IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

STATE OF MISSOURI, et al., Plaintiffs, v. JOSEPH R. BIDEN, et al. Defendants.	No. 4:21-cv-01300-DDN

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

The United States is in the midst of the most serious public health crisis it has faced in at least a century. To date, COVID-19 has infected more than 47 million Americans, hospitalized more than 3 million, and killed over 761,000. *See* Centers for Disease Control and Prevention (CDC), COVID Data Tracker Weekly Review, https://perma.cc/UGE3-XZ7Q (updated Nov. 17, 2021); CDC, COVID DATA Tracker – Cases, Deaths, and Testing (updated Nov. 15, 2021), https://perma.cc/2LZK-7WGX. More than a year and a half into the COVID-19 pandemic, approximately 70,000 new cases are reported in the United States every day. *See* COVID Data Tracker Weekly Review, *supra*.

Since the pandemic's earliest days, there has been broad agreement—from public health experts and leaders across the political spectrum—that the pandemic will not end until safe and effective vaccines are broadly administered across the population. Three such vaccines—one developed by Pfizer, Inc. and BioNTech; another by Moderna TX, Inc.; and a third by Janssen Biotech, Inc., a subsidiary of Johnson & Johnson—are now widely available in the United States. Hundreds of millions of doses have been administered, and there is no question that the vaccines are safe and highly effective. Yet as of November 5, 2021, only 58.2% of adults in the United States are fully vaccinated. *See id.* And in October 2021—many months after COVID-19 vaccines became widely available to adults at no cost—over 40,000 Americans died of COVID-19. *See* CDC, COVID DATA Tracker – Daily and Total Trends (updated Nov. 4, 2021), https://perma.cc/B3JG-99AL.

The illness and mortality caused by COVID-19 have led to serious disruptions for organizations and contractors across the United States, and the federal government is no exception. Accordingly, on September 9, 2021, acting as Chief Executive Officer of the Executive Branch, the

President issued an executive order aimed at preventing disruptions in the provision of government services by federal contractors by combatting the spread of COVID-19. See Ensuring Adequate COVID Safety Protocols for Federal Contractors, Exec. Order No. 14,042 (EO 14,042), 86 Fed. Reg. 50,985 (Sept. 14, 2021). EO 14,042 instructs federal agencies, "to the extent permitted by law," to ensure that certain federal contracts include a clause requiring the contractor or subcontractor to comply with COVID-19 safety protocols published by the Safer Federal Workforce Task Force (Task Force), and approved by the Director of the Office of Management and Budget (OMB) in a determination published in the Federal Register. 86 Fed. Reg. at 50,985. Those protocols require full vaccination by all employees (subject to legally required exemptions) at a workplace in which individuals working on or in connection with government contracts in which the clause required by EO 14,042 is present. OMB, Determination of the Acting OMB Director Regarding the Revised Safer Federal Workforce Task Force Guidance for Federal Contractors and the Revised Economy & Efficiency Analysis, 86 Fed. Reg. 63,418 (Nov. 16, 2021). For the type of contracts covered by the EO, federal agencies are required to include the safety protocols in "any new contract," "new solicitation for a contract," "extension or renewal of an existing contract," and "exercise of an option on an existing contract." EO 14,042 § 5. The deadline for full vaccination by covered contractor employees is January 18, 2022.

Plaintiff States have sued the President, the United States, and more than two dozen federal agencies and officials. Plaintiffs challenge Executive Order 14,042, which directs federal government contracts to include a clause requiring certain COVID safety protocols—including vaccination requirements—in "any new contract," "new solicitation for a contract," "extension or renewal of an existing contract," and "exercise of an option on an existing contract." Executive Order 14,042, 86 FR 50985 (Sept. 9, 2021) ("Executive Order" or "EO").

Plaintiffs[1] ask this Court to exercise its extraordinary emergency powers to enjoin this EO across the country—even outside the boundaries of the Plaintiff States. *See* Mem. in Support of Pls.' Mem. for Prelim. Inj. ECF No. 9 ("Pls.' Mem."). But this Court should reject Plaintiffs' argument that the President has no power to direct federal contracting—an argument that conflicts with more than 50 years of precedent. Their procedural and notice arguments are meritless and now are moot because the Director of the Office of Management and Budget issued a Notice last week, including opening up a period for comments. And the constitutional claims raised by Plaintiffs have been considered and rejected by courts many times over.

Plaintiffs' motion for a preliminary injunction should be denied.

BACKGROUND AND PROCEDURAL HISTORY

I. The COVID-19 Pandemic

In January 2020, the emergence of the novel coronavirus SARS-CoV-2 caused the Secretary of Health and Human Services to declare a public health emergency, and in March 2020, the President declared a national emergency to contain and combat the virus. *See* Declaring a Nat'l Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 18, 2020). SARS-CoV-2 causes a respiratory disease known as COVID-19, *id.*, which "spreads when an infected person breathes out droplets and very small particles that contain the virus," CDC, How COVID-19 Spreads (updated July 14, 2021), https://perma.cc/9MSV-BS5N.

In July 2021, the United States began to experience "a rapid and alarming rise in . . . COVID-19 case and hospitalization rates," driven by an especially contagious strain of SARS-

[1] Plaintiff States are Missouri, Nebraska, Alaska, Arkansas, Iowa, Montana, New Hampshire, North Dakota, South Dakota, and Wyoming.

CoV-2 known as the Delta variant. *See* CDC, Delta Variant: What We Know About the Science (updated Aug. 26, 2021), https://perma.cc/5CAA-WC8A. As of this filing, community transmission rates of SARS-CoV-2 remain high in 39 states, substantial in other 10 states and the District of Columbia, and moderate in the remaining state.[2] *See* CDC, COVID DATA Tracker – Cases, Deaths, and Testing (updated Nov. 15, 2021), https://perma.cc/2LZK-7WGX.

II. The Development and Authorization of COVID-19 Vaccines

Currently, three manufacturers offer vaccines approved or authorized for use in the United States by the Food and Drug Administration (FDA). *See* https://perma.cc/2N5P-22F6. The FDA has authority to review and approve "biological products," including vaccines, as safe and effective for introduction into interstate commerce for their intended uses. *See* 42 U.S.C. § 262(a)(1), (i)(1). Under § 564 of the Food, Drug, and Cosmetic Act, 21 U.S.C. § 360bbb-3, the FDA also may issue an "emergency use authorization" (EUA) even before such approval, which permits the marketing of vaccines (and other products) "intended for use" in responding to a public health emergency.

In March 2020, the Secretary of Health and Human Services determined that "circumstances exist justifying the authorization of emergency use of drugs and biological products during the COVID-19 pandemic." EUA Declaration, 85 Fed. Reg. 18,250, 18,250–51 (Apr. 1, 2020). Based on that determination, the FDA issued EUAs in December 2020 for the Pfizer-BioNTech and Moderna vaccines, and a third EUA in February 2021 for the Janssen vaccine. *See* Oct. 29, 2021 Letter of Authorization from FDA to Pfizer Inc., https://perma.cc/YY3Q-JGW4 (Pfizer EUA Letter) (revising and reissuing the December 2020 EUA); Oct. 20, 2021 Letter of

[2] The Court can judicially notice these statistics and other facts on government websites. *See Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322–23 (2007); *Swindol v. Aurora Flight Sci. Corp.*, 805 F.3d 516, 518-19 & n.2 (5th Cir. 2015).

Authorization from FDA to ModernaTX, Inc., https://perma.cc/LN7L-AE6D (Moderna EUA Letter) (same); Oct. 20, 2021 Letter of Authorization from FDA to Janssen Biotech, Inc., https://perma.cc/R7HA-Z6BD (Janssen EUA Letter) (revising and reissuing the February 2021 EUA). These EUAs are based on the FDA's review of extensive safety and efficacy data, including from a Pfizer clinical trial with approximately 46,000 participants, a Moderna clinical trial with approximately 30,000 participants, and a Janssen clinical trial with approximately 43,000 participants. *See* Pfizer EUA Letter at 4; Moderna EUA Letter at 2; Janssen EUA Letter at 2.

On August 23, 2021, the Pfizer-BioNTech COVID-19 vaccine obtained FDA approval, under the name Comirnaty, for people aged 16 years and older. *See* Ex. 1 ¶ 6, Decl. of Peter Marks, M.D., Ph.D.[3] This means that the vaccine has completed "the agency's standard process for reviewing the quality, safety and effectiveness of medical products." FDA, News Release – FDA Approves First COVID-19 Vaccine (Aug. 23, 2021), https://perma.cc/J9NV-92VH. In approving Comirnaty, the FDA determined that the vaccine was 91.1% effective in preventing COVID-19 disease and between 95% and 100% effective in preventing severe COVID-19, based on an analysis of effectiveness data from approximately 20,000 vaccine and 20,000 placebo recipients. FDA, Comirnaty Approved Prescribing Information at 7, 15–18 (revised Aug. 2021), https://perma.cc/53H8-UG3C. The FDA concluded the product is safe based on data from approximately 12,000 vaccine recipients who were followed for safety outcomes for at least six months after their second dose, as well as safety information from the millions of vaccine doses administered under the EUA. *Id.* at 12.

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[3] The Marks Declaration, submitted in *Doe v. Austin*, Civil No. 3:21-cv-01211 (N.D. Fl.), a challenge to FDA action filed in the Northern District of Florida, is offered here to provide useful background on the authorization and subsequent approval of the Pfizer-BioNTech vaccine.

III. Vaccination Requirements for Federal Contractors

On September 9, 2021, President Biden issued EO 14,042 to "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." *See* EO 14,042 § 1. The President determined that new safeguards 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*. Those specific safeguards would be set forth in guidance issued by the Safer Federal Workforce Task Force ("Task Force"). *Id*. But that guidance would not be binding until the OMB Director, acting pursuant to a delegation the President's statutory authority, approves the guidance and determines that the guidance "will promote economy and efficiency in Federal contracting if adhered to by Government contractors and subcontractors" to the OMB Director *Id*. § 2(c) (citing 3 U.S.C. § 301).

EO 14,042 is a directive from the President, essentially acting as the U.S. Government's Chief Executive Officer, to federal executive departments and agencies, "to the extent permitted by law," to incorporate a clause into certain types of contracts—new contracts, new solicitations for a contract, extensions or renewals of an existing contract, and exercises of an option on an existing contract—if they also fall into one of the following categories (all categories together, "covered contracts"): (i) a procurement contract for services, construction, or a leasehold interest in real property; (ii) a contract for services covered by the Service Contract Act, 41 U.S.C. § OMB, Determination of the Acting OMB Director Regarding the Revised Safer Federal Workforce Task Force Guidance for Federal Contractors and the Revised Economy & Efficiency

Analysis, 86 Fed. Reg. 63,418 (Nov. 16, 2021). 6701 *et seq.*; (iii) a contract for concessions, including any concessions contract excluded by Department of Labor regulations at 29 C.F.R. § 4.133(b); or (iv) a contract entered into with the Federal government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general publicEO 14,042 § 5(a). The required clause "shall specify that the contractor or subcontractor shall, for the duration of the contract, comply with all guidance for contractor or subcontractor workplace locations published by" the Task Force, provided the guidance is approved by the OMB Director, as described above. *Id*. at § 2(a). The mandatory clause also "shall apply to any workplace locations (as specified by the Task Force Guidance) in which an individual is working on or in connection with a Federal Government contract[.]" *Id.*

The EO, however, is targeted and contains exceptions. As relevant here, it does not apply to contracts below the special acquisition threshold, *id*. at § 5(a), which is currently $250,000. Fed. Acquisition Reg. 2.101, Definitions, *available* at https://www.acquisition.gov/far/2.101. Moreover, although EO 14,042 provides that "agencies are strongly encouraged, to the extent permitted by law, to ensure that the safety protocols required under [existing] contracts . . . are consistent with" the Task Force Guidance, it includes no authority to force conforming changes to existing contracts. *Id*. at § 6(c).

The Task Force issued guidance under EO 14,042 on September 24, 2021.[4] Task Force, COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors (September Contractor Guidance), https://perma.cc/H2MY-K8RT. Exercising the authority delegated to her by the President, the Acting OMB Director made the statutorily required determination that the

[4] Throughout, "Task Force Guidance" means the operative guidance at the time.

Task Force Guidance would promote economy and efficiency in federal contracting. *See* Determination of the Promotion of Economy and Efficiency in Federal Contracting Pursuant to Executive Order No. 14,042, 86 Fed. Reg. 63,691, 53,691–92 (Sept. 28, 2021).[5]

On November 10, 2021, the Task Force issued revised Task Force Guidance. Determination of the Acting OMB Director Regarding the Revised Safer Federal Workforce Task Force Guidance and the Revised Economy & Efficiency Analysis, unpublished version available online at https://perma.cc/9Q3S-5WMA ("OMB Determination"). At the same time, OMB submitted a new Determination by the OMB Director. 86 Fed. Reg. 63,418. The new Determination rescinded and superseded the previous September 24 notice (thus superseding the earlier Task Force Guidance); included a determination by the Acting OMB Director, exercising the authority delegated to her by the President, that the Task Force Guidance would promote economy and efficiency in federal contracting; provided the revised Task Force Guidance; included economic analysis of the COVID-19-workplace safety protocols and the effect on economy and efficiency in federal procurement; and addressed procedural requirements. *Id.*

The Task Force Guidance requires federal contractors that are party to a covered contract to "ensure that all covered contractor employees are fully vaccinated for COVID-19, unless the employee is legally entitled to an accommodation." *Id.* at 9. "Covered contractor employees means any full-time or part-time employee of a covered contractor working on or in connection

[5] The Task Force Guidance determined that covered contractor and subcontractor employees should be vaccinated against COVID-19, except insofar as any such employee was legally entitled to an accommodation. *See* Sept. Contractor Guidance at 5–6. Consistent with the EO, the Task Force Guidance set forth a phase-in period for the new requirements to be added to federal contracts, generally keyed to new contracts awarded on or after November 14 and any changes to existing contracts made on or after October 15. *See id.* at 12.

with a covered contract or working at a covered contractor workplace." *Id.* at 6. A covered contractor workplace is "a location controlled by a covered contractor at which any employee of a covered contractor working on or in connection with a covered contract is likely to be present during the period of performance for a covered contract." *Id.*

Covered contractor employees subject to the requirement must be fully vaccinated[6] no later than January 18, 2022. *Id.* at 9. After that date, covered contractor employees not subject to the requirement "must be fully vaccinated by the first day of the period of performance on a newly awarded covered contract, and by the first day of the period of performance on an exercised option or extended or renewed contract when the clause has been incorporated into the covered contract." *Id.* Covered contractors oversee compliance with the Task Force Guidance. Federal law may in some cases require covered contractor employers to provide accommodation to contractor employees "who communicate to the covered contractor that they are not vaccinated against COVID-19 because of a disability (which would include medical conditions) or because of a sincerely held religious belief, practice, or observance" may be provided accommodations by the covered contractor. *Id.* at 9–10.

IV. Procedural History

On October 29, 2021, Plaintiffs filed this lawsuit to challenge EO 14,042, the Task Force Guidance, OMB's determination, and the FAR Memo. Compl., ECF No. 1. Plaintiffs bring 12 claims against Defendants, *id.* ¶¶ 91–186, and seek declaratory and injunctive relief, *id.* Prayer

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[6] Under the Task Force Guidance, "people are considered fully vaccinated if they have received COVID-19 vaccines currently approved or authorized for emergency use by the FDA (Pfizer-BioNTech, Moderna, and Johnson & Johnson/Janssen COVID-19 vaccines) or COVID-19 vaccines that have been listed for emergency use by the World Health Organization (e.g., AstraZeneca/Oxford)." Nov. Notice at 8.

for Relief. On November 4, prior to the issuance of the November OMB Determination, Plaintiffs moved for a preliminary injunction. ECF No. 8.

LEGAL STANDARDS

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (citation omitted). To justify this "drastic remedy," the movants must "clearly establish[] the burden of persuasion" on the following four elements: (1) Plaintiffs have a substantial likelihood of success on the merits; (2) there is a substantial threat that Plaintiffs will suffer irreparable injury absent an injunction; (3) the threatened injury to Plaintiffs outweighs the damage an injunction would cause to Defendants; and (4) the injunction would not be adverse to the public interest. *Adventist Health Sys./SunBelt, Inc. v. United States Dep't of Health & Hum. Servs.* — F. 4th. —, No. 21-1589, 2021 WL 5170810, at *5 (8th Cir. Nov. 8, 2021). "Failure to show any of the four factors is fatal[.]" *ACLU of Fla., Inc. v. Miami-Dade Cty. Sch. Bd.*, 557 F.3d 1177, 1198 (11th Cir. 2009).

ARGUMENT

I. Plaintiffs are unlikely to succeed on the merits.

A. Plaintiffs are not likely to show that the President lacks authority to direct federal government contracting.

Plaintiffs first argue that the President lacks authority to issue binding guidance for government contracts. Pls.' Mem. at 16. This argument ignores that Congress specifically authorized the President to direct federal procurement in the Federal Property and Administrative Services Act, FPASA. 40 U.S.C. § 121(a). While Plaintiffs claim that the FPASA does not grant the President such authority, they cite no opinions interpreting the FPASA in the novel manner they are proposing. Indeed, Plaintiffs' position ignores the President's role as manager of the Executive

Branch and more than half a century of precedent from all three branches of our constitutional system.

Since the 1960s, federal appellate courts have routinely held that the FPASA authorizes the president to manage government contracting through executive orders. *See, e.g.*, *Farmer v. Phila. Elec. Co.*, 329 F.2d 3, 7 (3d Cir. 1964); *Farkas v. Texas Instrument, Inc.*, 375 F.2d 629, 632 (5th Cir. 1967). Courts have concluded, for example, that FPASA authorizes the President to require government contractors to comply with wage and price controls, *AFL-CIO v. Kahn*, 618 F.2d 784 (D.C. Cir. 1979) (en banc), to post notices at all of their facilities informing employees that they cannot be forced to join a union or to pay mandatory dues for costs unrelated to representational activities, *UAW-Lab. Emp. & Training Corp. v. Chao*, 325 F.3d 360, 366 (D.C. Cir. 2003), and to require contractors to confirm employees' immigration status through e-Verify, *Chamber of Com. of U.S. v. Napolitano*, 648 F. Supp. 2d 726, 729 (D. Md. 2009). *See also City of Albuquerque v. U.S. Dep't of Interior*, 379 F.3d 901 (10th Cir. 2004) (urban renewal); *AFGE v. Carmen*, 669 F.2d 815 (D.C. Cir. 1981) (conservation of gasoline during an oil crisis). Indeed, even cases relied on by Plaintiffs confirm that "the Procurement Act does vest broad discretion in the President." *Chamber of Com. of U.S. v. Reich*, 74 F.3d 1322, 1330, 1334 (D.C. Cir. 1996) (affirming the "President's authority to pursue 'efficient and economic' procurement" through EOs, but holding the challenged order conflicted with the National Labor Relations Act).

Plaintiffs ask the Court to adopt their cramped interpretation of the FPASA by purportedly relying on the text of the statute. But the text is quite broad—the FPASA authorizes the President to "prescribe such policies and directives, not inconsistent with the provisions of this Act, as he shall deem necessary to effectuate the provisions of said Act." *Chao*, 325 F.3d at 366 (quoting 40 U.S.C. § 486(a) (2000) (now codified as amended at 40 U.S.C. § 121)). The

President is given broad discretion to supervise government contracting "as he shall deem necessary" so long as the President does not act "inconsistent[ly] with the provisions" of the FPASA. Courts have "read this as requiring that the executive order have a 'sufficiently close nexus' to the values of providing the government an 'economical and efficient system for . . . procurement and supply.'" *Chao*, 325 F.3d at 366 (quoting *Kahn*, 618 F.2d at 788, 792); *see also Liberty Mut. Ins. Co. v. Friedman*, 639 F.2d 164, 169 (4th Cir. 1981) (citing 40 U.S.C. § 101 *et seq.*).[7] And as discussed below, the challenged policies satisfy this nexus requirement.

Plaintiffs' argument that the President lacks authority to direct government contracting is further undermined by Congress's implicit endorsement of an expansive view of the President's power under the FPASA. Presidents have regularly exercised their authority under the FPASA since it was enacted. *See Kahn*, 618 F.2d 784, 790–91 ("Since 1941, though, the most prominent use of the President's authority under the FPASA has been a series of anti-discrimination requirements for Government contractors"); *see also, e.g.*, EO No. 12072, 43 FR 36869 (Aug. 16, 1978); EO 13465, 73 FR 33285 (June 11, 2008); EO 13950, 85 FR 60683 (Sept. 22, 2020). "Past [Presidential] practice does not, by itself, create power, but 'long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent.'" *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981). "[T]he President's view of his own authority under a statute is not controlling, but when that view has been

[7] Plaintiffs likewise fail to provide any legal authority that the President's authority to "prescribe[e] policies and directives" is less expansive than the GSA Administrator's authority to "prescribe regulations." Pls.' Mem. at 17; (citing 40 U.S.C. § 121(a) and (d)). The words "regulation," "policy," and "directive" are neither statutorily defined words nor terms of art, and cases use them interchangeably. *See, e.g.*, *Liberty Mut.*, 639 F.2d at 173 (Butzner, J., concurring-in-part and dissenting-in-part) ("Implicit in [FPASA], I believe, is authorization for the President to promulgate orders and regulations . . . ."). As a matter of ordinary meaning, all three are synonyms. *See, e.g.*, *Regulation*, Oxford English Dictionary (3d ed. 2009) ("[A] directive established and maintained by an authority.").

acted upon over a substantial period of time without eliciting Congressional reversal, it is entitled to great respect." *Kahn*, 618 F.2d at 790 (footnote omitted).

Congress, likewise, has long understood and accepted that FPASA granted broad authority to the President. While Congress has revised the FPASA since 1949, including a complete recodification in 2002, none of those amendments modified or restricted the power being used by the President here.[8] "If a word or phrase has been . . . given a uniform interpretation by inferior courts . . . , a later version of that act perpetuating the wording is presumed to carry forward that interpretation." *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 536–37 (2015) (quoting A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012)).

B. The Executive Order has a nexus with procurement efficiency required by the FPASA.

Presidential policies to direct government procurement need only be "reasonably related to the Procurement Act's purpose of ensuring efficiency and economy in government procurement." *Liberty Mut. Ins. Co.*, 639 F.2d at 170. Courts have "emphasized the necessary flexibility and 'broad-ranging authority'" that FPASA provides. *Chao*, 325 F.3d at 366. The standard is "lenient" and can be satisfied even when "the order might in fact increase procurement costs" in the short run. *Id.* at 366–67. Courts find a nexus even when "[t]he link may seem attenuated" and even if one can "advance an argument claiming opposite effects or no effects at all." *Id.* "[T]his close nexus requirement [] mean[s] little more than that President's explanation for how an Executive Order promotes efficiency and economy must be reasonable and rational." *Napolitano*, 648

[8] *See, e.g.*, Pub. L. 99-500, §101(m) [title VIII, §832], Oct. 18, 1986, 100 Stat. 1783-345; Pub. L. 99-591, §101(m) [title VIII, §832], Oct. 30, 1986, 100 Stat. 3341-345§ 101(f) [Title VI, § 611], Sept. 30, 1996, 110 Stat. 3009-355Pub.L. 107-217, 116 Stat. 1068 (Aug. 21, 2002).

F. Supp. 2d at 738 (one sentence explanation sufficient); *see also Reich*, 74 F.3d at 1333 ("The President's authority to pursue 'efficient and economic' procurement . . . certainly reach[es] beyond any narrow concept of efficiency and economy in procurement.") (collecting examples).

Executive Order 14,042 easily satisfies this lenient standard. The President explained in Section 1 of the EO:

> This order promotes 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 . . . . These safeguards will decrease the spread of COVID-19, which will 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.

To anyone who has lived through the COVID-19 pandemic and its resulting economic turmoil, the nexus between reducing the spread of COVID-19 and economic efficiency is self-evident. While Plaintiffs may disagree with the President's policy or consider it unwise, the EO's explanation is sufficient to show the required nexus between the policy and promoting economy and efficiency. *Compare* EO, § 1 *with Chao*, 325 F.3d at 366–67 (holding sufficiently close nexus to efficient and economic procurement based on two sentences: "When workers are better informed of their rights, including their rights under the Federal labor laws, their productivity is enhanced. The availability of such a workforce from which the United States may draw facilitates the efficient and economical completion of its procurement contracts.").

EO 14,042 and the Acting OMB Director's related efficiency-and-economy determination clear this "lenient" standard with plenty of room to spare. *Chao*, 325 F.3d at 367. COVID-19 hobbled the economy for months and continues to disrupt American life. Federal procurement is no exception. The President, as the ultimate manager of procurement operations, determined that workplace safeguards aimed at preventing COVID-19's spread will "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." EO 14,042 § 1. Slowing COVID-19's spread promotes efficiency and economy because federal procurement—like any business endeavor—suffers when people contracting with the federal government get sick and miss work.

Plaintiffs rely on *Reich* to suggest that the President acted as a "regulator" when he issued the EO, and argue that if an EO touches on social policies other than procurement policy, then the EO is outside the permissible bounds of the FPASA. *Id.* (citing *Reich*, 74 F.3d 1322). But those quotes come from a section in *Reich* where was analyzing an entirely different issue—the preemptive effect of the National Labor Relations Act. *Reich*, 74 F.3d at 1334–35. Plaintiffs identify no similar statute that could have a preemptive effect here. Moreover, even though *Reich* ultimately found that EO conflicted with the NLRA, the opinion emphasized that it was *not* reaching any question about the scope of FPASA authority. *Id.* at 1332. At the same time it emphasized: "That is not to say that the President, in implementing the Procurement Act, may not draw upon any secondary policy views . . . that are directed beyond the immediate quality and price of goods and services purchased." *Id.*

While FPASA says nothing specific about vaccination or disease prevention, it also does not specifically authorize promoting urban renewal, promoting collective bargaining rights, conserving gasoline during an oil crisis, combating discrimination, verifying contractors' immigration status, or the other Presidential directives that have passed FPASA muster. *See, e.g.*, *City of Albuquerque*, 379 F.3d 901 (urban renewal); *Chao*, 325 F.3d 360 (collective bargaining rights); *Am. Fed'n of Gov't Emps., AFGE*, 669 F.2d 815 (energy conservation during an oil crisis); *Kahn*, 618 F.2d at 790 (noting multiple Presidents "prominent[ly]" used FPASA to impose "a series of anti-discrimination requirements for Government contractors"); *Napolitano*, 648 F. Supp.

2d at 729 (employee work eligibility). Rather, FPASA "emphasiz[es] the leadership role of the President in setting Government-wide procurement policy on matters common to all agencies" and expects "the President [to] play a direct and active part in supervising the Government's management functions." *Kahn*, 618 F.2d at 788.

Plaintiffs just ignore all these cases. Instead, Plaintiffs argue in broad terms that principles of federalism and their separate constitutional claims require a hard look at the nexus between the challenged action and the FPASA. Pls.' Mem. 21–25. Setting aside that Plaintiffs are unlikely to succeed on their constitutional claims, *infra* at X, Plaintiffs provide no compelling reason why this Court should radically depart from the way FPASA has been interpreted for more than 50 years.[9]

C. The President can delegate his policymaking authority to the OMB Director.

Plaintiffs also argue that the President and OMB Director's actions conflict with the FAR Council's statutory responsibility to "issue and maintain" the Federal Acquisition Regulation—a 2,000+-page regulation. Pls.' Mem. 19–20 (citing 41 U.S.C. § 1303(a)(1)). But the FAR Council's authority to issue regulations is not exclusive. Plaintiffs rely on Section 1303(a)(1) for their argument, but the very next subsection, Section 1303(a)(2)(A), permits agencies to prescribe "regulations essential to implement Government-wide policies and procedures." And, of course, the EO and the OMB Director's Determination set Government-wide procurement "policies" pursuant to 40 U.S.C. § 121(a), which authorizes the President to "prescribe policies."

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[9] Pre-FPASA practice provides additional support. In 1941, President Franklin Roosevelt issued an executive order instructing that "[a]ll contracting agencies of the Government of the United States shall include in all defense contracts hereafter negotiated by them a provision obligating the contractor not to discriminate against any worker because of race, creed, color, or national origin." Executive Order 8802, 6 FR 3109 (June 27, 1941).

Section 3 of the EO recognizes these two sources of authority by (1) directing the FAR Council to revise the FAR, and (2) until the FAR is revised, directing agencies "to exercise any applicable authority" to implement the Government-wide policies and procedures described in the Executive Order and any subsequent OMB Determinations.

D. Plaintiffs' Notice and APA claims are not likely to succeed.

1. Plaintiffs' challenges to the OMB determination are not justiciable.

Plaintiffs challenge the OMB's initial determination, issued on September 24, 2021. As a threshold matter, Plaintiffs' APA challenge to that determination is moot because it has been expressly superseded by a new OMB Determination containing substantive changes. *See Akiachak Native Cmty. v. U.S. Dep't of Interior*, 827 F.3d 100, 113 (D.C. Cir. 2016) (noting the "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.").

Further, neither the previous notice nor the operative OMB Determination is reviewable under the APA, because the OMB Determination is not an "agency action." "Because the President is not an 'agency' for purposes of the APA, presidential action is not subject to judicial review under that statute." *NRDC v. State*, 658 F. Supp. 2d 105, 109 (D.D.C. 2009) (citing *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992); *Dalton v. Specter*, 511 U.S. 462, 470 (1994)). The President delegated to the OMB Director, pursuant to 3 U.S.C. § 301, the authority to determine whether Guidance from the COVID Task Force "will promote economy and efficiency in Federal contracting." *See* EO 14,042, § 2(c). Section 301 authorizes the President to "to designate and empower the head of any department or agency in the executive branch, . . . to perform without approval, ratification, or other action by the President [] any func-

tion which is vested in the President by law," including the President's power to direct government contracting pursuant to 41 U.S.C. § 121(a). When exercising delegated authority, the official "stands in the President's shoes" and "cannot be subject to judicial review under the APA." *NRDC*, 658 F. Supp. 2d at 109 & n.5, 111; *see also Detroit Int'l Bridge Co. v. Canada*, 189 F. Supp. 3d 85, 100 (D.D.C. 2016), *aff'd*, 875 F.3d 1132 (D.C. Cir. 2017).

In arguing that OMB is an "agency" subject to APA review, Pls.' Mem. at 25, Plaintiffs ignore the distinction between the exercise of delegated Congressional power and Presidential authority. While OMB may sometimes act pursuant to Congressional dictates, such as in complying with the Natural Environmental Policy Act, *Sierra Club v. Andrus*, 581 F.2d 895, 897 (D.C. Cir. 1978), *rev'd,* 442 U.S. 347 (1979), or the Freedom of Information Act, *Meyer v. Bush*, 981 F.2d 1288, 1294 (D.C. Cir. 1993), it did not do so here. By acting under express Presidential delegation, OMB's determination falls outside the scope of APA review. *NRDC*, 658 F. Supp. 2d at 109 & n.5, 111.

Plaintiffs also fault the now-superseded OMB determination for not following the notice-and-comment requirements of 41 U.S.C. § 1707, Pls.' Mem. at 32–33, but Section 1707 also does not apply to exercises of Presidential authority such as the OMB determination. Section 1707 generally requires "the head of the agency" to publish a proposed "procurement policy, regulation, procedure, or form" in the Federal Register if the proposal "relates to the expenditure of appropriated funds" and either "has a significant effect beyond the internal operating procedures of the [issuing] agency" or "has a significant cost or administrative impact on contractors." 41 U.S.C. § 1707(a)(1), (b). But, as just explained, when the OMB Director exercises delegated presidential authority, she is not acting as "the head of [an] agency."

2. OMB's determination complies with the APA's substantive and procedural requirements.

Even if the Determination were subject to the APA, those claims would still fail because the Determination provides "a rational connection between the facts found and the choice made." *Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1404–05 (D.C. Cir. 1995) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). "Arbitrary and capricious is a highly deferential standard of review." *Adventist Health Sys./SunBelt, Inc. v. United States Dep't of Health & Hum. Servs.*, — F. 4th —,-No. 21-1589, 2021 WL 5170810, at *7 (8th Cir. Nov. 8, 2021). 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." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021).

The OMB Determination is eminently reasonable. OMB approved the revised Task Force Guidance because it concluded that "[t]he safety protocols that are set forth" in the guidance "are meant to ensure that COVID-19 does not easily spread within the workplace, so that Federal contractor employees can continue to be productive." 86 Fed. Reg. at 63423. The requirement promotes economy and efficiency in federal contracting because decreasing worker absences reduces costs. As OMB explains, "[r]educing the number of infected people mechanically reduces transmission," and "evidence also indicates that vaccines also reduce transmission by people who contract 'breakthrough' infections." *Id.* at 63422. In conjunction with the other safety protocols proposed in the Workforce Guidance, the vaccine requirements will "prevent infection and illness and preserve the productivity" of federal contractors. *Id.*

OMB's Determination also explains that, in its judgment, requiring vaccination will not lead any meaningful number of workers to quit their jobs, thereby addressing Plaintiffs' concern about the "risk of negative economic impacts . . . from the prospect of large-scale resignations

and terminations of employees" and the ensuing "hardships to . . . citizens who lose their jobs." Pls.' Mem. at 28–29. OMB examined data from major private employers to see whether workers would leave their jobs instead of complying with vaccine requirements and concluded that there was "no systematic evidence that this has been a widespread phenomenon or that it would be likely to occur among employees of Federal contractors. In fact, the experience of private companies is to the contrary."[10] 86 Fed. Reg. at 63422 (citing evidence from Tyson Foods and United Airlines, among other companies). OMB's "predictive judgment," based on empirical evidence, is entitled to deference. *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009); *see also Newspaper Ass'n of Am. v. Postal Regulatory Comm'n*, 734 F.3d 1208, 1216 (D.C. Cir. 2013) ("When, 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.") (citation omitted).

Plaintiffs claim that the vaccine requirement's costs and disruptions to the States were not considered. Pls.' Mem. at 29. But OMB *did* consider the costs to covered contractors, including Plaintiffs, and determined that "[b]ecause vaccines are widely available for free, the cost of implementing a vaccine mandate is largely limited to administrative costs associated with distributing information about the mandate and tracking employees' vaccination status. Such costs are likely to be small." 86 Fed. Reg. 63422. As for "reliance interests," Pls.' Mem. at 30, Plaintiffs

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[10] The article that Plaintiffs reference on page 15 of their brief, Chris Isidore & Virginia Langmaid, *72% of unvaccinated workers vow to quit if ordered to get vaccinated*, CNN (Oct. 28, 2021), https://perma.cc/7JMV-SULY, also includes the real-life data from these two companies and specifically notes that "[w]hat people say in a survey, and what they would [ultimately] do . . . can be two different things." *Id.*

fail to articulate any real harm from their "reliance" on the absence of a contractor vaccine requirement when enacting state laws. Further, EO 14,042 and the approved Task Force Guidance apply to new contracts or upcoming extensions to current contracts, which does a great deal to protect Plaintiffs' reliance interests on preexisting contract terms. OMB was entitled to approve guidance to manage federal operations and contracts on the basis of the data it considered, notwithstanding the presence of state and local measures that would be preempted for federal contracting purposes.

Plaintiffs' arguments that the underlying Task Force guidance is overinclusive, Pls.' Mem. at 29, do not render the OMB Determination arbitrary and capricious. The government need not "explore 'every alternative device and thought conceivable by the mind of man'" before making a decision. *Regents*, 140 S. Ct. at 1915 (quoting *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 551 (1978)); *see also Motor Vehicle Mrs. Ass'n*, 463 U.S.at 51 (declining to "require an agency to consider all policy alternatives in reaching [a] decision"). Further, OMB's approval of guidance that broadly construes the meaning of covered contractor employee was a policy choice, and while others may disagree, "[a] court cannot "substitute its judgment for that of the agency." *Adventist Health Sys./SunBelt,* , 2021 WL 5170810, at *7 (citation omitted).

Plaintiffs also argue that OMB's Determination was pretextual because it was actually about "federalizing the public-health response to the COVID-19 pandemic." Pls.' Mem. at 31. In support, they rely on an extra-record and inapposite statement made earlier in the pandemic by the White House Press Secretary and a retweet from a senior administration official about a different executive action with a broader scope and different purpose. Plaintiffs' attempts to rely on

material outside the administrative record as evidence of pretext, *see id.* at 26 n.19, should be rejected. As the Supreme Court has explained, when there is a "contemporaneous explanation" for an agency's decision, its validity "must . . . stand or fall on the propriety of that finding." *Camp v. Pitts*, 411 U.S. 138, 143 (1973).

Plaintiffs fail to establish that the OMB Determination and attendant explanation "is incongruent with what the record reveals about the agency's priorities and decisionmaking process." *Dep't of Comm. v. New York*, 139 S. Ct. 2551, 2575–76 (2019). As OMB reasonably concluded, slowing the spread of COVID-19 has an economically beneficial impact on federal operations, since federal workers are incurring significant labor costs from workers getting sick from COVID-19 and spreading it to others in the workplace. *See* 86 Fed. Reg. 63421–23. While such a policy may also have salutary public health effects, that result does not undermine the reasoning or legitimacy of OMB's decision. Further, even if the public-health effect was a background consideration, "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 Comm.*, 139 S. Ct. at 2573.

Nor can Plaintiffs succeed in claiming that the OMB Determination contains "impermissible *post hoc* rationalizations." Pls.' Mem. at 31. By explaining why the Task Force Guidance promoted government efficiency, OMB merely complied with EO 14,042 and the FPASA. And by superseding its old determination with a new Determination that further details why it initially approved the Task Force Guidance, OMB provided "a fuller explanation of the agency's reasoning *at the time of the agency action*," *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1907–08 (2020) (emphasis in original) (quoting *Pension Benefit Guaranty*

Corporation v. LTV Corp., 496 U.S. 633, 654 (1990)), which is the opposite of post-hoc rationalization.

3. The OMB Determination also complied with any applicable procedural requirements under the Procurement Policy Act.

In any event, the new OMB Determination satisfies § 1707's procedural requirements. Section 1707 permits a proposal to become temporarily effective without publication and public comment if "the officer authorized to issue" the proposal finds that "urgent and compelling circumstances make compliance with [those] requirements impracticable." *Id.* § 1707(d)–(e). Here, the Acting OMB Director did just that by finding that the imminent threat of the COVID-19 pandemic and its impact on "worker absence," "labor costs," and "the efficiency of federal contracting" presented "[u]rgent and compelling circumstances justify[ing]" a waiver under § 1707(d). 86 Fed. Reg. at 63423–24. And consistent with § 1707(e), the Acting OMB Director "solicit[ed] comments on all subjects of" the OMB Determination, thus permitting the determination to become temporarily effective upon filing with the Federal Register on November 10, 2021 and mooting Plaintiffs' arguments on this score. *Id.* at 63423.

4. Challenges to the FAR Memo are likewise not likely to succeed.

The FAR Memo is also not subject to judicial review under the APA. To begin, Plaintiffs lack standing to challenge the FAR Memo because they (1) are not a party to a contract with the recommended clause, (2) have not identified any potential contracts that have the proposed provision, and (3) have not identified any injury that would be redressed by enjoining the FAR Memo. *See Transp. Workers Union of Am., AFL-CIO v. Transportation Sec. Admin.*, 492 F.3d 471, 477 (D.C. Cir. 2007) (no injury from guidance because "the change caused nothing" to happen to the claimant). The FAR Memo itself does not affect the authority of agencies to include a

COVID-19 safety clause in their contracts; agencies have authority to include a verbatim clause in contracts and solicitations even without the FAR Memo

The FAR Memo is also not a "final agency action." 5 U.S.C. § 704. The APA also provides review only of *final* agency action: a decision (1) that marks the "consummation of the agency's decisionmaking process" and (2) by which "rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (citation omitted). Neither prong is met here.

First, the FAR Memo is not final agency action because it is not the FAR Council's final word on the contract clause. The guidance was issued in accordance with the EO's instructions for the FAR to "take *initial* steps to implement" the contract clause described in the EO. EO 14,042 § 3(a) (emphasis added); *see also* FAR Memo at 1 ("The purpose of this memorandum is to provide agencies that award contracts under the . . . [FAR] with *initial* direction.") (emphasis added). The Memo suggests a clause for contracting officers to use in the interim, subject to agency- and contract-specific deviations to be developed by each agency. FAR Memo at 2. The conclusion of the policymaking process set forth in the EO—the FAR Council's amendment to the FAR by providing the contract clause "for inclusion in Federal procurement solicitation and contracts" subject to the EO—has yet to occur. EO 14,042 § 3(a); *see also* FAR Open Cases Report" at 2, available at https://www.acq.osd.mil/dpap/dars/opencases/farcasenum/far.pdf (indicating that on September 29, 2021, the FAR Council opened a case to implement EO 14,042 by drafting a proposed rule).

Second, the FAR Memo is not a decision from which "legal consequences will flow." *Bennett*, 520 U.S. at 177–78 (citation omitted). Plaintiffs cannot challenge guidance when they fail to show "any risk of future harm traceable to the . . . Guidance itself, as opposed to the

preexisting federal laws it describes." *Klayman v. President of United States*, 689 F. App'x 921, 924 (11th Cir. 2017). The Memo makes clear that the final decision from which legal consequences flow was EO 14,042—not the non-binding FAR guidance. FAR Memo ("The FAR Council has developed the attached clause pursuant to section 3(a) of the order to support agencies in meeting the applicability requirements and deadlines set forth in the order."). Alternatively, legal consequences would flow from the actual inclusion of a vaccine-requirement contract clause in a plaintiff's contract, which could be challenged before the agency board of contracting appeals or in the Court of Federal Claims, not *ex ante* in this Court.[7] 28 U.S.C. § 1346(a)(2); *id.* § 1491(a)(2).

Even if the FAR Memo was final agency action, Plaintiffs fail to challenge any specific aspect of the Memo as unreasonable. The FAR Council's guidance does nothing more than carry out the EO directive to "take initial steps to implement appropriate policy direction" for how agency acquisition offices can use the contract clause described in the EO. EO 14,042 § 3(a). In doing so, it merely reiterates the deadlines and requirements in the EO and provides a sample contract clause that incorporates the Task Force Guidance.

Section 1707's procedural notice requirements also do not apply to the FAR Memo because it is, at most, nonbinding guidance, and not "a procurement policy, regulation, procedure, or form" with "a significant effect beyond" the FAR Council's operating procedures. 41 U.S.C. § 1707(b). The FAR Council issued the memo to develop a template COVID-19 safety clause "to *support* agencies in meeting the applicability requirements and deadlines set forth in [EO 14,042]" and to "encourage[]" agencies to "exercise their authority" to temporarily deviate from the FAR by including similar clauses in their procurement contracts. FAR Memo at 2–3. The FAR Memo has no independent effect, however, and none of its guidance is operational unless

an agency chooses to incorporate it into a procurement contract. And the FAR Memo does not direct an agency to take any specific action, but instead encourages contracting officers to "follow the direction[s] … issued by their respect agencies" for how to utilize the memo's guidance. *Id.*

E. Plaintiffs' constitutional claims are meritless.

1. The challenged actions do not violate the Tenth Amendment.

Plaintiffs cannot succeed on a Tenth Amendment claim by simply invoking general maxims of federalism. The Tenth Amendment provides that "[t]he 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." U.S. Const. amend. X. The powers specifically delegated to the federal government by the Constitution "are not powers that the Constitution 'reserved to the States.'" *United States v. Comstock*, 560 U.S. 126, 144 (2010); *accord New York v. United States*, 505 U.S. 144, 156 (1992) ("If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States[.]"). Simply put: As long as federal action rests on a constitutionally delegated power, "there can be no violation of the Tenth Amendment." *United States v. Mikhel,* 889 F.3d 1003, 1024 (9th Cir. 2018) (citation omitted), *cert. denied*, 140 S. Ct. 157 (2019).

Where (as here) a federal statute is validly enacted under one of Congress's enumerated powers, and the Executive Branch exercises authority lawfully delegated under that statute, the Tenth Amendment is no bar to federal action. *See, e.g.*, *Wachovia Bank v. Watters*, 431 F.3d 556, 563 (6th Cir. 2005), *aff'd,* 550 U.S. 1 (2007). As explained above, *see supra* Argument I.A–C, EO 14,042 and the OMB Determination were issued pursuant to the President's authority under

the Procurement Act, a federal statute that was an evident exercise of Congress's power under the Spending Clause, *see infra* Argument I.E.4.

In addressing a Tenth Amendment claim, a court has "no license to employ freestanding conceptions of state sovereignty when measuring" federal authority under the Constitution. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985). The only question under the Tenth Amendment is whether the federal government acts pursuant to one of its powers in the Constitution; if it does, a court "necessarily must also conclude that the [plaintiffs'] efforts to invoke abstract principles of federalism through the Tenth Amendment fail." *See, e.g.*, *Town of Johnston v. Fed. Hous. Fin. Agency*, 765 F.3d 80, 86 (1st Cir. 2014); *see also Garcia*, 469 U.S. at 549 ("States unquestionably do retain a significant measure of sovereign authority," but "only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government." (cleaned up)).

Plaintiffs also appear to suggest that a Tenth Amendment problem exists whenever federal action regulates subject matter that is also regulated by the states. *See* Pls.' Mem. 34 ("[t]he safety and the health of the people . . . are, in the first instance, for [the States] to guard and protect") (citation omitted)). But "[t]here is no general 'doctrine implied in the Federal Constitution that the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other.'" *Maryland v. Wirtz*, 392 U.S. 183, 195 (1968), *overruled on other grounds by Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976) (quoting *Case v. Bowles*, 327 U.S. 92, 101 (1946)). Indeed, it is axiomatic that the federal government does not "invade[] areas reserved to the States by the Tenth Amendment simply because it exercises *its* authority" under the Constitution, even "in a manner that *displaces* the States' exercise of their police powers." *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264,

291 (1981) (emphasis added). Thus, "'the Federal Government, when acting within a delegated power, may override countervailing state interests,' whether those interests are labeled traditional, fundamental, or otherwise." *Brackeen v. Haaland*, 994 F.3d 249, 310 (5th Cir. 2021) (en banc) (op. of Dennis, J.) (quoting *Wirtz*, 392 U.S. at 195)), *petition for cert. filed*, No. 21-380 (U.S. Sept. 8, 2021).

Plaintiffs' argument also ignores that the terms of a federal contract are an exclusively *federal* concern. Under the doctrine of intergovernmental immunity, a federal contractor is immune from conflicting state laws and regulations even when those state laws are purportedly based on state police power. The doctrine arises from the Supremacy Clause and bars state regulations that "retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by [C]ongress to carry into effect the powers vested in the national government." *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 317 (1819). "For purposes of intergovernmental immunity, federal contractors are treated the same as the federal government itself." *U.S. v. Cal.*, 921 F.3d 865, 882 n.7 (9th Cir. 2019). Courts regularly conclude that government contractors are immune from conflicting state laws, even when those laws are based on state power to regulate health and safety. *See Boeing Co. v. Movassaghi*, 768 F.3d 832, 840 (9th Cir. 2014); *GEO Grp., Inc. v. City of Tacoma*, No. 3:18-cv-05233, 2019 WL 5963112, at *5 (W.D. Wash. Nov. 13, 2019), *appeal dismissed*, 2020 WL 1249388 (9th Cir. Jan. 21, 2020). The Federal Government may contract with whom it likes under whatever terms it pleases without interference from states.

2. Contracts for services do not commandeer state officials.

Plaintiffs argue that is unconstitutional for a contract between a State and Federal Government to include a clause that compels a State to perform according to the terms of the contract—because requiring compliance would "commandeer" State officials. Pls.' Mem. at 35–36 (citing *Printz v. United States*, 521 U.S. 898 (1997)). The case Plaintiffs rely on for this remarkable position, *Printz*, held no such thing. In *Printz*, Congress directed state officials—who had not voluntarily entered into any contract—to perform certain duties related to firearms background checks. *Printz*, 521 at 903 –04. Plaintiffs ignored that *Printz* explained that if Congress had *contracted* with state officials, rather than merely commanding them, then there would have been no constitutional issue. *Id.* at 936 (O'Connor, J., concurring) ("Congress is also free to amend the interim program to provide for its continuance on a contractual basis with the States if it wishes, as it does with a number of other federal programs."); *see id.* at 916 (noting historical practice of contracting with state officials). Indeed, adopting Plaintiffs' view of the anti-commandeering doctrine would render all contracts between Federal and State governments unconstitutional.

3. Federal contracts do not violate the Commerce Clause.

Plaintiffs next claim that imposing requirements on its federal contracting workforce violates the Commerce Clause. Pls.' Mem. at 36 (citing *NFIB v. Sebelius*, 567 U.S. 519, 555 (2012)). But *NFIB* involved a challenge to a general mandate requiring most Americans to purchase health insurance, and the Court held that requirement exceeded Congress's power to regulate commerce. But here the government is not using its Commerce Clause authority to regulate anything. Instead, the government has set conditions on who the government does business with—something private-sector business leaders do all the time. *Cf. Arbitraje Casa de Cambio,*

S.A. de CV. v. United States, 79 Fed. Cl. 235, 240–41 (Fed. Cl. 2007) (noting that when contracting with other parties, "the sovereign steps off the throne and engages . . . as private parties, individuals or corporations also engage in among themselves"). "Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, 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). "Those wishing to do business with the Government must meet the Government's terms; others need not." *Am. Fed'n of Lab. & Cong. of Indus. Organizations v. Kahn*, 618 F.2d 784, 794 (D.C. Cir. 1979) (en banc). The policies at issue in this case are not a generally applicable regulations, and they do not implicate the Commerce Clause.

4. The challenged actions do not violate the Spending Clause.

Plaintiffs also claim that EO 14,042 and its implementing guidance exceed a limitation imposed on the federal government's spending power because the "mandate fails to 'unambiguously' establish the contract terms." Pls.' Mem. at 35 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). Plaintiffs also claim that the mandate exceeds Congress's Spending Clause power because it "is not 'related to the federal interest in particular national projects or programs.'" *Id.* (quoting *Van Whye v. Reisch*, 581 F.3d 693, 650 (8th Cir. 2009)).

These limits on Congress's authority to condition grants of federal funding do not apply to federal contracts. Plaintiffs cite no case where a court has found federal contract obligations invalid under *Pennhurst*'s clarity requirement or *Van Whye*'s federal interest requirement.[11] And

[11] The President has already determined that including the COVID-19 safety clause is in the federal interest, *see supra*, Argument I. B., and the OMB Director's Determination provides additional details, *supra* Argument I.D.

for good reason: adopting Plaintiffs' position would make simple imprecisions in federal procurement contracts matters of constitutional magnitude. As the Supreme Court has explained, even "the consequences of imprecision" in spending legislation "are not constitutionally severe" when the government "is acting as patron rather than as sovereign." *See Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 589 (1998). The same is true when the government procures property or services in the same manner "as private parties, individuals or corporations also engage in among themselves." *See Arbitraje Casa de Cambio, S.A. de CV.*, 79 Fed. Cl at 240–41 (Fed. Cl. 2007) (citation omitted).

At any rate, EO 14,042 and its implementing guidance unambiguously put contractors on notice that compliance with OMB-approved Task Force Guidance is an obligation under a covered contract. *Pennhurst* requires nothing more. *See Benning v. Georgia*, 391 F.3d 1299, 1307 (11th Cir. 2004). The Court in *Pennhurst* was concerned with a federal grant program that "was unclear as to whether the states incurred *any* obligations *at all* by accepting federal funds." *See id.* (emphasis added); *accord Ky., Dep't of Hum. Resources v. Donovan*, 704 F.2d 288, 299 n.17 (6th Cir. 1983). Here, however, EO 14,042 ensures that "the *existence* of the condition itself" will be "explicitly obvious" to federal contractors by directing agencies to incorporate (to the extent permitted by law) a COVID-19 safety clause into a contract before obligating a contractor's compliance. *See Benning*, 391 F.3d at 1307 (emphasis added) (quoting *Mayweathers v. Newland*, 314 F.3d 1062, 1067 (9th Cir. 2002)). For each covered contract, a clause can only be incorporated upon the mutual agreement of the parties. Thus, because the challenged actions ensure that the "*intention to impose a condition* is expressed clearly" in a covered contract, *see Mayweathers*, 314 F.3d at 1067, a state will be capable of making "an informed," voluntary decision whether to accept the attendant obligations of contracting with the federal government, *see*

Pennhurst, 451 U.S. at 25; *see also id.* at 17 (conditions must be imposed clearly so a state is not "unaware of the conditions" or "unable to ascertain what is expected of [them]").

Furthermore, Plaintiffs stake their entire claim on the fact that agencies are encouraged under the FAR Memo to include a provision requiring a contractor to "comply with all guidance . . . as amended during the performance' of the contract 'published by the . . . Task Force'"). *See* Pls.' Mem. at 35. But the Supreme Court has not required exactitude when conditioning federal funding. *See, e.g.*, *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 669 (1985) ("[T]he Federal Government simply could not prospectively resolve every possible ambiguity concerning particular applications of [a grant program's] requirements …."). Indeed, "the Supreme Court has held that conditions may be 'largely indeterminate,'" and yet constitutionally permissible, "so long as the statute 'provid[es] clear notice to the States that they, by accepting funds under [federal law], would indeed be obligated to comply with [the conditions].'" *Mayweathers*, 314 F.3d at 1067 (quoting *Pennhurst*, 451 U.S. at 24–25). Federal contractors are capable of making informed, voluntary decisions to accept an obligation to comply with periodically updated guidelines. *See* *Donovan*, 704 F.2d at 299 ("Thus, the state voluntarily accepts the Secretary's power to alter the program and require compliance.").

5. The challenged actions do not violate the nondelegation doctrine.

Plaintiffs contend that the Procurement Act violates the Constitution's nondelegation doctrine if it authorizes the President to issue EO 14,042. *See* Pls.' Mem. at 22–23. To the contrary, the Procurement Act's delegation of authority fits comfortably within the bounds of constitutionally permissible delegations. Congress may lawfully delegate decision-making authority so long as it "lay[s] down by legislative act an intelligible principle to which the person or body au-

thorized to [act] is directed to conform." *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (citation omitted). A delegation is "constitutionally sufficient if Congress clearly delineates [1] the general policy, [2] the public agency which is to apply it, and [3] the boundaries of this delegated authority." *Id.* at 372–73 (citation omitted); *accord Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019) (plurality op.) ("[A] delegation is permissible if Congress has made clear to the delegee 'the general policy' he must pursue and the 'boundaries of his authority.'" (cleaned up)).

The intelligible-principle standard is so deferential that the Supreme Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474–75 (2001) (quoting *Mistretta*, 488 U.S at 416 (Scalia, J., dissenting)). In fact, the Supreme Court has struck down congressional delegations only twice in United States history—both in 1935—and only because "Congress had failed to articulate *any* policy or standard" to confine discretion. *Gundy*, 139 S. Ct. at 2129. Over the last eighty years, the Court "has countenanced as intelligible seemingly vague principles in statutory text such as whether something would 'unduly or unnecessarily complicate,' … be 'generally fair and equitable,' in the 'public interest,' … [or] authoriz[es] the recovery of excessive profits." *In re Nat'l Sec. Agency Telecomms. Recs. Litig.*, 671 F.3d 881, 896 (9th Cir. 2011) (citing multiple cases); *see also, e.g.*, *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980) (upholding delegation to determine what constituted a "safe" place of employment); *Gundy*, 139 S. Ct. at 2129 (noting that the Supreme Court has, on multiple occasions, "approved delegations to various agencies to regulate in the 'public interest"' (citing *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 216 (1943), and *N.Y. Cent. Secs. Corp. v. United States*, 287 U.S. 12, 24 (1932))); *id.*

at 2130–31 (Alito, J., concurring in the judgment) ("[S]ince 1935, the Court has uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards.").

In light of this longstanding precedent, the statute at issue here reflects an intelligible principle that falls well within permissible bounds. This is not a regulation that binds the general public; it only applies to contractors. The Procurement Act sets forth a general policy—the promotion of economy and efficiency in the federal government's procurement of property and services, *see* 40 U.S.C. § 101—and authorizes the President to issue orders designed to further those specific statutory goals in that narrow, definable context, *see id.* § 121(a). The statute's criteria thus establish a clear boundary for the President's actions, and compares favorably to other congressional delegations that have been sustained against challenges under the nondelegation doctrine. *See, e.g.*, *Whitman*, 531 U.S. at 474–75 (listing cases). Several courts have already held that the Procurement Act's delegation of authority to the President is valid. *See Kahn*, 618 F.2d at 785–86, 793 n.51 ("[The Procurement Act] requires the President to make procurement policy decisions based on considerations of economy and efficiency. Although broad, this standard can be applied generally to the President's actions to determine whether those actions are within the legislative delegation."); *City of Albuquerque*, 379 F.3d at 914–15 (finding the Procurement Act's limit that the President "establish 'an economical and efficient system for . . . the procurement and supply' of property" provided an "'intelligible principle' to guide the exercise" of the "relatively broad delegation of authority" in the statute (citations omitted).

Plaintiffs cite no authority to the contrary. Instead, they largely reiterate their statutory objections, maintaining that EO 14,042 "has no basis in the text of" the Procurement Act, but if it did, the statute would be too "broad." *See* Pls.' Mem. 23. But that is not the standard. "Congress

does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors." *Touby v. United States*, 500 U.S. 160, 165 (1991). As the Supreme Court has acknowledged, "Congress simply [could not] do its job absent an ability to delegate power under broad general directives." *Mistretta*, 488 U.S. at 372. In sum, only if this Court "could say that there is an *absence* of standards for the guidance of the [President's] action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would [the Court] be justified in overriding [Congress's] choice of means for effecting its declared purpose" in the Procurement Act. *See Yakus v. United States*, 321 U.S. 414, 426 (1944) (emphasis added). That is not the case here.

II. Plaintiffs do not face irreparable harm.

Plaintiffs are also not entitled to a preliminary injunction because they have failed to show a likelihood of irreparable harm. That showing must demonstrate that irreparable harm is *likely*, not merely possible, *Winter*, 555 U.S. at 20. "To succeed in demonstrating a threat of irreparable harm, 'a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief.'" *Roudachevski v. All-Am. Care Centers, Inc.*, 648 F.3d 701, 706 (8th Cir. 2011) (citation omitted). Plaintiffs have not carried this burden here.

First, Plaintiffs have not alleged any irreparable harm from their position as federal contractors. Because EO 14,042 applies only to certain types of contracts entered into or extended on or after October 15, 2021, Plaintiffs cannot rely on ongoing contracts of indeterminate value that are not imminently up for renewal or extension to support irreparable harm. Here, Plaintiffs submit a bevy of declarations in support of their irreparable, but they miss the mark. Many of the

declarations (1) claim in general terms that Plaintiffs contract with the federal government,[12] (2) allege potential harm to contracts far in the future,[13] and (3) describe contracts either for an unspecified amount of money or that are affirmatively below the simplified acquisition threshold amount of $250,000 and thus not subject to the EO.[14] EO 14,042 § 5(a).

Other declarations describe federal agency attempts to seek bilateral modifications to include the safety-protocol clause into existing contracts.[15] While agencies are "strongly encouraged" under EO 14,042 to incorporate the Task Force's COVID-19 safety protocols into "existing contracts," they can only do so "to the extent permitted by law." *See* EO 14,042, § 6(c). Most of the contracts that Plaintiffs identify can be amended only upon the mutual, written

[12] Decl. of Ryan Rapp, ECF No 9-6; Decl. of Jason Jackson, ECF No. 9-13; Decl. of Marcia Mahaney, ECF No. 9-14.

[13] Decl. of Andrew Armacast, ECF No. 9-10 ¶¶ 3–4 (describing contracts set to expire in 2023 and 2025); Decl. of Tara Evans, ECF No. 9-11 ¶ 8 (describing contracts up for renewal in August 2022 and in 2023).

[14] Decl. of David Scanlan ¶ 7, ECF No. 9-9 (describing a contract potentially up for renewal on December 31, 2021 and others expiring later all worth less than $250,000); Evans Decl. ¶¶ 7, 11 (describing contracts up for renewal at the end of the year worth less than $250,000); Decl. of Dru Buntin ¶ 3, ECF No. 9-15 (describing three contracts worth unspecified amounts that are set to "expire on December 31, 2021," without establishing whether they are up for renewal or extension).

[15] *E.g.*, Decl. of Kraig Paulsen, ECF No. 9-7; Decl. of Patrick Hackley, ECF No. 9-8; Decl. of Karen Pat Pitney, ECF No. 9-12.

agreement of the parties. But these bilateral modifications are not required by the EO and are effective only upon both parties' approval.[16] Being asked to change a contract term, and voluntarily agreeing to the change, is not irreparable harm.[17]

In any event, were a federal agency to assert that EO 14,042 requires the insertion of a clause into an existing contract, Plaintiffs could dispute the existence of such a requirement by making a claim to the contracting officer under the Contract Disputes Act. The CDA "applies to any express or implied contract entered into by an executive agency for the procurement of property, services, construction, repair, or the disposal of personal property." *Anselma Crossing, L.P. v. USPS*, 637 F.3d, 238, 240 (3d Cir. 2011); *see* 28 U.S.C. § 1491(a)(2). It requires that a contractor present for a contracting officer's decision any claim "relating to a contract," 41 U.S.C.A.

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[16] Plaintiffs identify one contract they claim was unilaterally modified by the Department of Energy (DOE), with Iowa State University (ISU). Decl. of Kraig Paulsen, ECF No. 9-7. As DOE confirms, it rescinded the unilateral modification of the contract to include the DOE's FAR Deviation Clause, though the agency ultimately unilaterally included another Task Force Guidance order in accordance with a DOE order. *See* Decl. of Cody Benjamin, Ex. 2 ¶ 5–7. To the extent ISU shows irreparable harm from the EO, it is the only entity to do so, any preliminary injunctive relief should be limited to this contract. *Gill v. Whitford*, 138 S. Ct. 1916, 1933–34 (2018) ("[a] plaintiff's remedy must be tailored to redress the plaintiff's particular injury.").

[17] Plaintiffs also claim that the General Services Administration (GSA) is exerting pressure on Missouri to enter into a bilateral modification for three contracts. Decl. of Dru Buntin ¶ 3, ECF No. 9-15. But that is not the case either; the allegedly coercive language the Buntin Declaration quotes without support does not even apply to the three contracts described in that declaration. They are not the types of contracts subject to the "interim measures" GSA explained it would take, *see* Gen. Serv. Admin., FAR Class Deviation - Implementation of Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, *available at* https://www.gsa.gov/cdnstatic/Class%20Deviation%20CD-2021-13_0.pdf (last accessed Nov. 18, 2021) (describing interim measures to be taken as to Indefinite Delivery Indefinite Quantity contracts); Decl. of Erica Hoffman ¶ 7, Ex. 3 ("The GSA-Missouri DNR Contracts are not . . . IDIQ contracts or Federal Supply Schedule contracts."). Moreover, the contracts are also all under the "simplified acquisition threshold" amount of $250,000 and thus outside the scope of the EO. *Id.* ¶¶ 9–10; *see also* EO 14,042 § 5(b)(iii).

§ 7103, with the decision reviewable by the Court of Federal Claims or a board of contract appeals. Similarly, if Plaintiffs were to contend that a federal government solicitation for a new contract included a COVID-19 related clause not mandated by law, 28 U.S.C. § 1491(b)(1) provides the Court of Federal Claims with jurisdiction to "render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." For these separate and independent reasons, Plaintiffs have failed to carry their burden to demonstrate irreparable harm. *United States of America v. Jefferson Cnty.*, 720 F.2d 1511 (11th Cir. 1983) ("The possibility [that] adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.") (quoting *Samsung v. Murray*, 415 U.S. 61, 90 (1974).

Second, Plaintiffs also claim that EO 14,042 and its implementing guidance will harm them by causing "direct sovereign injuries." Pls.' Mem. at 37. But this claim simply reiterates Plaintiffs' doctrinally barren view of the Tenth Amendment. Again, it is black-letter law that the federal government does not "invade[]" areas of state sovereignty "simply because it exercises *its* authority" in a way that preempts conflicting state laws, even "in a manner that displaces the States' exercise of their police powers." *Hodel*, 452 U.S. at 291 (emphasis added). Here, EO 14,042 and the OMB Determination, and the FAR Memo were issued pursuant to delegated authority under the Procurement Act. *See supra* § I.C. And as federal law, these actions preempt conflicting state laws by simple operation of the Supremacy Clause, and nothing in the text or

structure of the Constitution entitles Plaintiffs to enact or enforce laws and policies that conflict with federal law.[18]

Third, Plaintiffs invoke the *parens patriae* doctrine "to prevent the manifest irreparable injury to their millions of citizens." Pls.' Mem. at 40. Although a state may have standing to vindicate its own injuries, *see Massachusetts v. EPA*, 549 U.S. 497, 520 n.17 (2007), "a state does not have standing as *parens patriae* to bring an action against the Federal government." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 610 n.16 (1982); *see also Iowa ex rel. Miller v.* Block, 771 F.2d 347, 355 (8th Cir. 1985) ("[W]e cannot allow the State to proceed as parens patriae in this case" against the federal government. "To do so would intrude on the sovereignty of the federal government and ignore important considerations of our federalist system."). Plaintiffs' reliance on the *parens patraie* doctrine as a basis for irreparable injury is therefore misplaced.

III. The equities and the public interest weigh against injunctive relief.

The third and fourth requirements for issuance of a preliminary injunction—the balance of harms and whether the requested injunction will disserve the public interest—"merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). Here, these considerations tilt decisively in the Defendants' favor.

[18] Plaintiffs' reliance on *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers), and *Abbott v. Perez*, 138 S. Ct. 2305 (2018), is misplaced. Neither support the theory that states suffer irreparable injury whenever the federal government "prevent[s]" them "from effectuating" their own laws. *See* Pls.' Mem. at 39 (citation omitted). If such a rule existed, a state would suffer irreparable harm per se from all federal laws with preemptive effect. Instead, each case held that a state defendant established irreparable harm sufficient to grant a stay of a lower court's injunction barring the state from enforcing a challenged state law—a scenario not at issue here.

First, enjoining EO 14,042 would harm the public interest by hampering the efficiency of the contractors on which the federal government relies. The COVID-19 pandemic has interfered with numerous aspects of the government's work, *e.g.*, by forcing office closures; interfering with employees' access to paper-based or sensitive records; limiting official travel; and causing staffing shortages. *See generally* Pandemic Response Accountability Committee, Top Challenges Facing Federal Agencies (June 2020), https://perma.cc/GGF4-F4FV. These disruptions have affected the work of federal employees and federal contractors alike. Requiring federal covered contractor employees to become fully vaccinated against COVID-19, with exceptions only as required by law, reduces disruptions caused by worker absences associated with illness or exposure to the virus, generating meaningful gains in contracting efficiency. Enjoining EO 14,042 would prevent these gains and would likely interfere with the government's ability to resume normal, pre-pandemic operations.

Second, enjoining EO 14,042 would harm the public interest in slowing the spread of COVID-19 among millions of federal contractors and the members of the public with whom they interact. As the Supreme Court has recognized, "[s]temming the spread of COVID-19 is unquestionably a compelling interest." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020). Accordingly, numerous courts reviewing "executive action designed to slow the spread of COVID-19" have concluded that "[t]he public interest in protecting human life—particularly in the face of a global and unpredictable pandemic—would not be served by" an injunction. *Tigges v. Northam*, 473 F. Supp. 3d 559, 573–74 (E.D. Va. 2020); *see also, e.g.*, *Am.'s Frontline Drs. v. Wilcox*, No. EDCV 21-1243, 2021 WL 4546923, at *8 (C.D. Cal. July 30, 2021); *Valdez v. Grisham*, ---F. Supp. 3d---, 2021 WL 4145746, at *13 (D.N.M. Sept. 13, 2021), *appeal filed*, No. 21-2105 (10th Cir. Sept. 15, 2021), *Harris v. Univ. of Mass., Lowell*, ---F.

Supp. 3d---, 2021 WL 3848012, at *8 (D. Mass. Aug. 27, 2021), *appeal filed*, No. 21-1770 (1st Cir. Sept. 28, 2021), *Williams v. Brown*, ---F. Supp. 3d---, 2021 WL 4894264, at *10-11 (D. Or. Oct. 19, 2021); *Wise v. Inslee*, No. 2:21-cv-0288, 2021 WL 4951571, at *6 (E.D. Wash. Oct. 25, 2021), *Mass. Corr. Officers Federated Union v. Baker*, ---F. Supp. 3d---, 2021 WL 4822154, at *7-8 (D. Mass. Oct. 15, 2021), *Johnson v. Brown*, --- F. Sup. 3d---, 2021 WL 4846060, at *26-27 (D. Or. Oct. 18, 2021); *TJM 64, Inc. v. Harris*, 475 F. Supp. 3d 828, 840–41 (W.D. Tenn. 2020); *Talleywhacker, Inc. v. Cooper*, 465 F. Supp. 3d 523, 543 (E.D.N.C. 2020); *Brnovich v. Biden,* 2:21-cv-01568 (D. Az.) (denying preliminary injunction regarding federal government contractor vaccine requirement).

Moreover, granting the requested relief is not needed to preserve the status quo—existing contracts generally do not change without bilateral agreement of the parties. And granting the requested injunction would upend the status quo by (1) preventing further implementation of EO 14,042, which has been in effect for over two months; and (2) interfering with the federal government's ability to determine the terms on which it will enter into contracts. *See, e.g.*, *Nken*, 556 U.S. at 428–29 (explaining that enjoining a government policy is an act of "judicial intervention" that "*alter[s]* the legal status quo"). Further, granting the relief would allow challengers to obtain a preliminary injunction against *any* new government policy, in order to maintain the prior "status quo" until a decision on the merits. *But see Winter*, 555 U.S. at 24 ("A preliminary injunction is an extraordinary remedy never awarded as of right."); *Brown v. Gilmore*, 533 U.S. 1301, 1303 (2001) (Rehnquist, C.J., in chambers) (explaining that "an injunction against the enforcement of a presumptively valid" enactment should only be granted in extraordinary circumstances).

Against these weighty and substantial federal interests, Plaintiffs advance only vague notions of federalism. Setting aside that Plaintiffs' specific federalism claims are meritless for the

reasons stated above, the public interest in "federalism" actually cuts against Plaintiffs' position. Plaintiff States overstep their federalist bounds by seeking to interfere with the federal government's ability to enter into contracts on its own terms. And by seeking a nationwide injunction, Plaintiff States are trying reach beyond their borders to interfere with contracts the federal government has with their sister States and private parties completely unrelated to Plaintiffs. Plaintiffs unquestionably disagree with the policy determinations that undergird EO 14,042, but they do not have the right or authority to control federal contracting policy across America.

In sum, granting the pending motion would harm the public interest far more than denying the motion would harm Plaintiffs, and the motion should therefore be denied.

IV. In all events, this Court should not enter nationwide relief.

Although preliminary relief is unjustified here, at a minimum, any such relief should be no broader than necessary to redress Plaintiffs' alleged injuries. Because this Court's "constitutionally prescribed role is to vindicate the individual rights of the people appearing before it," "[a] plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, 138 S. Ct. 1916, 1933–34 (2018) (citation omitted). Nationwide injunctions are inappropriate and "take a toll on the federal court system—preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch." *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring). EO 14,042 and its implementing guidance have been challenged in numerous other cases, underscoring why this Court should not attempt to decide its legality for all parties. *See e.g.*, *Brnovich v. Biden,* 2:21-cv-01568 (D. Az.) (denying preliminary injunction regarding government contractor vaccine mandate); *Smith v. Biden*, No. 1:21-cv-19457, 2021 WL 5195688, at *8 (D.N.J. Nov. 8, 2021) (same); *Texas v. Biden,* 3:21-cv-

00309; *Georgia v. Biden*, 1:21-cv-163 (S.D. Ga.); *Missouri v. Biden*, 4:21-cv-1300 (E.D. Mo.); *Oklahoma v. Biden*, 5:21-cv-01069 (W.D. Okla.); *Louisiana v. Biden*, 1:21-cv-3867 (W.D. La.); *Hollis v. Biden*, 1:21-cv-163 (N.D. Miss.); *Navy Seal 1 v. Biden*, No. 21-2429 (M.D. Fla.).

Here, any relief should be limited to harmed contracts identified in Plaintiffs' motion. And any relief should block enforcement—but not inclusion—of a COVID-19 safety clause. Allowing COVID-19 safety clauses to be included but not enforced during the pendency of this litigation would mean that: contractors within its scope would not have to require their employees to be vaccinated. But if EO 14,042 and its implementing guidance are ultimately upheld, the policy can be put into effect without further delay.[19]

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for a preliminary injunction should be denied.

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Respectfully submitted,

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[19] Allowing COVID safety clauses to be included but not enforced will not precipitate lay-offs or a rush to vaccination if the injunction is dissolved. Covered contractor employers have flexibility to "determine the appropriate means of enforcement" and to craft "polic[ies] that encourage[] compliance." Safer Federal Workforce, Federal Contractor FAQs, Compliance, https://perma.cc/RGR9-ZTES. In other words, covered contractors would not need to immediately fire unvaccinated employees once the injunction is dissolved. Rather, covered contractors should provide for a "period of counseling and education, followed by additional disciplinary measures if necessary," before terminating an employee or putting them on leave. *Id.*

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