The government argues that the Workers' claims are not redressible because, it argues, the president cannot be enjoined. However, this is not true. First, since the Workers filed their opening brief the President *has* been enjoined from enforcing the Contractor Mandate. Moreover, all of the cases cited by the government involve questions of a Court's ability to force the president to act or refrain from acting within his official authority, not to refrain from acting outside his power. *Franklin v. Massachusetts*, 505 *U.S.* 788 (1992), relied upon extensively by the government in its opposition, is inapplicable because it applies to enjoining "the President in the performance of his official duties." This action challenges the constitutionality of the executive orders and if they are unconstitutional then they cannot be in the performance of the president's official duties.

The Court also has jurisdiction to enjoin non-parties working in concert and participation with the President under *Fed. R. Civ. P.* 65(d)(2)(c). In its opposition,

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those claims *would* be barred because of a lack of ripeness. That is not the case here because the unconstitutional condition makes the claims ripe.

the government quotes *Jacobson v. Florida* out of context to argue that *Fed. R. Civ. P.* 65(d)(2)(c) does not apply here. In *Jacobson v. Florida* the court held that it could not enjoin non-parties in active concert and participation with the defendant because it did not have jurisdiction over the defendant due to traceability and redressability requirements and therefore could not exercise jurisdiction over the non-parties with whom the defendant was in active participation. *See Jacobson v. Fla. Sec'y of State,* 974 F.3d 1236, 1255 (11th Cir. 2020) (stating "[a]lthough a district court may bind nonparties "who are in active concert" with a defendant, Fed. R. Civ. P. 65(d)(2)(C), that rule applies only when a plaintiff validly invokes federal jurisdiction by satisfying the traceability and redressability requirements of standing against a defendant"). Here, there is no such issue of jurisdiction. The harms are clearly traceable to the President's actions and enjoining him and the non-parties working under his orders would redress the harms.

The Court also has jurisdiction to enjoin the President and parties working in active participation with him with regard to Executive Order 14042, the Contractor Mandate to which Ms. Lorenzo is subject. The government has knowledge of what contracts Ms. Lorenzo's employer holds with it. She does not. Ms. Lorenzo's harms will be redressed by enjoining the President and/or government from enforcing the Contractor Mandate.

Respectfully submitted,

Law Offices of Dana Wefer, LLC
Attorney for the Workers

BY: s/ Dana Wefer

DANA WEFER, ESQ.

Dated: December 15, 2021

COMBINED CERTIFICATIONS

I, Dana Wefer, counsel for the Plaintiffs/Appellants hereby certify as follows:

1) I am a member of the Bar of the Third Circuit Court of Appeals;
2) The brief complies with the word county and typeface requirements set forth in Federal Rule of Appellate Procedure 27. The brief is under 15 pages and is typed in Times New Roman font, 14-point type.
3) The brief and attached cases will be served on the government contemporaneously by filing with ECF;
4) The electronic brief and paper copies of the briefs are identical;
5) This brief and all associated documents were run through Windows Security Virus & Threat detection software on December 15, 2021 before uploading. No threats were found.

BY: s/ Dana Wefer

DANA WEFER, ESQ.

Dated: December 15, 2021

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
FRANKFORT

COMMONWEALTH OF KENTUCKY, *et al.*, Plaintiffs, v. JOSEPH R. BIDEN, in his official capacity as President of the United States, *et al.*, Defendants.	Civil No. 3:21-cv-00055-GFVT **OPINION & ORDER**

*** *** *** ***

This is not a case about whether vaccines are effective. They are. Nor is this a case about whether the government, at some level, and in some circumstances, can require citizens to obtain vaccines. It can. The question presented here is narrow. Can the president use congressionally delegated authority to manage the federal procurement of goods and services to impose vaccines on the employees of federal contractors and subcontractors? In all likelihood, the answer to that question is no. So, for the reasons that follow, the pending request for a preliminary injunction will be GRANTED.

I

On January 20, 2021, Joseph Robinette Biden, Jr. became the forty-sixth President of the United States. On his first day in office, President Biden signed Executive Order 13991, which established the Safer Federal Workforce Task Force. 86 Fed. Reg. 7,045–48 (Jan. 20, 2021). The Task Force's stated 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." *Id.* at 7,046.

On September 9, 2021, President Biden signed Executive Order 14042. 86 Fed. Reg. 50,985–88 (Sept. 9, 2021). Executive Order 14042 mandated the Safer Federal Workforce Task Force to provide Guidance regarding "adequate COVID–19 safeguards" by September 24, 2021, that would apply to all federal contractors and subcontractors. *Id.* at 50,985. According to the Department of Labor, "workers employed by federal contractors" make up "approximately one-fifth of the entire U.S. labor force." United States Department of Labor, *History of Executive Order 11246*, https://www.dol.gov/agencies/ofccp/about/executive-order-11246-history (last visited Nov. 24, 2021). For Kentucky, Ohio, and Tennessee, federal contracting is a multi-billion-dollar industry. [R. 32 at 4.] The executive order specified that the Guidance would be mandatory at all "contractor or subcontractor workplace locations" so long as the Director of the Office of Management and Budget approved the Guidance and determined that it would "promote economy and efficiency in Federal contracting." 86 Fed. Reg. at 50,985. Furthermore, the executive order applies to "any new contract; new contract-like instrument; new solicitation for a contract or contract-like instrument; extension or renewal of an existing contract or contract-like instrument; and exercise of an option on an existing contract or contract-like instrument." *Id.* at 50,986.[1]

On September 24, the Safer Federal Workforce Task Force issued its Guidance pursuant to Executive Order 14042. *See* Safer Federal Workforce Task Force, *COVID–19 Workplace*

[1] President Biden made clear his intentions in signing Executive Order 14042 in a speech to the American Public. On the day that President Biden signed Executive Order 14042, he stated that earlier in the day he had signed an executive order requiring all federal contractors to be vaccinated. Joseph Biden, Remarks at the White House (Sept. 9, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/.

Safety: Guidance for Federal Contractors and Subcontractors, https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf (last visited Nov. 24, 2021). The Guidance requires all "covered contractors"[2] to be fully vaccinated by December 8, 2021,[3] unless they are "legally entitled to an accommodation." *Id.* at 1. The Guidance applies to all "newly awarded covered contracts" at any location where covered contract employees work and covers "any full-time or part-time employee of a covered contractor working on or in connection with a covered contract or working at a covered contractor workplace." *Id.* at 3–5.

On September 28, the Director of the OMB, "determined that compliance by Federal contractors and subcontractors with the COVID–19 workplace safety protocols detailed in that guidance will improve economy and efficiency by reducing absenteeism and decreasing labor costs for contractors and subcontractors working on or in connection with a Federal Government contract." 86 Fed. Reg. 53,692.

Executive Order 14042 tasked the Federal Acquisition Regulatory Council with "amend[ing] the Federal Acquisition Regulation." 86 Fed. Reg. 50,986. The Federal Acquisition Regulation is a set of policies and procedures that governs the drafting and procurement processes of contracts for all executive agencies. *See* United States General Services Administration, *Federal Acquisition Regulation (FAR)*, https://www.gsa.gov/policy-regulations/regulations/federal-acquisition-regulation-far (last visited Nov. 24, 2021). On

[2] A covered contractor is "a prime contractor or subcontractor at any tier who is party to a covered contract." Safer Federal Workforce Task Force, *COVID–19 Workplace Safety: Guidance for Federal Contractors and Subcontractors*, at 3.

[3] The deadline for full vaccination has been delayed until January 18, 2022. This means that covered contractors would need to receive their Johnson & Johnson vaccine or the second dose of a Pfizer or Moderna vaccine by January 4 to be fully vaccinated by January 18. *See* The White House, *Fact Sheet: Biden Administration Announces Details of Two Major Vaccination Policies*, https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/04/fact-sheet-biden-administration-announces-details-of-two-major-vaccination-policies/ (last visited Nov. 24, 2021).

September 30, the Federal Acquisition Regulatory Council issued Guidance in the form of a memo to assist agencies responsible for mandating contractor and subcontractor compliance with the vaccination requirement until the Federal Acquisition Regulation can be officially amended. *See* FAR Council Guidance, https://www.whitehouse.gov/wp-content/uploads/2021/09/FAR-Council-Guidance-on-Agency-Issuance-of-Deviations-to-Implement-EO-14042.pdf (last visited Nov. 24, 2021). The vaccine requirement officially only applies to contracts awarded (1) on or after November 15; (2) "new solicitations issued on or after October 15"; and (3) extensions to or renewals of existing contracts exercised on or after October 15." *Id.* at 2. However, the Federal Acquisition Regulatory Council attached a deviation clause to the Guidance that contractors were encouraged to insert into their current contracts. *Id.* at 4–5.

Plaintiffs filed their Complaint on November 4, and on November 8, Plaintiffs filed a temporary restraining order and preliminary injunction asking this court to enjoin the federal contractor vaccine mandate. [R. 12 at 31.] Plaintiffs argue that Defendants' actions were contrary to procedure, arbitrary and capricious, and violated the U.S. Constitution. *Id.* at 9–10. On November 9, the Court held a telephonic conference with the parties, and with no objection from the parties, denied Plaintiffs' temporary restraining order and construed the motion as one for a preliminary injunction only.[4] The Court set briefing deadlines for the parties and scheduled a hearing for Thursday, November 18. [R. 16; R. 17.] On November 10, the OMB Director issued a revised Determination that (1) revoked the prior OMB Determination; (2) provided

[4] Courts frequently construe joint TRO and preliminary injunction motions as a motion for a preliminary injunction only and deny the TRO as moot. *See Ranchers-Cattlemen Action Legal Fund v. Perdue*, 2017 WL 2671072, at *1 (D. Mont. June 21, 2017) (denying TRO as moot and addressing as preliminary injunction only); *Justice Res. Ctr. v. Louisville-Jefferson Cnty. Metro. Gov't*, 2007 WL 1302708, at *5 (W.D. Ky. Apr. 30, 2007) (denying plaintiffs' request for a temporary restraining order and focusing only on plaintiffs' motion for a "temporary injunction," which the court construed as a motion for preliminary injunction because defendant was given notice and opportunity to respond to Plaintiff's request); *New England Health Care v. Rowland*, 170 F. Supp. 2d 199, 201 n.2 (D. Conn. 2001) (denying TRO as moot after setting hearing on a preliminary injunction).

additional reasoning and support for how the Contractor Guidance will promote economy and efficiency in government contracting; and (3) gave covered contractors additional time to comply with the vaccination requirement. *See* 86 Fed. Reg. 63,418. On November 15, in light of the revised Determination, Plaintiffs filed an Amended Complaint. [R. 22.] Defendants filed a response in opposition to Plaintiffs' preliminary injunction on November 16, Plaintiffs replied on November 17, and the Court held a hearing with the parties on November 18. [R. 27; R. 32; R. 41.]

II

A

An initial matter is the question of standing. *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) ("a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought") (quoting *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008)); *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). "At least one plaintiff must have standing to seek each form of relief requested in the complaint." *Town of Chester, N.Y.*, 137 S. Ct. at 1651.

Standing is a threshold inquiry in every federal case that may not be waived by the parties. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 498 (1975); *Planned Parenthood Ass'n of Cincinnati, Inc. v. Cincinnati*, 822 F.2d 1390, 1394 (6th Cir. 1987). "To satisfy the 'case' or 'controversy requirement' of Article III, which is the 'irreducible constitutional minimum' of standing, a plaintiff must, generally speaking, demonstrate that he has suffered an 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (citations omitted). Plaintiffs' injury-in-fact must be both particularized and concrete. *Spokeo, Inc. v.*

Robins, 136 S. Ct. 1540, 1545 (2016) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000)). "For an injury to be particularized, it must affect the plaintiff in a personal and individual way." *Id.* at 1548 (internal quotation marks omitted). Further, a "concrete" injury is a de facto injury that actually exists. *Id.* Finally, "a plaintiff must also establish, as a prudential matter, that he or she is the proper proponent of the rights on which the action is based." *Haskell v. Washington Twp.*, 864 F.2d 1266, 1275 (6th Cir. 1988) (citations omitted).

Here, Defendants argue that (1) Plaintiffs have failed to provide proof in either their Complaint or Amended Complaint that any state agency or subdivision will be affected by the vaccine mandate; and (2) Plaintiffs lack standing to challenge the FAR Memo under the redressability prong. [R. 27 at 17–19.] Under the first argument, Defendants argue that none of the contracts Plaintiffs provide in their briefing are actually covered by the vaccine mandate because they are present and not future contracts and are merely requests for bilateral modification. *Id.* at 18–19. Defendants argue that "[a]sking to change a contract term is not a cognizable harm." *Id.* at 19.

Although the Plaintiffs did not provide an example of a new contract that is subject to the mandate in their briefing, the Court finds that Plaintiffs satisfy standing as to this argument for multiple reasons. States are "entitled to special solicitude in the standing analysis." *Massachusetts v. E.P.A.*, 549 U.S. 497, 520 (2007). And 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." *Id.* at 520 n.17 (quoting R. Fallon, D. Meltzer, & D. Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* 289 (5th ed. 2003)).

In 2020, according to the federal government's System for Award Management, which tracks federal contracts, $10,221,706,227 worth of federal contracts were performed in Kentucky, and $9,934,033,221 worth of federal contracts were held by vendors located in Kentucky, including numerous state agencies.[5] [R. 22 at 13 (citing SAM.gov).] In 2020, Ohio was the place of performance for $8,935,417,106 worth of federal contracts, and $12,498,379,202 worth of federal contracts were held by vendors located in Ohio, including Ohio agencies. *Id.* at 14. And in 2020, Tennessee was the place of performance for $10,258,679,277 worth of federal contracts, and $10,010,028,677 worth of federal contracts were held by Tennessee vendors, including Tennessee agencies. *Id.*

"When a claim involves a challenge to a future contracting opportunity, the pertinent question is whether Plaintiffs ha[ve] made an adequate showing that sometime in the relatively near future [they] will bid on another Government contract." *Adarand Contractors, Inc. v. Pena*, 515 U.S. 200, 211 (1995). As the facts above indicate, federal contracts bring in billions of dollars to the states of Kentucky, Ohio, and Tennessee annually, and there is every indication that federal contractors and subcontractors throughout Kentucky, Ohio, and Tennessee will continue bidding for new contracting opportunities.[6] *But see Hollis v. Biden*, 2021 WL 5500500 (N.D. Miss. Nov. 23, 2021) (finding institutions who are "likely to be recipients of" future federal contracts lacked standing to challenge Executive Order 14042). Therefore, given that the OMB's latest Determination on the matter is only a couple of weeks old, it seems disingenuous of Defendants to argue that because Plaintiffs do not yet have an example of a new contract

[5] As both parties declare in their briefing, the Court may take judicial notice of factual information located on government websites. *See Twumasi-Ankrah v. Checkr, Inc.*, 954 F.3d 938, 947 n.3 (6th Cir. 2020) (Bush, J., dissenting).

[6] This also applies to the two Sheriff Plaintiffs, Frederick W. Stevens and Scott A. Hildenbrand, who are suing in their official capacities as sheriffs for the Seneca County and Geauga County Sheriff's Offices, respectively. [*See* R. 12-2; R. 12-3.]

ensuring compliance with the vaccine clause, they lack standing. This situation is constantly changing, as evidenced by the email Counsel for the Plaintiffs received during the hearing in this matter stating that the University of Louisville, which relies on numerous contracts with the federal government to operate, would be implementing a vaccine mandate for all University of Louisville employees pursuant to Executive Order 14042.

Furthermore, the fact that governmental agencies are already requesting that current contracts, which are not officially subject to Executive Order 14042 and subsequent Guidance, comply with the vaccine mandate indicates a threat of future harm to the Plaintiffs. [*See* R. 32 at 5.] The Defendants argue that because the vaccine mandate only applies to future contracts, contractors with current contracts have a choice as to whether they will comply with the vaccine mandate or not. [R. 27 at 18.] However, if the government is already attempting to require contracts not officially covered by the vaccine mandate to still include such a mandate, it stands to reason that contractors who do not comply will likely be blacklisted from future contracting opportunities if they refuse to comply. This is particularly true given President Biden's remarks on September 7: "If you want to work with the federal government, vaccinate your workforce." Remarks of President Joseph Biden, Remarks at the White House (Sept. 9, 2021), available at https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/. Accordingly, the Court finds that Plaintiffs have satisfied their burden as to the Defendants' first standing argument.

Defendants next argue that Plaintiffs do not have standing to challenge the FAR Memo under the redressability prong. [R. 27 at 19.] Specifically, Defendants argue that because the FAR Memo merely "suggests a sample clause that agencies and contracting officers might use to implement the Executive Order," enjoining the FAR Memo would not actually redress any

injury. *Id.* However, the FAR Memo flows directly from the President's executive order, which tasked the FAR Council with recommending to agencies language to include in existing contracts until the Federal Acquisition Regulation could be amended. 86 Fed. Reg. at 50, 986.

Essentially, the effect of the FAR Memo is to force contractors and subcontractors with existing federal government contracts to include a vaccine mandate in their current contracts by adding a deviation clause to those current contracts. Sure, a contractor may refuse to include the deviation clause in their current contracts because current contracts are not covered by the vaccine mandate. But moving forward, those contractors who refuse to include a deviation clause, many of whom rely on federal contracts, are provided with a Hobson's choice: add the vaccine mandate to your current federal contracts by way of the deviation clause or lose out on future federal contracts. [R. 32 at 5–6.] Enjoining the vaccine mandate, including the FAR Memo, would redress this injury.

Here, the Court finds that Plaintiffs have sufficiently demonstrated that they have suffered an injury in fact, that the injury is fairly traceable to the Defendants' actions, and that enjoining the vaccine mandate will redress the Plaintiffs' injuries. *See Spear*, 520 U.S. at 162. The Court has the power to hear this case.

B

"A preliminary injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet v. Lexington–Fayette Urban County Government*, 305 F.3d 566, 573 (6th Cir. 2002) (citing *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000) (cleaned up) ("[A] preliminary injunction involv[es] the exercise of a very far-reaching power ...."). To issue a preliminary injunction, the Court must consider: (1) whether the movant has shown a strong likelihood of

success on the merits; (2) whether the movant will suffer irreparable harm if the injunction is not issued; (3) whether the issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuing the injunction. *Overstreet*, 305 F.3d at 573 (citations omitted).

The Court of Appeals clarified that, "[w]hen a party seeks a preliminary injunction on the basis of a potential constitutional violation, the likelihood of success on the merits often will be the determinative factor." *City of Pontiac Retired Employees Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (quoting *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012)). However, even if the plaintiff is unable "to show a strong or substantial probability of ultimate success on the merits" an injunction can be issued when the plaintiff "at least shows serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant if an injunction is issued." *In re Delorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985). Thus, the Plaintiffs must show that the foregoing preliminary injunction factors are met, and that immediate, irreparable harm will result if the injunction is not issued.

Defendants' arguments against Plaintiffs' motion for a preliminary injunction fall primarily into two buckets: (1) whether the president exceeded his statutory and constitutional authority in promulgating the executive order at issue in this case; and (2) whether the agencies at issue in this case followed the proper administrative procedures. Plaintiffs argue both that the president exceeded his authority in promulgating the executive order and that the agencies failed to follow the proper administrative procedures in implementing and enforcing President Biden's executive order.

1

President Biden issued Executive Order 14042 pursuant to the U.S. Constitution, 3 U.S.C § 301, which provides the president with general delegation authority, and 40 U.S.C. 101 *et seq.*, also known as the Federal Property and Administrative Services Act (FPASA). *See* 86 Fed. Reg. 50,985–88 (Sept. 9, 2021). Congress delegated to the president the authority to manage federal procurement through FPASA. 40 U.S.C. 101 *et seq.* The first question the Court must answer is whether President Biden exceeded his delegated authority under FPASA in promulgating Executive Order 14042. The Court finds that he did.

The scope of FPASA is a matter first impression in the Sixth Circuit[7] and presents a "difficult problem of statutory interpretation." *AFL-CIO v. Kahn*, 618 F.2d 784, 787 (D.C. Cir. 1979) (en banc). The FPASA "was designed to centralize Government property management and to introduce into the public procurement process the same flexibility that characterizes such transactions in the private sector." *Id.* Congress's goal in enacting FPASA was to create an "economical and efficient system for…procurement and supply." *Id.* at 788. "'Economy' and 'efficiency' are not narrow terms; they encompass those factors like price, quality, suitability, and availability of goods or services that are involved in all acquisition decisions." *Id.* at 789.

Through the FPASA, Congress granted to the president a broad delegation of power that presidents have used to promulgate a host of executive orders. *See, e.g.*, *UAW-Labor Employment and Training Corp. v. Chao*, 325 F.3d 360, 366 (2003) (holding that FPASA authorized the president to require contractors to post notices at all facilities informing

[7] A Westlaw search of the term "Federal Property and Administrative Services Act" revealed that only four cases in the Sixth Circuit have even mentioned the Federal Property and Administrative Services Act, and none of them addressed the scope of the act. *See Americans United for Separation of Church and State v. School Dist. of City of Grand Rapids*, 718 F.2d 1389, 1415 (6th Cir. 1983) (Krupansky, J. dissenting); *Higginson v. United States*, 384 F.2d 504, 506 (6th Cir. 1967); *Solomon v. United States*, 276 F.2d 669, 673 (6th Cir. 1960); *United States v. Witherspoon*, 211 F.2d 858, 860 n.1 (6th Cir. 1954).

employees of certain rights); *Kahn*, 618 F.2d 784 (holding that FPASA authorized the president to require government contractors to comply with price and wage controls); *Albuquerque v. U.S. Dept. of Interior*, 379 F.3d 901, 905 (10th Cir. 2004) (holding that FPASA authorized executive order setting out priorities "for meeting Federal space needs in urban areas"). For decades, "the most prominent use of the President's authority under the FPASA [was] a series of anti-discrimination requirements for Government contractors." *Kahn*, 618 F.2d at 790.[8]

However, despite Congress's broad delegation of power under the FPASA, the President's authority is not absolute. *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1330 (D.C. Cir. 1996). The District of Columbia Circuit cautioned that the FPASA does not provide authority to "write a blank check for the President to fill in at his will. The procurement power must be exercised consistently with the structure and purposes of the statute that delegates that power." *Id.* (quoting *Kahn*, 618 F.2d at 793). Furthermore, the FPASA "does not allow the President to exercise powers that reach beyond the Act's express provisions, *Kahn*, 618 F.2d. at 797 (Tamm, J., concurring), and there must be a "close nexus between the Order and the objectives of the Procurement Act." *Id.* (Bazelon, J., concurring).

Defendants argue that the nexus between the vaccine mandate and economy and efficiency in federal contracting "is self-evident." [R. 27 at 23.] After all, Defendants argue, requiring vaccination for all government contractors and subcontractors will limit the spread of Covid-19, which in turn will (1) decrease worker absence; (2) decrease labor costs; and (3) improve efficiency at work sites. [R. 27 at 23 (citing Executive Order 14042).] However, the

[8] In dissent, Judge MacKinnon argues that the majority's argument that FPASA has been used in the past to invoke anti-discrimination orders is misleading because, in the cases relied on by the majority, either "the courts' discussion of the scope of the procurement power was dicta," or the court did not need to "rely exclusively on the presidential procurement power to uphold an affirmative action plan," and "did not do so." *Kahn*, 618 F.2d at 810 (MacKinnon, J. dissenting).

FPASA's goal is to create an "economical and efficient system for…*procurement and supply*." *Kahn*, 618 F.2d at 788 (emphasis added). While the statute grants to the president great discretion, it strains credulity that Congress intended the FPASA, a procurement statute, to be the basis for promulgating a public health measure such as mandatory vaccination.

If a vaccination mandate has a close enough nexus to economy and efficiency in federal procurement, then the statute could be used to enact virtually any measure at the president's whim under the guise of economy and efficiency. *Cf. Ala. Ass'n of Realtors v. Dept. of Health and Human Servs.*, 141 S. Ct. 2485, 2488–89 (2021) (finding the federal government's interpretation of § 361 would grant the CDC a "breathtaking amount of authority" that could be used to "mandate free grocery delivery for the sick or vulnerable…[r]equire manufacturers to provide free computers to enable people to work from home" or "[o]rder telecommunications companies to provide free high-speed Internet service to facilitate remote work").

The vaccine mandate applies to employees of federal contractors and subcontractors who work entirely from home and are not at risk of spreading Covid-19 to others. [R. 12 at 6 (citing Task Force Guidance).] Under the same logic employed by the Defendants regarding the vaccine mandate, what would stop FPASA 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." Centers for Disease Control and Prevention, *Obesity, Race/Ethnicity, and COVID-19*, https://www.cdc.gov/obesity/data/obesity-and-covid-19.html (last visited Nov. 22, 2021).

Furthermore, the CDC states that Covid-19 spreads more easily indoors than outdoors. Centers for Disease Control and Prevention, *Participate in Outdoor and Indoor Activities*,

https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/outdoor-activities.html (last visited Nov. 22, 2021). Why 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?

Although Congress used its power to delegate procurement authority to the president to promote economy and efficiency federal contracting, this power has its limits. *Reich*, 74 F.3d at 1330. Furthermore, even for a good cause, including a cause that is intended to slow the spread of Covid-19, Defendants cannot go beyond the authority authorized by Congress. *See Ala. Ass'n of Realtors*, 141 S. Ct. at 2488–89; *see also Missouri v. Biden*, Case No. 4:21-cv-01329-MTS, at *3–4 (E.D. Mo. Nov. 29, 2021) (holding that Congress must provide clear authorization if delegating the exercise of powers of "vast economic and political significance," if the authority would "significantly alter the balance between federal and state power," or if the "administrative interpretation of a statute invokes the outer limits of Congress' power"). Accordingly, the Court finds that the president exceeded his authority under the FPASA.

a

There are several concerning statutory and constitutional implications from President Biden exceeding his authority under the FPASA. Three of particular concern are the Competition in Contracting Act, the nondelegation doctrine and concerns regarding federalism, and the Tenth Amendment.[9]

[9] The Plaintiffs also briefly argue that the vaccination mandate violates the Spending Clause. Plaintiffs cite to *Cutter v. Wilkenson* to argue that the government must "state all conditions on the receipt of federal funds 'unambiguously' so as to 'enabl[e] the states to exercise their choice knowingly." [R. 12 at 21 (citing 423 F.3d 579, 585 (6th Cir. 2005) (citing *South Dakota v. Dole*, 483 U.S. 203, 207 (1987)).] However, Plaintiffs fail to point to any support for the proposition that federal contract obligations are subject to the *Dole* clarity requirement. The Court is concerned, given that the Defendants in this case are "acting as patron rather than sovereign" that accepting the Plaintiffs' argument may turn simple budgetary imprecisions in federal procurement into matters of constitutional concern. [R. 27 at 33 (citing *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 589 (1998)).] At this early stage in the

Plaintiffs argue that President Biden exceeded his authority under the Competition in Contracting Act. [R. 12 at 16.] Pursuant to 41 U.S.C. § 3301(a)(1), federal agencies must provide "full and open competition through the use of competitive procedures" in procurement. Plaintiffs argue that the vaccine mandate violates § 3301. *Id.* Defendants argue that just because a requirement may exclude certain contractors from bidding on certain jobs, that does not mean that the requirement runs afoul of the Competition in Contracting Act. [R. 27 at 24 (citing *Nat'l Gov't Servs, Inc. v. United States*, 923 F.3d 977, 985 (Fed. Cir. 2019)).]

However, *National Government Services* supports the Plaintiff's position. In *National Government Services*, the Federal Circuit determined that a contract award limit placed on contractors by Centers for Medicare and Medicaid Services violated the Competition in Contracting Act because it failed to provide for full and open competition, which the Act requires. 923 F.3d at 990. The court held that "the Award Limitations Policy precludes full and open competition by effectively excluding an offeror from winning an award, even if that offeror represents the best value to the government." *Id.* Here, Defendants may run into the same problem: contractors who "represent[] the best value to the government" but choose not to follow the vaccine mandate would be precluded from effectively competing for government contracts. *Id.*

Defendants cannot preclude full and open competition pursuant to the Competition in Contracting Act, and Defendants have not demonstrated that they followed "the congressionally designed procedure for" excluding unvaccinated contractors and subcontractors from government contracts. *Id.* Accordingly, at this early stage in the litigation, the Court finds that this argument favors the Plaintiffs.

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litigation, and on the record before the Court, the Court does not find that Plaintiffs are likely to succeed on the merits as to this claim.

b

The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. Const. art. I § 1. "The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government." *Gundy v. United States*, 139 S. Ct. 2116, 2121 (2019). Therefore, under the nondelegation doctrine, Congress may not "delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537–38 (1935). In the nondelegation doctrine context, "[t]he constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion." *Gundy*, 139 S. Ct. at 2123. Here, Plaintiffs argue that FPASA "lacks any intelligible principle if interpreted so loosely as to bless the Administration's practices here." [R. 12 at 22.] Plaintiffs argue that mandating vaccination for millions of federal contractors and subcontractors is a decision that should be left to Congress (or, more appropriately, the States) and is a public health regulation as opposed to a measure aimed at providing an economical and efficient procurement system. *Id.* at 22–23. Defendants respond that the "Procurement Act's delegation of authority fits comfortably within the bounds of constitutionally permissible delegations," particularly given the leniency of the "intelligible principle" standard. [R. 27 at 35.]

It would be reasonable to assume that a vaccine mandate would be more appropriate in the context of an emergency standard promulgated by OSHA. After all, OSHA was created "to ensure safe and healthful working conditions for workers by setting and enforcing standards and by providing training, outreach, education and assistance." Occupational Safety and Health Administration, *About OSHA*, https://www.osha.gov/aboutosha (last visited Nov. 23, 2021). On

November 5, 2021, OSHA promulgated a vaccine mandating requiring all employers with 100 or more employees to "develop, implement, and enforce a mandatory COVID-19 vaccination policy." 86 Fed. Reg. 61,402,61,402. However, the Fifth Circuit recently found that the "Occupational Safety and Health Act, which created OSHA," could not be used under the nondelegation doctrine to "make sweeping pronouncements on matters of public health affecting every member of society in the profoundest of ways." *BST Holdings, LLC v. OSHA*, --- F.4th ---, 2021 WL 5279381, at *3 (5th Cir. Nov. 12, 2021). If OSHA promulgating a vaccine mandate runs afoul of the nondelegation doctrine, the Court has serious concerns about the FPASA, which is a procurement statute, being used to promulgate a vaccine mandate for all federal contractors and subcontractors.[10]

Admittedly, the OSHA vaccine mandate at issue in *BST Holdings* and the vaccine mandate in this case differ in significant ways. First, of course, the purposes and effects of the two statutes are markedly different. The Occupational Safety and Health Act created OSHA, which is a governmental agency responsible for overseeing workplace safety in the United States. *See* Occupational Safety and Health Administration, *About OSHA*. The FPASA, on the other hand, was enacted to create an "economical and efficient system for…procurement and supply." *Kahn*, 618 F.2d at 788.

Second, the scope and impact of the two vaccine mandates are different. The OSHA vaccine mandate applied to all companies in the United States with one hundred or more employees. *BST Holdings, LLC*, 2021 WL 5279381, at *1. The OSHA mandate would have

[10] Following the Fifth Circuit's stay issued on November 6 and extended on November 12, the Sixth Circuit was chosen by random multi-circuit lottery to decide the outcome of OSHA's Emergency Temporary Standard requiring Covid-19 vaccination or weekly testing. Andrea Hsu, *6th Circuit Court 'wins' lottery to hear lawsuits against Biden's vaccine rule*, NPR (Nov. 16, 2021), https://www npr.org/2021/11/16/1056121842/biden-lawsuit-osha-vaccine-mandate-court-lottery. That matter is currently pending before the Sixth Circuit. *See In re: MCP No. 165; OSHA Rule on Covid19 Vaccination and Testing, 86 Fed. Reg. 61402*, No. 21-7000.

forced all companies in the United States with one hundred or more employees to comply with the mandate or pay a fine. *Id.* Here, however, contractors and subcontractors are free to choose whether they want to bid for federal government contracts. Only if a contractor or subcontractor chooses to contract with the federal government will they be required to abide by the vaccine mandate. Therefore, the federal government is not forcing the vaccine mandate on contractors writ large, only contractors and subcontractors who choose, moving forward, to contract with the federal government.

Third, although *BST Holdings* concerned the imposition of a vaccine mandate on private businesses, the vaccine mandate in this case concerns the federal government acting as a business entity in its own interest. Generally, the federal government, as a business entity, is free to "determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940).

Notwithstanding these differences, however, one thing is clear in both cases: neither OSHA nor the executive branch is permitted to exercise statutory authority it does not have. *Cf. Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 ("We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance."); *Kahn*, 618 F.2d at 811 (MacKinnon, J., dissenting) ("Mere proximity may count in horseshoes and dancing, but adherence to congressionally-prescribed standards is required for valid lawmaking by executive officers."). In this case, the FPASA was enacted to promote an economical and efficient procurement system, and the Defendants cannot point to a single instance when the statute has been used to promulgate such a wide and sweeping public health regulation as mandatory vaccination for all federal contractors and subcontractors.

It is true that only twice in American history, both in 1935, has the Supreme Court found Congressional delegation excessive. *See A.L.A. Schechter Poultry Corp.*, 295 U.S. 495; *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). The Court believes that today's holding is consistent with prior nondelegation doctrine precedent. However, because cases analyzing the contours of the nondelegation doctrine are scarce, it may be useful for appellate courts to further develop the contours of the nondelegation doctrine, particularly in light of the pandemic. *See Gundy*, 139 S. Ct. at 2131 (Alito, J., concurring) ("If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort.").

c

The Court is also concerned that the vaccine mandate intrudes on an area that is traditionally reserved to the States. This principle, which is enshrined in the Tenth Amendment of the Constitution, states that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[11] U.S. Const. amend. X. Generally, "[t]he regulation of health and safety matters is primarily and historically, a matter of local concern." *Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985); *see also South Bay Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring). Plaintiffs argue that the federal government "has no general police power, and nothing in the Constitution gives the federal government the power it seeks here." [R. 12 at 20.] In response, Defendants argue that the FPASA is a "validly enacted

[11] *See* Thomas Jefferson Letter to George Washington, Feb. 15, 1791, Opinion on Bill for Establishing a National Bank ("I consider the foundation of the Constitution as laid on this ground that 'all powers not delegated to the U.S. by the Constitution, not prohibited by it to the states, are reserved to the states or to the people' ... To take a single step beyond the boundaries thus specially drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition.").

[statute] under one of Congress's enumerated powers, and the Executive Branch [is exercising] authority lawfully delegated under that statute."[12] [R. 27 at 31.]

The Fifth Circuit recently addressed federalism concerns in a similar governmentally imposed vaccine mandate context:

> [T]he Mandate likely exceeds the federal government's authority under the Commerce Clause because it regulates noneconomic inactivity that falls squarely within the States' police power. A person's choice to remain unvaccinated and forgo regular testing is noneconomic inactivity. And to mandate that a person receive a vaccine or undergo testing falls squarely within the States' police power…The Commerce Clause power may be expansive, but it does not grant Congress the power to regulate noneconomic inactivity traditionally within the States' police power. In sum, the Mandate would far exceed current constitutional authority.

BST Holdings, LLC, 2021 WL 5279381, at *7 (citations omitted). The Court finds *BST Holdings* to be persuasive. On the record currently before the Court, there is a serious concern that Defendants have stepped into an area traditionally reserved to the States, and this provides an additional reason to temporarily enjoin the vaccine mandate.

2

The next issue is whether the relevant agencies in this case followed the proper administrative procedures. Plaintiffs argue that (1) the Defendants issued the FAR Council Guidance and OMB Determination in violation of the procedure required by law; and (2) the agencies' actions were "arbitrary and capricious." [R. 12 at 10, 17.]

[12] Defendants also argue that the doctrine of intergovernmental immunity applies here, arguing that "federal contractors are treated the same as the federal government itself." [R. 27 at 32 (citing *United States v. Cal.*, 921 F.3d 865, 882 n.7 (9th Cir. 2019)).] However, as Plaintiffs point out, intergovernmental immunity is not relevant to this lawsuit because "Plaintiffs are not suing federal contractors for violations of state law," but are instead suing the federal government as, at least in part, federal contractors. [R. 32 at 18.]

a

The Administrative Procedure Act (APA) requires a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be…without observance of procedure required by law." 5 U.S.C. § 706(2)(D). Specifically, Plaintiffs argue that 41 U.S.C. § 1707(a) requires procurement policies, regulations, procedures, or forms to be published in the Federal Register for sixty days before it can take effect, which Plaintiffs state Defendants failed to do with regards to the FAR Council Guidance and OMB Determination.[13] In response, Defendants argue that the FAR Council Guidance is not final agency action or subject to review under § 1707. [R. 27 at 29.] Furthermore, Defendants argue that the OMB Determination is not reviewable under § 1707, and even if it were reviewable, the OMB Determination satisfies § 1707's procedural requirements. *Id.* at 25. Although the procedural path taken by the agencies was, at times, inartful and a bit clumsy, the Court finds based on the record before it that the Defendants likely followed the procedures required by statute.

First, FAR Council Guidance is not subject to judicial review pursuant to the APA because the Guidance does not constitute final agency action. *See Spear*, 520 U.S. at 178 (finding that final agency action is action that marks "the consummation of the agency's decisionmaking process," and "by which rights or obligations have been determined, or from which legal consequences will flow"). Here, as Defendants correctly argue, Executive Order 14042 instructed the FAR Council to "take *initial* steps to implement" the contract clause. 86 Fed. Reg. 50,985–88 (Sept. 9, 2021) (emphasis added). Therefore, the FAR Council Guidance is not final agency action and is therefore not subject to judicial review under the APA.

[13] Plaintiffs also invoke 5 U.S.C. § 553 but focus on § 1707 "because it is more stringent." [R. 12 at 11.]

Furthermore, § 1707 does not apply to the FAR Council Guidance because it constitutes nonbinding guidance that does not rise to the level of a "procurement policy, regulation, procedure, or form." § 1707. The purpose of the FAR Council Guidance was to "support agencies in meeting the applicability requirements and deadlines set forth in" the executive order, and to encourage agencies to "exercise their authority" in helping contractors and subcontractors insert deviation clauses into their contracts. FAR Council Guidance. Therefore, the Court finds that Plaintiffs' challenge of Defendants' FAR Council Guidance is not likely to succeed on the merits.

The OMB Determination is a bit more complicated. Plaintiffs filed their Motion for a Preliminary Injunction and argued that the OMB Determination failed to "adhere to the process mandated by law." [R. 12 at 12.] However, on November 16, eight days after Plaintiffs filed their motion, the OMB Director rescinded its original Determination and issued a new Determination. 86 Fed. Reg. 63418. In addition to revoking the prior Determination, the OMB Director's new Determination also provided more robust support for the proposition that the vaccine mandate will promote economy and efficiency in government contracting, provided covered contractors more time to comply with the vaccine mandate, and invoked § 1707 "to the extent that…1707 is applicable." *Id.*

Defendants first argue that § 1707 does not apply to the OMB determination because that section "does not apply to exercises of Presidential authority like the OMB Determination" in this case. [R. 27 at 25.] However, the D.C. Circuit squarely rejected this argument in *Reich*. There, the Court stated:

> That the "executive's" action here is essentially that of the President does not insulate the entire executive branch from judicial review. We think it is now well established that "[r]eview of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the

> President's directive." *Franklin*, 505 U.S. at 815, 112 S.Ct. at 2790 (Scalia, J., concurring in part and concurring in the judgment). Even if the Secretary were acting at the behest of the President, this "does not leave the courts without power to review the legality [of the action], for courts have power to compel subordinate executive officials to disobey illegal Presidential commands."

Reich, 74 F.3d at 1328. The Court further explained that "if [a] federal officer, against whom injunctive relief is sought, allegedly acted in excess of his legal authority, sovereign immunity does not bar a suit." *Id.* at 1329. The Court finds *Reich* to be persuasive. *Reich* also involved a challenge to an executive order promulgated under FPASA. *Id.* at 1324. Therefore, the Court finds that review of the OMB Determination is appropriate in this case.

However, judicial review is not fatal to the OMB Determination. From the outset, the Court notes that Plaintiff's arguments pertaining to the September 24 OMB Determination were rendered moot by the promulgation of the new OMB Determination on November 16. *See Akiachak Native Community v. U.S. Dep't of Interior*, 827 F.3d 100, 113 (D.C. Cir. 2016) (collecting cases demonstrating that it is an "uncontroversial and well-settled principle of law" that "when an agency has rescinded and replaced a challenged regulation, litigation over the legality of the original regulation becomes moot"). Furthermore, Plaintiffs argued that the OMB Director failed to either permit notice and comment or invoke § 1707(d)'s waiver of notice and comment. [R. 12 at 11–12.] While this was true of the OMB Director's initial Determination, the subsequent Determination included a thirty-day notice and comment period and invoked § 1707(d). 86 Fed. Reg. 63423.

Plaintiffs argue that the OMB Director's invocation of § 1707(d) in its subsequent Determination is "facially senseless" and irrational because the Determination simultaneously delayed the mandate compliance date and invoked the § 1707(d) "urgent and compelling circumstances," exception. [R. 32 at 10–11.] Plaintiffs' argument is well taken, and further

review may demonstrate that the OMB Determination failed to follow the proper procedures. However, there is no evidence of bad faith on the part of the OMB Director, and Counsel for the Defendants explained during the hearing in this matter that the compliance date was delayed to benefit federal contractors and ensure that they would have sufficient time to comply with the mandate. Ultimately, based on the limited record, the Court finds that the FAR Council Guidance and subsequent OMB Determination in this matter did not run afoul of the proper administrative procedures.

b

Plaintiffs also argue that the administration's actions in promulgating the vaccine mandate were arbitrary and capricious under the APA.[14] As the Supreme Court recently explained:

> The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained. Judicial review under that standard is deferential, and a court may not substitute its own policy judgment for that of the agency. A court simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision.

Fed. Commc'ns Comm'n v. Prometheus Radio Project, 141 S. Ct. 1150, 1158 (2021).

First, Plaintiffs argue that the OMB Determination failed to explain how the vaccine mandate would "promote economy and efficiency in procurement." [R. 12 at 17.] Second, Plaintiffs argue that Defendants "failed to consider the possibility that their actions would cause a labor shortage." *Id.* at 18. Third, Plaintiff argue that the OMB Determination ignored "costs to the Plaintiffs." *Id.* Fourth, Plaintiffs argue that the OMB Determination failed to consider "lesser alternatives to a vaccine mandate." *Id.* And finally, Plaintiffs argue that the Task Force

[14] Plaintiffs' arguments here pertain to both the FAR Council Guidance and OMB Determination. [R. 12 at 17–19.] However, because the Court found above that the FAR Council Guidance was not subject to review under the APA, the Court need only address Plaintiffs' arguments as they pertain to the OMB Determination.

Guidance and FAR Council Guidance concluding that the vaccine mandate would "improve procurement efficiency by reducing absenteeism and decreasing labor costs is blatantly pretextual." *Id.* at 19.

Plaintiffs' first argument primarily pertained to the OMB Director's first Determination, which, as explained above, is now moot. It is true that the first Determination only included a 210-word explanation for how the vaccine mandate would create contracting efficiencies. *See* OMB Determination, 86 Fed. Reg. at 53,691–92. But the subsequent Determination promulgated on November 16 included a more thorough and robust economy-and-efficiency analysis. *See* Fed. Reg. 86 63,421–23. Therefore, Plaintiffs' first argument fails.

Similar to Plaintiffs' first argument, the second are third arguments are more applicable to the OMB Director's first Determination than the second. In the OMB Director's second Determination, she specifically addressed potential effects on the labor force and costs of the vaccine mandate, finding that few employees will quit if faced with a vaccine mandate and that Covid-19 vaccination will reduce net costs. *Id.* at 63421–23. It is perfectly reasonable for the Plaintiffs to disagree with Defendants on this point. However, "[w]hen, as here, an agency is making predictive judgments about the likely economic effects of a rule, we are particularly loath to second-guess its analysis." *Newspaper Ass'n of Am. v. Postal Regul. Comm'n*, 734 F.3d 1208, 1216 (D.C. Cir. 2013).

The Court likewise rejects Plaintiffs' one-sentence argument that the OMB Director failed to consider lesser alternatives to a vaccine mandate. *See La Quinta Corp. v. Heartland Properties LLC*, 603 F.3d 327, 338 n.5 (6th Cir. 2010) (finding argument made without elaboration is waived); *see also In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 901

(6th Cir. 2009) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.").

Plaintiffs' final argument, that Defendants' finding that a vaccine mandate would improve procurement efficiency is pretextual, also fails. To support this argument, Plaintiffs argue that from the beginning, the President's statements demonstrate that this executive order and the vaccine mandate are an effort to get more people vaccinated. [R. 12 at 19.] However, the Court is "reluctant to consider the President's motivation in issuing the Executive Order." *Reich*, 74 F.3d at 1335. Furthermore, the subsequent OMB Determination provided ample support for the premise that a vaccine mandate will improve procurement efficiency. *See* 86 Fed. Reg. 63,421–23. Furthermore, "a court may not reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons." *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2573 (2019). Accordingly, the Plaintiffs' arguments that the administration's actions were arbitrary and capricious fail.

3

The Court finds, based on the limited record at this stage in the litigation, that Defendants have followed the appropriate procedural requirements in promulgating the vaccine mandate. However, because the Court also finds that the president exceeded his authority under the FPASA, and for the serious Constitutional concerns addressed above, the Court holds that Plaintiffs are likely to succeed on the merits as to their preliminary injunction. Furthermore, the Court finds that Plaintiffs are likely to suffer irreparable harm without preliminary relief and that preliminary relief is not contrary to the public interest.

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. For the individual Plaintiffs, "the loss of constitutional freedoms 'for even minimal periods of time…unquestionably constitutes irreparable injury.'" *BST Holdings, LLC*, 2021 WL 5279381, at *8 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

Furthermore, "complying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance." *Id.* (citing *Texas v. EPA*, 829 F.3d 405, 433 (5th Cir. 2016)). And the States "have an interest in seeing their constitutionally reserved police power over public health policy defended from federal overreach." *Id.* Finally, "any abstract 'harm' a stay might cause…pales in comparison and importance to the harms the absence of a stay threatens to cause countless individuals and companies." *Id.* Therefore, Plaintiffs have satisfied the requisite preliminary injunction factors in this case.

C

Lastly, the Court must consider the scope of its injunction. The Sixth Circuit has held that a "district court should limit the scope of [an] injunction to the conduct 'which has been found to have been pursued or is related to the proven unlawful conduct.'" *Howe v. City of Akron*, 801 F.3d 718, 753 (6th Cir. 2015) (quoting *E.E.O.C. v. Wilson Metal Casket Co.*, 24 F.3d 836, 842 (6th Cir. 1994)). The Defendants' actions affect Kentucky, Ohio, and Tennessee, as well as the additional two plaintiffs in this case. However, individuals in every state in the country are affected. While it is true that the evidence presented by the parties primarily relates to Kentucky, Ohio, and Tennessee, this Court's ruling rests on facts that are universally present in the federal government's dealings with contractors and subcontractors in all of the states. Consequently, this Court must consider the breadth of its injunction. Should it temporarily enjoin enforcement of the vaccine mandate for contractors and subcontractors as it relates to (1)

the Eastern District of Kentucky (this Court's District); (2) Ohio, Tennessee, and Kentucky (the entities before the Court); or (3) all of the States (both parties and non-parties).

In *Trump v. Hawaii*, 138 S. Ct. 2392, 2424 (2018) (Thomas, J., concurring) Justice Thomas discussed the increasing frequency of "universal" or "nationwide injunctions." Justice Thomas expressed his skepticism of such injunctions, noting: (1) historical principles of equity in Article III courts; (2) the recency of nationwide injunctions; (3) and the properly limited role of district courts. *Id.* at 2425–29 ("[In the past, as] a general rule, American courts of equity did not provide relief beyond the parties to the case"). Justice Thomas found that the sweeping relief brought by nationwide injunctions likewise brings "forum shopping" and makes "every case a national emergency for the courts and the Executive Branch." *Id.* at 2425. Instead, district courts should allow legal questions to percolate through the federal court system. *Id.* Justice Gorsuch affirmed this notion in *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring). Noting that "[e]quitable remedies, like remedies in general, are meant to redress the injuries sustained by a particular plaintiff in a particular lawsuit," Justice Gorsuch found that nationwide injunctions "raise serious questions about the scope of courts' equitable powers under Article III." *Id.* Not only are such injunctions impracticable, they "force judges into making rushed, high-stakes, low-information decisions." *Id.* Careful review by multiple district and circuit courts, on the other hand, allows the Supreme Court the benefit of thoughtful and, at times, competing outcomes. *Id.*

Although the debate over the proper scope of injunctions is ongoing, this Court believes that redressability in the present case is properly limited to the parties before the Court. Consequently, the scope of the permanent injunction shall apply to Kentucky, Ohio, Tennessee and the additional sheriff plaintiffs before the Court in equal force.

III

Once again, the Court is asked to wrestle with important constitutional values implicated in the midst of a pandemic that lingers. These questions will not be finally resolved in the shadows. Instead, the consideration will continue with the benefit of full briefing and appellate review. But right now, the enforcement of the contract provisions in this case must be paused.

Accordingly, and the Court being sufficiently advised and for the reasons set forth herein, it is hereby **ORDERED** as follows:

1. Plaintiffs' motion for a preliminary injunction **[R. 12]** is **GRANTED**;
2. The Government is **ENJOINED** from enforcing the vaccine mandate for federal contractors and subcontractors in all covered contracts in Kentucky, Ohio, and Tennessee.

This the 30th day of November, 2021.

Gregory F. Van Tatenhove
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

THE STATE OF GEORGIA, et al., Plaintiffs, v. JOSEPH R. BIDEN, in his official capacity as President of the United States, et al., Defendants.	CIVIL ACTION NO.: 1:21-cv-163

O R D E R

Plaintiffs, comprised of the States of Georgia, Alabama, Idaho, Kansas, South Carolina, Utah and West Virginia; the governors of several of those states; and various state agencies, including the Board of Regents of the University System of Georgia, filed this suit seeking declaratory and injunctive relief against enforcement of Executive Order 14042, which requires, *inter alia*, that contractors and subcontractors performing work on certain federal contracts ensure that their employees and others working in connection with the federal contracts are fully vaccinated against COVID-19. (Docs. 1, 54.) Upon filing the lawsuit, Plaintiffs requested that this Court issue a preliminary injunction. (Docs. 19, 55.) Additionally, Associated Builders and Contractors, Inc. (hereinafter, "ABC"), a trade organization, and one of its chapters, Associated Builders and Contractors of Georgia, Inc. (hereinafter, "ABC-Georgia"), (hereinafter, collectively, "Proposed Intervenors")) filed a Motion to Intervene in the action, (doc. 48), and also filed their own Motion for Preliminary Injunction, (doc. 50). The Court established an expedited briefing schedule and, following the submission of responses by the Defendants to all motions, (docs. 61,

63), and the submission of replies by Plaintiffs and by the Proposed Intervenors, (docs. 76–78), the Court conducted a hearing on the Motions on December 3, 2021.

As another Court that has preliminarily enjoined the same measure at issue in this case has stated, "[t]his case is not about whether vaccines are effective. They are." Kentucky v. Biden, No. 3:21-cv-55, 2021 WL 5587446, at *9 (E.D. Ky. Nov. 30, 2021). Moreover, the Court acknowledges the tragic toll that the COVID-19 pandemic has wrought throughout the nation and the globe. However, even in times of crisis this Court must preserve the rule of law and ensure that all branches of government act within the bounds of their constitutionally granted authorities. Indeed, the United States Supreme Court has recognized that, while the public indisputably "has a strong interest in combating the spread of [COVID-19]," that interest does not permit the government to "act unlawfully even in pursuit of desirable ends." Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2490 (2021) (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582, 585–86 (1952)). In this case, Plaintiffs will likely succeed in their claim that the President exceeded the authorization given to him by Congress through the Federal Property and Administrative Services Act when issuing Executive Order 14042. Accordingly, after due consideration of the motions, supporting briefs, responsive briefing, and the evidence and argument presented at the hearing,[1] the Court **GRANTS IN PART and DENIES IN PART** the Motion to Intervene, (doc. 48), **GRANTS** ABC's Motion for Preliminary Injunction, (doc. 50), and **GRANTS** Plaintiffs' Amended Motion for Preliminary Injunction, (doc. 55).

[1] On December 2, 2021, the American Medical Association, which is not a party to this case, was granted leave of Court to file an *amicus curiae* brief in opposition to Plaintiffs' Amended Motion for Preliminary Injunction. (Doc. 86.)

BACKGROUND

On January 20, 2021, President Biden signed Executive Order 13991, establishing the "Safer Federal Workforce Task Force" (hereinafter, the "Task Force"). 86 Fed. Reg. 7,045–48 (Jan. 20, 2021). The Task Force's stated 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." Id. at 7,046.

On September 9, 2021, President Biden signed Executive Order 14042 (hereinafter, "EO 14042"). 86 Fed. Reg. 50,985–88 (Sept. 9, 2021). Therein, the President stated that his order would "promote[] economy and efficiency in Federal procurement by ensuring that the parties that contract with the Federal Government provide adequate COVID-19 safeguards to their workers performing on or in connection with a Federal Government contract or contract-like instrument," which would "decrease worker absence, reduce labor costs, and improve the efficiency of contractors and subcontractors at sites where they are performing work for the Federal Government." Id. at § 1. EO 14042 mandated that the Task Force provide, by September 24, 2021, guidance regarding "adequate COVID-19 safeguards," which must be complied with by federal contractors and subcontractors. Id. at 50,985. This executive order specified that the Task Force's guidance would be mandatory at all "contractor or subcontractor workplace locations" so long as the Director of the Office of Management and Budget (hereinafter, the "OMB") approved the guidance and determined that it would "promote economy and efficiency in Federal contracting." Id. EO 14042 states that it applies, with some specified exceptions, to "any new contract; new contract-like instrument; new solicitation for a contract or contract-like instrument;

extension or renewal of an existing contract or contract-like instrument; and exercise of an option on an existing contract or contract-like instrument." Id.

On September 24, the Task Force issued its Guidance for Federal Contractors and Subcontractors (hereinafter, the "Task Force Guidance") pursuant to EO 14042. See Safer Federal Workforce Task Force, *COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors*, available at https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf (last visited Dec. 4, 2021). The Task Force Guidance requires all "covered contractors"[2] to be fully vaccinated by January 18, 2022,[3] unless they are "legally entitled to an accommodation." Safer Federal Workforce Task Force, *COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors* (Updated November 10, 2021), at p. 5, available at https://www.saferfederalworkforce.gov/downloads/Guidance%20for%20Federal%20Contractors_Safer%20Federal%20Workforce%20Task%20Force_20211110.pdf (last visited December 4, 2021). The Task Force Guidance applies to all "newly awarded covered contract[s]" at any

[2] "Covered contractor" means "a prime contractor or subcontractor at any tier who is party to a covered contract." Safer Federal Workforce Task Force, *COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors*, at p. 3.

[3] While the initial Task Force Guidance announced a deadline of December 8, 2021, on November 10, 2021, an updated version was issued which pushed the deadline for full vaccination to January 18, 2022. See Safer Federal Workforce Task Force, *COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors* (Updated November 10, 2021), available at https://www.saferfederalworkforce.gov/downloads/Guidance%20for%20Federal%20Contractors_Safer%20Federal%20Workforce%20Task%20Force_20211110.pdf (last visited December 4, 2021). This means that covered contractors' employees would need to receive their Johnson & Johnson vaccine or the second dose of a Pfizer or Moderna vaccine by January 4 to be fully vaccinated by the deadline. See The White House, Fact Sheet: Biden Administration Announces Details of Two Major Vaccination Policies, https://www.whitehouse.gov/briefing-room/statementsreleases/2021/11/04/fact-sheet-biden-administration-announces-details-of-two-major-vaccination-policies/ (last visited Dec. 4, 2021).

location where covered contract employees work and it covers "any full-time or part-time employee of a covered contractor working on or in connection with a covered contract or working at a covered contractor workplace." Id. at pp. 3–5.

On September 28, the Director of the OMB issued a notice of her determination "that compliance by [f]ederal contractors and subcontractors with the COVID-19 workplace safety protocols detailed in th[e] [Task Force G]uidance will improve economy and efficiency by reducing absenteeism and decreasing labor costs for contractors and subcontractors working on or in connection with a Federal Government contract." 86 Fed. Reg. 53,691–92.

In order to implement the policies and requirements it established, EO 14042 directed the Federal Acquisition Regulatory Council (hereinafter, the "FAR Council") to "amend the Federal Acquisition Regulation to provide for inclusion in Federal procurement solicitations and contracts subject to this order [a] clause" requiring compliance with the Task Force Guidance (including the vaccination requirements). 86 Fed. Reg. 50,986. The Federal Acquisition Regulation (hereinafter, the "FAR") is the set of policies and procedures that governs the drafting and procurement processes of contracts for all executive agencies; it also contains standard solicitation provisions and contract clauses. See United States General Services Administration, Federal Acquisition Regulation (FAR), https://www.gsa.gov/policy-regulations/regulations/federal-acquisition-regulation-far (last visited Dec. 4, 2021).

On September 30, 2021, the FAR Council issued a memo to various agencies, providing direction on when and how to use the new clause, (hereinafter, the "FAR Memo"). See FAR Council Guidance, https://www.whitehouse.gov/wp-content/uploads/2021/09/FAR-Council-Guidance-on-Agency-Issuance-of-Deviations-to-Implement-EO-14042.pdf (last visited Dec. 4,

2021). The FAR Memo explains that EO 14042 directed the FAR Council to "develop a contract clause requiring contractors and subcontractors . . . to comply with [the Task Force Guidance] and to provide initial policy direction to acquisition offices for use of the clause by recommending that agencies exercise their authority under FAR subpart 1.4, Deviations from the FAR." Id. at p. 2. According to the FAR Memo, "[t]he FAR Council has opened a case (FAR Case 2021-021, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors) to make appropriate amendments in the FAR to reflect the requirements of [EO 14042]," id. at p. 3, and it has "developed [a] clause"—which it included as an attachment to the memo—"pursuant to section 3(a) of the order to support agencies in meeting the applicability requirements and deadlines set forth in [EO 14042]," id. at p. 2. The attachment is entitled "FAR Deviation Clause . . . [52.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors . . .]," and it states, *inter alia*:

> *(c) Compliance.* The Contractor shall comply with all guidance, including guidance conveyed through Frequently Asked Questions, as amended during the performance of this contract, for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (Task Force Guidance) at *https:/www.saferfederalworkforce.gov/contractors/*.
>
> *(d) Subcontracts.* The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts at any tier that exceed the simplified acquisition threshold, as defined in Federal Acquisition Regulation 2.101 on the date of subcontract award, and are for services, including construction, performed in whole or in part within the United States or its outlying areas.

Id. at pp. 4–5. The FAR Memo lists the types of solicitations and contracts in which the agencies "are *required* to include" the new clause, id. at p. 2 (emphasis added), but it also states that, "[t]o maximize the goal of getting more people vaccinated and decrease the spread of COVID-19, the Task Force *strongly encourages* agencies to apply the requirements of its guidance broadly,

consistent with applicable law, by including the clause in" other types of contracts that are not otherwise covered by EO 14042, id. at p. 3 (emphasis added).

Plaintiffs filed their Complaint initiating this action on October 29, 2021, (doc. 1), and they filed their initial Motion for Preliminary Injunction on November 5, 2021, (doc. 19). On November 10, 2021, the OMB Director issued a revised Determination that (1) revoked the prior OMB Determination; (2) provided additional reasoning and support for how the Task Force Guidance will promote economy and efficiency in government contracting; (3) gave covered contractors additional time to comply with the vaccination requirement; and (4) provided a public comment period through December 16, 2021. See 86 Fed. Reg. 63,418. In light of the revised OMB Determination, Plaintiffs filed an Amended Complaint, (doc. 54), and an Amended Motion for Preliminary Injunction, (doc. 55). Meanwhile, the Proposed Intervenors filed their Motion to Intervene as Plaintiffs, (doc. 48), and their Motion for Preliminary Injunction, (doc. 50). All parties were given an opportunity to file responsive briefs and to present evidence and argument during the hearing on December 3, 2021.

During the hearing, Plaintiffs presented testimony from representatives of three universities within the University System of Georgia: Augusta University, Georgia Institute of Technology (hereinafter, "Georgia Tech"), and the University of Georgia (hereinafter, "UGA"). (See also doc. 55-12, p. 4 (these three institutions' federal contracts generated approximately $736,968,899.00 in revenue in fiscal year 2021).) These witnesses each testified generally about their respective research institution's participation in and reliance on federal contracting, and they provided data regarding the number of employees who work on federal contracts at their institution and the amount of funds received by their institution as a result of its various federal contracts.

(See, e.g., Transcript of Dec. 3, 2021 Hearing (hereinafter, "Tr."), pp. 22–27 (testimony of Michael Shannon, Vice President and Deputy Chief Business Officer at Georgia Tech, that Georgia Tech has roughly 16,000 employees who work on contracts with the Department of Defense, the Department of Commerce, the Department of Transportation, the Department of Health and Human Services, the National Aeronautics and Space Administration (hereinafter "NASA"), the Centers for Disease Control, and other agencies, and, in fiscal year 2021, it received approximately $664 million in federal contracts, which constitutes approximately 68% of its externally sponsored revenue); id. at pp. 67–70 (testimony of Jason Guilbeault, Director of Post-Award Services at Augusta University, that his institution receives over $17 million per year on federal contracts, which represents about 10% of its total sponsored programs funding, and that it has roughly 5,802 employees working on federal contracts, which represents about 95% of its workforce); id. at p. 93 (testimony of Sige Burden, Senior Managing Director for Workforce Engagement at UGA, that UGA has 14,728 employees working on or in connection with federal contracts.) They also each provided even more detailed testimony about the laborious undertakings they have had to perform to comply with the mandate, particularly with the impending January 18 deadline. (See, e.g., id. at pp. 24–27 (testimony of Shannon that Georgia Tech had to "shift a tremendous amount of resources" in order to build a "team comprised of [members of the] information technology [department], [the human resources department], . . . medical and health services folks, [Georgia Tech's] legal team, [and its] emergency services folks" to "very, very rapidly" work to "create something that didn't exist"—a portal to "marry [human resources] data and medical data together"); id. at pp. 70 (testimony of Guilbeault about the data analytics he performed to identify the wide variety of employees who are covered by the mandate, and the software program he has

helped implement to permit employees to log in and enter their vaccination information and a scan of their vaccine card or to log in and submit questions).) Finally, they testified to having a number of employees who have not yet provided proof they are vaccinated or are in the process of becoming vaccinated, and the concern it causes them that many employees will ultimately decline to be vaccinated, meaning the institution will ultimately be non-compliant and may lose valuable employees. (See, e.g., id. at pp. 30–33 (about 20% of Georgia Tech's employees who may be covered have not provided proof they are vaccinated); id. at pp. 71–72 (about 39% of Augusta State employees who may be covered have not provided proof); id. at pp. 92–93 (fewer than half of the University of Georgia's employees who may be covered have provided proof of vaccination).) The Court, which heard testimony from each of these witnesses about their background and job experience and was able to observe them during both direct and cross-examination, found these witnesses to be credible.

LEGAL AUTHORITY & DISCUSSION

I. Motion to Intervene

Pursuant to Federal Rule of Civil Procedure 24(a)(2), a party is permitted to intervene as of right if (1) its application to intervene is timely; (2) it has an interest relating to the property or transaction which is the subject of the action; (3) it is so situated that disposition of the action, as a practical matter, may impede or impair its ability to protect that interest; and (4) its interest is represented inadequately by the existing parties to the suit. Tech. Training Assocs., Inc. v. Buccaneers Ltd. P'ship, 874 F.3d 692, 695–96 (11th Cir. 2017). Where a party is not entitled to intervene as of right, subsection (b) of Federal Rule of Civil Procedure 24 gives a court discretion to nonetheless permit the party to intervene, on timely motion, "when a statute of the United States

confers a conditional right to intervene," or "when [the] applicant's claim or defense and the main action have a question of law or fact in common." Fed. R. Civ. P. 24(b). Accordingly, when there is no right to intervene under Rule 24(a), it is wholly within the Court's discretion to allow permissive intervention under Rule 24(b). Worlds v. Dep't of Health & Rehab. Servs., 929 F.2d 591, 595 (11th Cir. 1991). Subsection (b) of Rule 24 instructs only that the Court must "consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

First, the Court finds that ABC, a trade organization representing tens of thousands of contractors and subcontractors that regularly bid on and work on federal contracts for services, (doc. 49-1, pp. 2–3), has an interest relating to the transaction which is the subject of the action. See N.Y. Pub. Interest Research Grp. v. Regents of Univ. of N.Y., 516 F.2d 350, 352 (2d Cir. 1975) (intervening organizations may properly assert the interests of their members). That interest is described in detail in Discussion Section II, infra, where the Court explains its conclusion that ABC has standing. Next, the Court finds that ABC's ability to protect its interests would be impaired without intervention. In ABC's own words, "in the event that the Proposed Intervenors cannot intervene[,] and this Court issues an adverse decision, the Proposed Intervenors will have no further recourse" and it members will have to comply with EO 14042, (doc. 49, p. 16), which—as explained throughout this Order—the Court finds costly, laborious and likely to result in a reduction in available members of the workforce. See Huff v. Comm'r of IRS, 743 F.3d 790, 800 (11th Cir. 2014) ("All that is required under Rule 24(a)(2) is that the would-be intervenor be practically disadvantaged by his exclusion from the proceedings."). Additionally, the Motion to Intervene was timely. ABC filed its Motion to Intervene roughly twenty days after Plaintiffs filed

suit and prior to any substantive decisions having been made by the Court. At the time the Motion to Intervene was filed, Defendants had not yet responded (or been required to respond) to any substantive requests for relief in the case. Indeed, the day after ABC filed its Motion to Intervene, Plaintiffs filed their Amended Complaint (and Amended Motion for Preliminary Injunction), superseding their prior pleadings. Finally, the Court finds that ABC's interests are represented inadequately by the existing Plaintiffs. ABC represents private entities, many of whom are considered small businesses, while the Plaintiffs are all governmental officials, entities, and agencies. ABC seeks to assert a clam for violation of the Small Business Regulatory Enforcement Fairness Act, which the existing Plaintiffs have not asserted (and may not be able to assert even if they desired to do so). (See doc. 48-1, p. 40.) Additionally, the evidence presented to the Court indicates that ABC's members generally bid on and perform different types of contracts as compared to the wider-ranging types of contracts the Plaintiffs typically bid on and perform, and Plaintiffs and ABC also have different administrative systems and costs when it comes to managing their employees and workforce. Accordingly, ABC's members (as private entities) have economic interests and concerns that differ from those of the Plaintiffs.[4] See, e.g., Kleissler v. United States Forest Serv., 157 F.3d 964, 973–74 (3d Cir. 1988) ("[T]he government represents numerous complex and conflicting interests in matters of this nature. The straightforward business interests asserted by intervenors here may become lost in the thicket of sometimes inconsistent governmental policies."); W. Energy Alliance v. Zinke, 877 F.3d 1157, 1168 (10th Cir. 2017)

[4] As a specific example, one differing interest and strategy that was readily apparent during oral argument concerned the scope of any preliminary injunction. The existing Plaintiffs indicated they would be satisfied if the Court issued a preliminary injunction only effective in Georgia, Alabama, Idaho, Kansas, South Carolina, Utah and West Virginia, while ABC, whose members work on contracts throughout the country, urged that any preliminary injunction would need to be nationwide in order to afford it adequate relief.

("Also, we have held that the government cannot adequately represent the interests of a private intervenor and the interests of the public.").

ABC-Georgia, however, has failed to show that it has standing to bring the claims it seeks to assert in its proposed complaint. No evidence was presented to show that any specific member of the chapter would have standing (i.e., no evidence was presented showing that any member regularly bids on or performs contracts that would be covered under EO 14042, much less that any member wishes to bid on any upcoming contracts that would be covered by EO 14042 but believes it cannot feasibly do so due to the vaccine requirement).

In light of the foregoing, the Court finds that ABC is entitled to intervene as of right in this case pursuant to Federal Rule of Civil Procedure 24(a). Even if it were not permitted to intervene as of right, the Court would exercise its discretion pursuant to subsection (b) of Rule 24 to permit it to intervene because, for the reasons described above, its claims and the main action "have a question of law or fact in common," Fed. R. Civ. P. 24(b), and its intervention will not result in any undue delay or prejudice to the adjudication of the original parties' rights. The Court, however, finds that ABC-Georgia lacks standing to assert its claims and thus is not entitled to intervene. Accordingly, the Court **GRANTS IN PART and DENIES IN PART** the Motion to Intervene. (Doc. 48.)

II. Standing

"[The] standing doctrine . . . requir[es] plaintiffs to 'alleg[e] such a personal stake in the outcome of the controversy as to . . . justify [the] exercise of the court's remedial powers on [their] behalf.'" Town of Chester, N.Y. v. Laroe Estates, Inc., 137 S. Ct. 1645, 1650 (2017) (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976)). To establish Article III standing a

plaintiff must show that it: "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." Spokeo v. Robins, 578 U.S. 330, 338 (2016).

Defendants have focused much of their standing challenge on arguing that Plaintiffs have not "provide[d] [any] evidence that they are (1) parties to a federal contract that already has the challenged clause; or (2) parties to an existing covered contract that is up for an option, extension, or renewal that must include the clause," and that they have not "identif[ied] any specific, covered solicitations that they plan to bid on or contracts that they plan to enter into in the immediate future." (Doc. 63, p. 3.) Notably, however, prior to the hearing, Plaintiffs filed the "Supplemental Declaration of Michael Shannon," which shows that Georgia Tech is a finalist in response to a solicitation, in excess of $250,000, issued by NASA. (Hearing Exhibit (hereinafter, "Exh.") P-22 (also available at doc. 76-1).) According to the Declaration (and as confirmed during Mr. Shannon's live testimony at the hearing and supported by exhibits to his Supplemental Declaration), in October 2021, "the solicitation was amended to include Federal Acquisition Regulation (FAR) clause 52.223-99" and "Georgia Tech was required to agree to FAR clause 52.223-99 to maintain its eligibility for the contract award pursuant to the NASA solicitation." (Id.; see also Tr., pp. 23–24, 43) Accordingly, Plaintiff Board of Regents of the University System of Georgia has standing because it has shown that one of its institutions (Georgia Tech) is a finalist for a contract with NASA and it has been advised that, if it is awarded the contract, the at-issue clause must be included in the contract.[5]

[5] At the hearing, counsel for Defendants conceded that this bestows at least limited standing to certain Plaintiff(s), but she argued that the standing is "limited to that particular contract." (Tr., pp. 17–18.)

Additionally, ABC, which the Court permits, through this Order, to intervene as a Plaintiff, has standing. An organization may sue "on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Greater Birmingham Ministries v. Sec'y of Ala., 992 F.3d 1299 (11th Cir. 2021). ABC, a construction industry trade association, has provided sworn declarations showing that at least two of its members "intended to bid" on specified upcoming federal construction projects, but, following EO 14042, have concluded that it is not practical for them to do so because they likely will not have sufficient employees to perform the job if they enter into a contract that requires all of the covered employees to be vaccinated. (See Exh. ABC-3 (declaration of President of McKelvey Mechanical, Inc., explaining that his company, which is a member of ABC, "traditionally bids many federal projects per year and usually performs 4–6 per year," but a majority of his employees are not vaccinated and many unvaccinated employees have stated that they will quit if they are required to be vaccinated); see also Exh. ABC-2 (declaration of Executive Vice President of Cajun Industries Holdings, LLC, explaining that there are "a number of forthcoming solicitations by the Army for construction projects of the type that Cajun would normally bid upon and perform, and which [it] desire[s] to bid for" but because the projects would fall under EO 14042, it will likely be unable to bid because it has reason to believe that many of its unvaccinated workers (over half its total workforce) will quit if they are required to be vaccinated).) ABC also provided evidence—using information gathered from the General Services Administration's Website for federal contracts—that the federal government frequently and routinely issues solicitations and pre-solicitations for bids on

construction contracts (which ABC's members would normally bid on and be qualified to perform) that would be covered by EO 14042. (Exh. ABC-4.) Coupling that evidence with the sworn testimony provided by ABC, the Court finds that ABC has members that would otherwise have standing to sue in their own right. The Court also concludes that, as a trade association for thousands of contractors, the interests ABC seeks to protect in this lawsuit are germane to its purpose. The Court also finds that neither the claims asserted nor the relief requested (declaratory and injunctive relief) require the participation of individual members in the lawsuit. Greater Birmingham Ministries, 992 F.3d at 1316 n.29 ("[P]rospective relief weigh[s] in favor of finding that associational standing exists."). Accordingly, ABC has standing.

It is well-established that, where there are multiple parties petitioning for injunctive relief, "[o]nly one petitioner needs to have standing to authorize review." Massachusetts v. E. P.A., 549 U.S. 497, 498 (2007); see also Town of Chester, 137 S. Ct. at 1650. Here, two parties petitioning for declaratory and injunctive relief (ABC and the Board of Regents of the University System of Georgia) have standing; accordingly, Defendants' challenge to the lawsuit on this ground fails.

Even without these showings about specific bids and/or contracts, the Court would be inclined to find that Article III standing exists based on the ample evidence (including declarations and live testimony presented at the hearing) showing that the State Plaintiffs (including many of their agencies) and members of ABC (as described in the preceding paragraph) routinely enter into contracts that would be covered by EO 14042,[6] have current contracts that could easily fall under

[6] According to the Declaration of Bill Anderson, the President and CEO of ABC's Georgia chapter, "[a]ccording to recent data posted on the government website www.usaspending.gov, ABC member general contractors compose a crucial segment of the construction industry's federal contracting base as ABC members won 57% of the $118 billion in direct federal U.S. construction contracts exceeding $25 million

the requirements of EO 14042 (if, for instance, they are renewed, modified, or have options that are exercised), and have shown that they would typically continue to seek out contract opportunities with the federal government that now will be covered by EO 14042. (See, e.g., doc. 55-6 (University of Idaho has federal contracts totaling approximately $22 million per year, based on average of last three years); doc. 55-10 (Utah Department of Health has federal contracts totaling $811,000); doc. 55-14 (Alabama Department of Agriculture and Industries has federal contracts and has leased land to the United States Department of Agriculture continuously for the past 26 years).) See Adarand Contractors, Inc. v. Pena, 515 U.S. 200, 211 (1995) (When a claim involves a challenge to a future contracting opportunity, the pertinent question for determining whether an alleged injury is sufficiently imminent is whether Plaintiffs "ha[ve] made an adequate showing that sometime in the relatively near future [they]will bid on another Government contract [of the type at issue in the case].").

Based on all the foregoing, the Court concludes that Plaintiffs have standing. The Court addresses the parties' debate over whether Plaintiffs have shown a sufficient injury-in-fact at length in Discussion Section III.C, infra, and, for the reasons provided therein, concludes that a sufficient injury has been shown.

III. Motions for Preliminary Injunction

A. Standard of Review

To be entitled to a preliminary injunction, Plaintiffs must show: (1) a substantial likelihood of ultimate success on the merits; (2) an injunction or protective order is necessary to prevent

awarded during fiscal years 2009–2020." (Doc. 49-1, p. 4 (citing USASpending.gov data (accessed Dec. 22, 2020) cross-referenced with ABC membership).)

irreparable injury; (3) the threatened injury outweighs the harm the injunction would inflict on the non-movant; and (4) the injunction or protective order would not be adverse to the public interest. Schiavo ex rel. Schindler v. Schiavo, 403 F.3d 1223, 1225–26 (11th Cir. 2005). In the Eleventh Circuit, an "injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly established the 'burden of persuasion' as to the four requisites." Horton v. City of Augustine, 272 F.3d 1318, 1326 (11th Cir. 2001). If a plaintiff succeeds in making such a showing, then "the court may grant injunctive relief, but the relief must be no broader than necessary to remedy the constitutional violation." Newman v. Alabama, 683 F.2d 1312, 1319 (11th Cir. 1982).

B. Likelihood of Success on the Merits

The likelihood of success on the merits is generally considered the most important of the four factors. Garcia-Mir v. Meese, 781 F.2d 1450, 1453 (11th Cir. 1986). If Plaintiffs cannot satisfy their burden with respect to this factor, the Court need not consider the other three factors. GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Eng'rs, 788 F.3d 1318, 1329 (11th Cir. 2015). Although Plaintiffs raise multiple claims against Defendants, Plaintiffs need only show a substantial likelihood of success on the merits on one claim. See Schiavo, 357 F. Supp. 2d at 1383, *aff'd* 403 F.3d 1223 (11th Cir. 2005) (noting that "[t]o obtain temporary injunctive relief, [the plaintiffs] must show a substantial likelihood of success on at least one claim").

1. Whether the Procurement Act Authorized the President to Issue EO 14042

The President expressly relied on the Federal Property and Administrative Services Act, 40 U.S.C. § 101 et seq. (hereinafter, the "Procurement Act"), for his authority to issue EO 14042 "in order to promote economy and efficiency in procurement by contracting with sources that provide adequate COVID-19 safeguards for their workforce." 86 Fed. Reg. 50,985–88. The

Procurement Act was "designed to centralize Government property management and to introduce into the public procurement process the same flexibility that characterizes such transactions in the private sector. These goals can be found in the terms 'economy' and 'efficiency' which appear in the statute and dominate the sparse record of the congressional deliberations." Am. Fed'n of Labor and Congress of Indus. Orgs. v. Kahn, 618 F.2d 784, 787–88 (D.C. Cir. 1979).[7] In Khan, the Court of Appeals for the District of Columbia Circuit examined the history of and apparent congressional intent behind the Procurement Act, and stated its belief that, "by emphasizing the leadership role of the President in setting Government-wide procurement policy on matters common to all agencies, Congress intended that the President play a direct and active part in supervising the Government's management functions." Id. at 788. The court acknowledged that, "To define the President's powers under Section 205(a) [(40 U.S.C. § 121(a))], some content must be injected into the general phrases 'not inconsistent with' the [Procurement Act] and 'to effectuate the provisions' of the Act." Id. After considering the Procurement Act's emphasis on promoting "economy" and "efficiency" and ensuring contracts are awarded on terms that are "most advantageous to the Government, price and other factors considered," the Kahn court stated that the Procurement Act "grants the President particularly direct and broad-ranging authority over those larger administrative and management issues that involve the Government as a whole. And that direct presidential authority should be used in order to achieve a flexible management system capable of making sophisticated judgments in pursuit of economy and efficiency." Id. at 789.

[7] The Court has been unable to find—and the parties have not pointed to—any relevant case law from the Court of Appeals for the Eleventh Circuit grappling with the scope of the authority granted to the President in the Procurement Act.

While the Procurement Act explicitly and unquestionably bestows some authority upon the President, the Court is unconvinced, at this stage of the litigation, that it authorized him to direct the type of actions by agencies that are contained in EO 14042. Pursuant to clear United States Supreme Court precedent, Congress is expected to "speak clearly" when authorizing the exercise of powers of "vast economic and political significance." Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2489 (2021) (quotations omitted); see also Utility Air Regul. Grp. v. E.P.A., 573 U.S. 302, 324 (2014). The Court has already described in detail the extreme economic burden the Plaintiffs have suffered and will continue to suffer in endeavoring to comply with EO 14042 (not to mention the impediment it will likely pose to some Plaintiffs' (in particular, ABC's members') ability to continue to perform federal contract work). Additionally, the direct impact of EO 14042 goes beyond the administration and management of procurement and contracting; in its practical application (requiring a significant number of individuals across the country working in a broad range of positions and in numerous different industries to be vaccinated or face a serious risk of losing their job), it operates as a regulation of public health. It will also have a major impact on the economy at large, as it limits contractors' and members of the workforce's ability to perform work on federal contracts. Accordingly, it appears to have vast economic and political significance.

The issue, then, is whether Congress, through the Procurement Act, has "clearly" authorized the President to issue the directives contained in EO 14042, or whether, instead, EO 14042 "bring[s] about an enormous and transformative expansion in . . . regulatory authority without clear congressional authorization," Utility Air Regul. Grp., 573 U.S. at 324. Looking to the Kahn court for guidance, the Court considers whether EO 14042 fits within Congress's grant

to the President, through the Procurement Act, of "particularly direct and broad-ranging authority over those larger *administrative and management issues* . . . that . . . should be used in order *to achieve a flexible management system* capable of making sophisticated judgments in pursuit of economy and efficiency." Kahn, 618 F.2d at 789 (emphases added). The Court finds that Plaintiffs have a likelihood of proving that Congress, through the language it used, did not clearly authorize the President to issue the kind of mandate contained in EO 14042, as EO 14042 goes far beyond addressing administrative and management issues in order to promote efficiency and economy in procurement and contracting, and instead, in application, works as a regulation of public health,[8] which is not clearly authorized under the Procurement Act.[9]

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[8] During oral argument, counsel for Defendants urged that vaccine mandates are needed in order to "efficiently manage our way out of this pandemic." (Tr., p. 153.) However, the issue here is far more nuanced and requires a finding that *Congress* clearly gave the *President* authority to require all individuals who work on or in connection with a federal contract (valued over $250,000) to be fully vaccinated against COVID-19.

[9] The Court acknowledges that, one day prior to the entry of this Order, the Eleventh Circuit Court of Appeals issued an opinion, in a separate case, refusing to preliminarily enjoin enforcement of an interim rule issued by the Secretary of Health and Human Services requiring facilities that provide health care to Medicare and Medicaid beneficiaries to ensure that their staff are fully vaccinated against COVID-19. See Florida v. Dep't of Health and Human Servs, No. 21-14098-JJ, 2021 WL 5768796, at *1 (11th Cir. Dec. 6, 2021), available at . Defendants in this case notified the Court that the Florida opinion "supplements their merits arguments" (though they neglected to elaborate as to how), but the Court finds the case at hand to be materially different, in numerous ways, from the case before the Eleventh Circuit. First, in the Florida opinion, the court addressed very different statutory and regulatory schemes, the Medicare and Medicaid statutes and the regulations governing conditions for facilities to participate in those programs. Id. at *1–2. Nothing in the Florida case bears on whether the President is authorized, under his authority pursuant to the Procurement Act, to require private companies that enter into federal contracts to, in turn, require virtually all of their employees to be vaccinated. Additionally, in the Florida case and unlike in the case at hand, the challenged directive is similar to the authorizing statutes, because they "both directly relate to efforts to prevent the spread of disease at facilities treating Medicare or Medicaid patients to protect the health and safety of those patients." Id. at *13; see also id. at *1–2 ("For both the Medicare and Medicaid programs, Congress charged the Secretary with ensuring that participating facilities protect the health and safety of their patients," and the at-issue interim rule issued by the Secretary "amend[ed] the infection-control regulations for facilities that participate in Medicare or Medicaid . . . [to] require[] that facilities certified to participate in Medicare or Medicaid ensure their staff are fully vaccinated against COVID-19, unless an employee is exempt . . . ."). By contrast, here, while EO 14042 relates to efforts to prevent the spread of disease in any place an individual is working on or in connection with a federal contract, the at-issue claimed authorizing statute relates to the President's authority to take actions to "achieve a flexible

Even if, however, EO 14042 did not trigger the specific requirement that Congress "speak clearly" in authorizing the challenged executive action, the Court additionally finds that Plaintiffs have a likelihood of proving that EO 14042 does not have a sufficient nexus to the purposes of the Procurement Act and thus does not fall within the authority actually granted to the President in that Act.

For essentially the same reasons recited in the preceding subsection, the Court finds that the directives contained within EO 14042 were not authorized by the Procurement Act. Defendants claim that, "[t]o anyone who has lived through the COVID-19 pandemic and its resulting economic turmoil, the nexus between reducing the spread of COVID-19 and economy and efficiency is self-evident." (Doc. 63, p. 16.) They emphasize EO 14042's explanation that "[the] safeguards [in the Task Force Guidance] will decrease the spread of COVID-19, which will decrease work absence, reduce labor costs, and improve the efficiency of contractors and subcontractors" and they argue that this "easily satisfies [the] lenient standard" of a sufficiently close nexus between the executive order and the purpose of the Procurement Act. (Id. (quoting 86 Fed. Reg. 50,985–88).) Defendants are correct that the President has typically been afforded deference when courts review executive orders issued pursuant to the Procurement Act. See, e.g., Chamber of Com. v. Reich, 74 F.3d 1322, 1333 (D.C. Cir. 1996) ("The President's authority to pursue 'efficient and economic' procurement . . . certainly reach[es] beyond any narrow concept

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management system capable of making sophisticated judgments in pursuit of economy and efficiency" in government procurement and contracting, see Kahn, 618 F.2d at 789. Put simply, the authorizing statute in the Florida case authorized the executive to implement a health and safety measure while the relied upon statute in this case does not. The differing results in this case, the Florida case, and other cases challenging governmental actions to address the COVID-19 pandemic underscore the point that the focus of these cases is not on the effectiveness of vaccines and other measures but rather the legality of the Government's actions.

of efficiency and economy in procurement.") (collecting examples). However, that deference was expressly *not* intended to operate as "a blank check for the President to fill in at his will." Kahn, 618 F.2d at 793. The President's directives still must be "*reasonably* related" to the purposes of the Procurement Act, Liberty Mut. Ins. Co. v. Friedman, 639 F.2d 164, 170 (4th Cir. 1981) (emphasis added), and Defendants have not cited to a case upholding the use of the Procurement Act "to promulgate such a wide and sweeping public health regulation as mandatory vaccination for all federal contractors and subcontractors," Kentucky v. Biden, 2021 WL 5587446, at *9. Nor have Defendants cited to a case upholding some action or requirement undertaken pursuant to the Procurement Act that the Court finds analogous to the mandates in EO 14042. While the Court is aware of cases where courts have held that a variety of types of executive orders were authorized under the Procurement Act, none have involved measures aimed at public health and none have involved the level of burdens implicated by EO 14042, which has already required and will continue to require extensive and costly administrative work by employers and will force at least some individuals to choose between getting medical treatment that they do not want or losing their job (and facing limited job replacement options due to the mandate). Cf. UAW-Labor Emp. & Training Corp. v. Chao, 325 F.3d 360, 366–67 (D.C. Cir. 2003) (sufficiently close nexus between Procurement Act and executive order requiring federal contractors to post notices at all of their facilities informing employees of rights under federal labor law that protect employees from being forced to join a union or to pay mandatory dues for costs unrelated to representational activities); Kahn, 618 F.2d at 786–87 (sufficiently close nexus between Procurement Act and executive order that required certain federal contractors to comply with wage and price controls). Following the Defendants' logic and reasoning, the Procurement Act would be construed to give the President

the right to impose virtually any kind of requirement on businesses that wish to contract with the Government (and, thereby, on those businesses' employees) so long as he determines it could lead to a healthier and thus more efficient workforce or it could reduce absenteeism. Simply put, EO 14042's directives and resulting impact radiate too far beyond the purposes of the Procurement Act and the authority it grants to the President. Accordingly, the Court concludes, based on the limited record before it, that Plaintiffs are more likely than Defendants to succeed on the issue of whether there is a sufficiently close nexus between EO 14042 and the purposes of the Procurement Act.

2. Other Grounds Upon Which Plaintiffs Challenge EO 14042

In further support of their request for a preliminary injunction, Plaintiffs also claim that Defendants issued the Task Force Guidance and the FAR Deviation Clause, which they claim constitute final agency action, without complying with the Administrative Procedure Act's notice-and-comment requirements. (Doc. 55, pp. 17–22.) The Court declines to wade into this issue given its determination that Plaintiffs have a likelihood of success on the merits on other grounds.

Additionally, Plaintiffs allege that, if the Procurement Act does indeed authorize the directives issued in EO 14042, then the Procurement Act and EO 14042 are unconstitutional under the non-delegation doctrine and because they exceed Congress's authority and intrude on state sovereignty. This Court need not and does not issue any determination as to those challenges to resolve the motions before it. However, it is worth noting that other Courts have either expressed agreement with or at least concern about these arguments, see, e.g., BST Holdings, LLC v. Occupational Safety and Health Admin., 17 F.4th 604, 616–18 (5th Cir. 2021); Kentucky, 2021 WL 5587446, at *9.

C. Irreparable Injury Requirement

In order to satisfy the irreparable injury requirement, a party must show that the threat of injury is "neither remote nor speculative, but actual and imminent." Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville, 896 F.2d 1283, 1285 (11th Cir. 1990) (quoting Tucker Anthony Realty Corp. v. Schlesinger, 888 F.2d 969, 973 (2d Cir. 1989)); see also Church v. City of Huntsville, 30 F.3d 1332, 1337 (11th Cir. 1994) (In order to obtain injunctive relief, a plaintiff must show "a real and immediate—as opposed to a merely conjectural or hypothetical—threat of future injury.").

Defendants argue that losing contracts would not be irreparable harm—because there are administrative processes through which Plaintiffs can seek to challenge the contractual provision and to recover losses on contracts—and they claim that Plaintiffs have not "demonstrated that the compliance costs they claim to have incurred are in fact tied to such contracts." (Doc. 63, p. 4.) As referenced previously in this Order, the Court heard from three witnesses who described the incredibly time-consuming processes they have undertaken (typically requiring major input and assistance from numerous other departments across their institution) to identify the employees covered by the mandate and to implement software and technology to ensure that those employees have been fully vaccinated (or have requested and been granted an accommodation or exemption) by the deadline in January. Not only must Plaintiffs ensure that their own employees satisfy the mandate, but they also must require that any subcontractors' employees working on or in connection with a covered contract are in compliance. The declarations of representatives of ABC members Cajun Contracting and McKelvey show similar administrative burdens and costs—though on a smaller scale. (See Exhs. ABC-2, ABC-3.) Moreover, "complying with a regulation

later held invalid almost always produces the irreparable harm of nonrecoverable compliance." BST Holdings, 17 F.4th at 618 (citing Texas v. EPA, 829 F.3d 405, 433 (5th Cir. 2016)). The Court finds that the time and effort spent on these measures in the past—and going forward—constitute compliance costs resulting from EO 14042, which appear to be irreparable. See id. ("[T]he companies seeking a stay in this case will also be irreparably harmed in the absence of a stay, whether by the business and financial effects of a lost or suspended employee, compliance and monitoring costs associated with the Mandate, [or] the diversion of resources necessitated by the Mandate . . . ."); see also Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp., 715 F.3d at 1289 ("[N]umerous courts have held that the inability to recover monetary damages . . . renders the harm suffered irreparable.").

D. Balancing of the Harms

Defendants contend that, even assuming Plaintiffs have shown a risk of irreparable injury, no injunction should issue because more harm would result from enjoining EO 14042 and further delaying the vaccination of the thousands of currently-unvaccinated individuals working on federal contracts (thereby permitting the continued spread of COVID-19). The Court disagrees. Enjoining EO 14042 would, essentially, do nothing more than maintain the status quo; entities will still be free to encourage their employees to get vaccinated, and the employees will still be free to choose to be vaccinated. In contrast, declining to issue a preliminary injunction would force Plaintiffs to comply with the mandate, requiring them to make decisions which would significantly alter their ability to perform federal contract work which is critical to their operations. Indeed, it appears that not granting an injunction could imperil the financial viability of many of ABC's members. Additionally, requiring compliance with EO 14042 would likely be life altering for many of

Plaintiffs' employees as Plaintiffs would be required to decide whether an employee who refuses to be vaccinated can, in practicality, be reassigned to another office or another task or whether the employee instead must be terminated. "[A]ny abstract 'harm' a stay might cause . . . pales in comparison and importance to the harms the absence of a stay threatens to cause countless individuals and companies." BST Holdings, 17 F.4th at 618. Accordingly, the Court finds that the balancing of the harms weighs heavily in favor of enjoining the enforcement of EO 14042.

E. Public Interest

"For similar reasons, a stay is firmly in the public interest. From economic uncertainty to workplace strife, the mere specter of [EO 14042] has contributed to untold economic upheaval in recent months" and "the principles at stake when it comes to [EO 14042] are not reducible to dollars and cents." Id. at 619.

F. Scope of Injunctive Relief

The Court now must determine the appropriate scope of the injunctive relief. Generally, the Court treads lightly when issuing injunctive relief and resists the entry of "universal" or "nationwide" injunctions, and recognizes the need to "allow legal questions to percolate through the federal court system," Kentucky, 2021 WL 5587446, at *14 (citing Trump v. Hawaii, 138 S. Ct. 2392, 2424 (2018) (Thomas, J., concurring) and Dep't of Homeland Sec. v. New York, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring)). While the original Plaintiffs to this case are (or are based in) a limited number of states, the Court has, in this Order, permitted ABC, a trade association with members "all over the country," (doc. 50-1, p. 3), to intervene as a Plaintiff. Not only is the geographic scope of ABC's membership broad, their involvement in federal contracts is as well. As noted above, they were awarded 57% of federal contracts exceeding $25 million

during fiscal years 2009–2020. Accordingly, if the Court were to enjoin the enforcement of the mandate only in the Southern District of Georgia or only in Georgia, Alabama, Idaho, Kansas, South Carolina, Utah and West Virginia, then ABC's members would not have injunctive relief as to covered contracts in other states.[10] Furthermore, given the breadth of ABC's membership, the number of contracts Plaintiffs will be involved with, and the fact that EO 14042 applies to subcontractors and others, limiting the relief to only those before the Court would prove unwieldy and would only cause more confusion. Thus, on the unique facts before it, the Court finds it necessary, in order to truly afford injunctive relief to the parties before it, to issue an injunction with nationwide applicability.

CONCLUSION

In light of the foregoing, the Court **GRANTS IN PART and DENIES IN PART** the Motion to Intervene, (doc. 48), **GRANTS** ABC's Motion for Preliminary Injunction, (doc. 50), and **GRANTS** Plaintiffs' Amended Motion for Preliminary Injunction, (doc. 55).[11] Accordingly, the Court **ORDERS** that Defendants are **ENJOINED**, during the pendency of this action or until further order of this Court, from enforcing the vaccine mandate for federal contractors and subcontractors in all covered contracts in any state or territory of the United States of America. The Court further **DIRECTS** the Clerk of Court to **UPDATE** the docket to reflect the addition of Associated Builders and Contractors, Inc., as a Plaintiff in this case. Because the proposed

[10] The Court is mindful of the fact that at least some of ABC's members are already able to benefit from the injunctive relief recently afforded by the District Court for the Eastern District of Kentucky as to covered contracts in Kentucky, Ohio, and Tennessee. See Kentucky, 2021 WL 5587446, at *14.

[11] Plaintiffs' initial Motion for Preliminary Injunction, which was superseded by the Amended Motion for Preliminary Injunction that they later filed, is **DENIED AS MOOT**. (Doc. 19.)

Complaint filed on the docket includes ABC-Georgia (which has not been allowed to intervene) as a plaintiff, the Court **ORDERS** Associated Builders and Contractors, Inc., to file a revised version of its Complaint within **SEVEN (7) DAYS**.

SO ORDERED, this 7th day of December, 2021.

R. STAN BAKER
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF GEORGIA