

IN THE SUPREME COURT OF THE UNITED STATES

No. 22A-_____

JOSEPH R. BIDEN, JR., PRESIDENT OF THE UNITED STATES, ET AL.,
APPLICANTS

v.

STATE OF LOUISIANA, ET AL.

APPLICATION FOR AN EXTENSION OF TIME
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Pursuant to Rules 13.5 and 30.3 of the Rules of this Court, the Solicitor General, on behalf of the President of the United States et al., respectfully requests a 30-day extension of time, to and including April 19, 2023, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case. The court of appeals entered its judgment on December 19, 2022. Unless extended, the time within which to file a petition for a writ of certiorari will expire on Monday, March 20, 2023. The jurisdiction of this Court would be invoked under 28 U.S.C. 1254(1). Copies of the opinions below are enclosed.

1. Under 40 U.S.C. 121(a), “[t]he President may prescribe policies and directives that the President considers necessary to carry out” Subtitle I of Title 40 of the United States Code, which

derives from the Federal Property and Administrative Services Act of 1949 (Procurement Act), ch. 288, 63 Stat. 377 (40 U.S.C. 101 et seq.). In September 2021, relying in part on his authority under the Procurement Act, the President issued an Executive Order designed to address the deleterious effects of the COVID-19 pandemic on the efficiency of the federal procurement system. Exec. Order No. 14,042 (Order), 86 Fed. Reg. 50,985 (Sept. 14, 2021). The Order directs all federal agencies that are subject to the Procurement Act to ensure, to the extent permitted by law, that future federal contracts include a clause requiring the contractor and any subcontractors to "comply with all guidance for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force," so long as the Office of Management and Budget (OMB) approves the Task Force guidance and determines that adhering to it "will promote economy and efficiency in Federal contracting." Order § 2(a), 86 Fed. Reg. at 50,985. The Task Force later issued, and OMB approved, guidance generally requiring covered contractors to "ensure that all covered contractor employees are fully vaccinated for COVID-19," subject to accommodations for religious and other objections. App., infra, 3a (citation omitted).

2. Respondents -- the States of Louisiana, Indiana, and Mississippi -- brought this action in the Western District of Louisiana to challenge the President's Order and the

administrative actions implementing it, which they referred to collectively as the "federal contractor mandate." App., infra, 2a; see id. at 5a.

On December 16, 2021, the district court granted the plaintiff States' request for a preliminary injunction forbidding the federal government from enforcing the Task Force guidance in any federal contract or similar instrument with the States or their agencies. App., infra, 44a-69a. The court principally reasoned that the States were likely to succeed in showing that the Order "conflicts with the Tenth Amendment," on the theory that it was impermissibly "motivated by public health policy first and foremost" and thereby "'intrude[d] on an area that is traditionally reserved to the States.'" Id. at 60a-61a (citation omitted).

A divided panel of the court of appeals affirmed. App., infra, 1a-43a. The panel majority invoked the major questions doctrine and concluded that, "absent a clear statement by Congress," the President could not require that federal contractors agree to ensure that their covered employees are vaccinated as a condition of doing business with the federal government. Id. at 23a; see id. at 19a-23a. The court also concluded that the Procurement Act itself does not provide such a clear statement. Id. at 23a, 27a.

Judge Graves dissented. App., infra, 32a-43a. Judge Graves would have held that the Procurement Act "authorizes the

President's action," and he would have therefore vacated the injunction. Id. at 41a. Judge Graves observed that the major questions doctrine has been previously invoked "only * * * when there are potential anti-delegation issues to agencies, and that is not the situation here," where Congress expressly delegated authority to the President himself. Id. at 37a.

3. The Solicitor General has not yet determined whether to file a petition for a writ of certiorari in this case. Additional time is needed for further consultation within the Department of Justice and with other affected components of the Executive Branch about the legal and practical impact of the court of appeals' decision. Additional time is also needed to allow for the preparation and printing of a petition if a filing is authorized.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

MARCH 2023

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

December 19, 2022

Lyle W. Cayce
Clerk

No. 22-30019

STATE OF LOUISIANA; STATE OF INDIANA; STATE OF
MISSISSIPPI,

Plaintiffs—Appellees,

versus

JOSEPH R. BIDEN, JR., IN HIS OFFICIAL CAPACITY AS
PRESIDENT OF THE UNITED STATES; UNITED STATES OF
AMERICA; FEDERAL ACQUISITION REGULATORY COUNCIL;
GENERAL SERVICES ADMINISTRATION; ROBIN CARNAHAN, IN
HER OFFICIAL CAPACITY AS ADMINISTRATOR OF GENERAL
SERVICES, ET AL

Defendants—Appellants.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 1:21-CV-3867

Before GRAVES, WILLETT, and ENGELHARDT, *Circuit Judges.*

KURT D. ENGELHARDT, *Circuit Judge:*

The President asks this Court to ratify an exercise of proprietary authority that would permit him to unilaterally impose a healthcare decision on one-fifth of all employees in the United States. We decline to do so. Thus, we AFFIRM the preliminary injunction issued by the district court.

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I. Background

As part of his efforts to combat the COVID-19 pandemic, President Biden issued a series of sweeping vaccination mandates. This Court has had occasion to consider at least two of them – namely, the OSHA-issued mandate which covered private employers with more than 100 employees, heard in *BST Holdings, L.L.C. v. Occupational Safety & Health Admin., United States Dep’t of Lab.*, 17 F.4th 604 (5th Cir. 2021),¹ and the President’s mandate covering government employees (which this Court recently heard *en banc* in *Feds for Medical Freedom v. Biden*, Case No. 22-40043). This case concerns another mandate that would, with limited exceptions, require the government to include in its contracts a clause that would require federal contractors to ensure that their entire workforce is fully vaccinated against COVID-19.

This challenge concerns four actions that together constitute the “federal contractor mandate.” The first is an Executive Order issued by the President on September 9, 2021.² President Biden ordered that “in order to promote economy and efficiency in procurement by contracting with sources that provide adequate COVID-19 safeguards for their workplace,” government contracts must include a clause specifying “that the contractor and any subcontractors ... shall, for the duration of the contract, comply with all guidance for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force [the “Task Force”] ... , provided that

¹ The Supreme Court considered this mandate in *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., Occupational Safety & Health Admin.* (hereinafter “*NFIB*”), 142 S. Ct. 661 (2022) (per curiam).

² Ensuring Adequate COVID Safety Protocols for Federal Contractors, 86 Fed. Reg. 50985 (published Sept. 14, 2021).

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the Director of the Office of Management and Budget ... approves the Task Force Guidance.”³

The second challenged action consists of guidance issued by the Task Force on September 24, 2021, which required “[c]overed contractors [to] ensure that all covered contractor employees are fully vaccinated for COVID-19, unless the employee is legally entitled to an accommodation[,] ... no later than December 8, 2021.”⁴ The Task Force guidance was not self-executing; rather, it required ratification by the Office of Management and Budget (“OMB”) to take effect.

As required by the Executive Order, the OMB Director issued a short finding that the Task Force guidance “will improve economy and efficiency by reducing absenteeism and decreasing labor costs for contractors and sub-contractors working on or in connection with a Federal Government contract.”⁵ This finding was issued on September 28, 2021. Shortly after this lawsuit was filed, OMB rescinded its initial finding and issued instead a longer finding (the “OMB Determination”) which reached the same conclusion with far more support.⁶ This latter OMB Determination constitutes the third action herein challenged.

The fourth challenged action is a memorandum issued by members of the Federal Acquisition Regulation (FAR) Council (the “FAR Memo”) in which federal agencies were urged to “act expeditiously to issue ...

³ Id.

⁴ COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors at 5 (Sept. 24, 2021), <https://bit.ly/3jTHSHJ>.

⁵ 86 Fed. Reg. 53691-01 (Sept. 28, 2021).

⁶ See Determination of the Acting OMB Director Regarding the Revised Safer Federal Workforce Task Force Guidance for Federal Contractors and the Revised Economy & Efficiency Analysis, 86 Fed. Reg. 63418-01 (Nov. 16, 2021).

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deviations [to their prescribed contractual clauses] so that their contracting officers may begin to apply the clause on or before October 15[, 2021].”⁷ In line with the President’s Executive Order, the example clause suggested in the FAR Memo requires the signatory to “comply with all guidance, including guidance conveyed through Frequently Asked Questions, as amended during the performance of this contract, ... published by the Safer Federal Workforce Task Force.”⁸

Together, these four actions require nearly all federal contractors, either immediately (in the case of new contracts or by consented-to changes to old contracts) or at the soonest opportunity, to consent to a contractual clause obliging them to follow guidance from the Task Force. The primary element of that guidance – at least for the moment, as the guidance is subject to amendment – is a mandate that contractors ensure that their employees become fully vaccinated against COVID-19.

The President’s Executive Order purports to exercise authority given to the President under the Federal Property and Administrative Services Act of 1949, known as the “Procurement Act.”⁹ The Procurement Act states that its purpose “is to provide the Federal Government with an economical and efficient system” for procurement, contracting, and other related activities.¹⁰ It also enables the President to “prescribe policies and directives that the

⁷ Issuance of Agency Deviations to Implement Executive Order 14042 at 3 (Sept. 30, 2021), <https://bit.ly/3bvdizB>.

⁸ *Id.* at 5.

⁹ 40 U.S.C. § 101 *et seq.*

¹⁰ 40 U.S.C. § 101.

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President considers necessary to carry out this subtitle,” provided that “[t]he policies must be consistent with this subtitle.”¹¹

The Congressionally-created FAR Council, meanwhile, “assist[s] in the direction and coordination of Government-wide procurement policy and Government-wide procurement regulatory activities in the Federal Government.”¹² Generally speaking, the FAR Council has exclusive authority to “issue and maintain ... a single Government-wide procurement regulation, to be known as the Federal Acquisition Regulation.”¹³ Finally, the Procurement Policy Act generally requires that “a procurement policy, regulation, procedure, or form ... may not take effect until 60 days after it is published for comment” unless “urgent and compelling circumstances make compliance with the requirements impracticable.”¹⁴

II. Procedural History

Three states – Louisiana, Indiana, and Mississippi (the “Plaintiff States”) – brought suit in the Western District of Louisiana against President Biden in his official capacity to seek invalidation of this mandate. These states brought suit in their capacities as federal contractors themselves. They sought and were granted a preliminary injunction and stay by the district court.

In evaluating the request for a preliminary injunction, the district court first found that the states had Article III standing as they faced a choice

¹¹ 40 U.S.C. § 121.

¹² 41 U.S.C. § 1302.

¹³ 41 U.S.C. § 1303(a)(1).

¹⁴ 41 U.S.C. § 1707.

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between complying with the mandate and potentially losing members of their workforce or becoming ineligible to bid on or renew federal contracts.

Next, the district court reviewed the familiar four factors which govern grants of a preliminary injunction: “(1) a likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted; and (4) that the grant of an injunction will not disserve the public interest.” *Ladd v. Livingston*, 777 F.3d 286, 288 (5th Cir. 2015) (quoting *Trottie v. Livingston*, 766 F.3d 450, 451 (5th Cir. 2014)).

In finding that the states’ suit was likely to succeed, the district court first expressed its concern “that EO 14042 conflicts with the Tenth Amendment,” as “EO 14042, although supported upon a nexus of economy and efficiency, was clearly and unequivocally motivated by public health policy first and foremost.” “Our Constitution principally entrusts ‘[t]he safety and the health of the people’ to the politically accountable officials of the states.” *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (mem.) (Roberts, C.J., concurring) (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905)). Thus, the district court explained, this mandate falls afoul of the Tenth Amendment’s reservation of such power to the states.

The district court also found that the elements of the mandate are procedurally invalid. First, the district court found that there were no “urgent and compelling circumstances”¹⁵ to justify dispensing with the otherwise required notice-and-comment period. Even assuming, *arguendo*, that the notice-and-comment requirement could be overruled, the district court held that the FAR Memo “clearly and unequivocally appl[ied] beyond EO 14042’s authorized scope” and was thus unlawful. And while the OMB

¹⁵ 41 U.S.C. § 1707.

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Determination included a shortened notice-and-comment period which arguably “adhere[d] to the text” of the statute, the district court found that since “[c]ompliance requires action by employees weeks before the effective date to obtain a fully vaccinated status,” “the actions of the OMB circumvent the protections envisioned under the APA.”

The district court then held that the states had shown irreparable harm in the form of “nonrecoverable compliance costs,” *Texas v. United States Env’t Prot. Agency*, 829 F.3d 405, 433 (5th Cir. 2016) (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 221 (1994) (Scalia, J., concurring in part and in the judgment)), such as “diversion of resources necessary to identify covered employees and manage their vaccination status.” The district court also identified as irreparable harm the choice the states would have to make if an employee refused to get vaccinated: a choice between “releasing the employee and all accompanying efficiency, institutional memory, and operational know-how or foregoing federal contracts.” Moreover, employees would have to undertake an irreversible decision – vaccination – in order to be compliant with this mandate. Finally, the district court identified the threat to the states’ sovereign interests as potentially irreparable harm.

In evaluating the balance of harms, the district court found simply: “[w]ithout denying the existence of the pandemic or the potential risk it imposes, ... EO 14042, the OMB determination[,] and the FAR Memo present a greater risk to the rights of covered employees and contractors and to the interests of the Plaintiff States to defend constitutionally reserved police powers from federal overreach.” Finally, the district court found that this Court’s analysis of the public interest factors in *BST Holdings* was applicable to this case as well.

Having established that an injunction was warranted, the district court set out that the injunction would only apply “to all contracts, grants, or any

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other like agreement by any other name between the Plaintiff States and the national government.” It then stayed the case pending appellate review.

III. Standard of Review

“We review a preliminary injunction for abuse of discretion, reviewing findings of fact for clear error and conclusions of law *de novo*.” *Texans for Free Enter. v. Tex. Ethics Comm’n*, 732 F.3d 535, 537 (5th Cir. 2013). “Under the clearly erroneous standard, this court upholds findings by the district court that are plausible in light of the record as a whole.” *Moore v. Brown*, 868 F.3d 398, 403 (5th Cir. 2017). And as this Court has often said, “it is an elementary proposition, and the supporting cases too numerous to cite, that this court may affirm the district court’s judgment on any grounds supported by the record.” *Texas v. United States*, 809 F.3d 134, 178 (5th Cir. 2015) (quoting *Palmer ex rel. Palmer v. Waxahachie Indep. Sch. Dist.*, 579 F.3d 502, 506 (5th Cir. 2009)).

To obtain or uphold a preliminary injunction, a movant must show: “(1) a likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted; and (4) that the grant of an injunction will not disserve the public interest.” *Ladd*, 777 F.3d at 288 (quoting *Trottie*, 766 F.3d at 451).

IV. Discussion

A. Validity of the Executive Order

The first issue presented in this appeal is whether or not the Executive Order is within the bounds of the President’s authority under the

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Procurement Act.¹⁶ Again, “to provide the Federal Government with an economical and efficient system,”¹⁷ the President may “prescribe policies and directives that [he] considers necessary to carry out this subtitle,” provided that “[t]he policies [are] consistent with this subtitle.”¹⁸ The Government contends that generally this “express grant of statutory authority permits the President to issue, among others, orders that improve the economy and efficiency of contractors’ operations.” The states suggest that under the Government’s interpretation of this act, “[t]here is simply no limiting principle to the government’s authority.” To this, the Government replies that “[p]residential authority under the Procurement Act is constrained by the statute’s text, which requires that any executive order bear a close nexus to the statutory goals of establishing ‘an economical and efficient system’ for federal procurement and contracting.” This “close nexus” test, the Government suggests, is amply demonstrated in the historical and jurisprudential record surrounding the Procurement Act.

¹⁶ On appeal, neither side challenges the district court’s finding that the states have Article III standing as federal contractors but likely no *parens patriae* standing as representatives of their citizens.

¹⁷ 40 U.S.C. § 101. The Plaintiff States contend that the Government impermissibly relies upon this “prefatory purpose statement ... [as] a grant of authority” in violation of Supreme Court precedent. The brief quotes *D.C. v. Heller*, 554 U.S. 570, 578 (2008) for the proposition that “apart from [a] clarifying function, a prefatory clause does not limit or expand the scope of the operative clause.” To this, the Government retorts that a statement of purpose, “[w]herever it resides, ... is ‘an appropriate guide’ to the ‘meaning of the [statute’s] operative provisions.’” *Gundy v. United States*, 139 S. Ct. 211, 2127 (2019) (quoting ANTONIN SCALIA & BRIAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 218 (2012)) (plurality opinion). To the extent that 40 U.S.C. § 121 authorizes the President to prescribe policies and directives concerning contracting, we agree that the statement of purpose acts as a set of guidelines within which those policies must reside.

¹⁸ 40 U.S.C. § 121.

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1. *Historical Practice*

In its relative infancy, the Procurement Act’s “most prominent use ... [was] a series of anti-discrimination requirements for Government contractors.” *Am. Fed’n of Lab. & Cong. of Indus. Organizations v. Kahn*, 618 F.2d 784, 790 (D.C. Cir. 1979) (*en banc*). However, the executive orders promulgating these requirements did not themselves cite the Procurement Act as the source of their authority. That reliance was instead a creature of case law. In evaluating a later executive action that did claim Procurement Act authority, the D.C. Circuit noted of the anti-discrimination requirements that “the early anti-discrimination orders were issued under the President’s war powers and special wartime legislation, but for the period from 1953 to 1964 only the [Procurement Act] could have provided statutory support for the Executive action.” *Id.* at 790-91 (footnotes omitted). None of these orders, it appears, were “tested in the courts until 1964,” *id.* at 791, at which point the Third Circuit held without analysis that “we have no doubt that the applicable executive order and regulations have the force of law.” *Farmer v. Phila. Elec. Co.*, 329 F.2d 3, 8 (3d Cir. 1964).¹⁹ This Circuit was next to address this question, although it did so without the benefit of a direct challenge to the validity of the claimed authority under the statute. *Farkas v. Texas Instrument, Inc.*, 375 F.2d 629 (5th Cir. 1967). In *Farkas*, the Fifth Circuit noted that “[w]e would be hesitant to say that the antidiscrimination provisions of Executive Order No. 10925 are so unrelated to the establishment of ‘an

¹⁹ Notably, the *Farmer* court recognized without much discussion that there is “[a]n argument to the contrary” that since “Congress has ... declined to enact anti-discriminatory legislation[,] [f]or the executive to attempt to reach the result by indirection, through the Government contract device, is an (invalid) attempt to legislate where Congress has refused to do so.” *Id.* at 8 n.9. As neither party in *Farmer* appears to have challenged the validity of the orders themselves, the Third Circuit left that note without refutation.

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economical and efficient system for ... the procurement and supply' of property and services that the order should be treated as issued without statutory authority." *Id.* at 632 n.2 (quoting 40 U.S.C. § 471 [now codified as 40 U.S.C. § 101]). "Indeed," the Court continued, "appellees make no such challenge to its validity." *Id.* Both *Farmer* and *Farkas* involved an employee suing an employer alleging violations of anti-discrimination contractual terms mandated by executive order in federal contracts. *See Farmer*, 329 F.2d at 4-5; *Farkas*, 375 F.2d at 631.²⁰ *Farmer* was decided on jurisdictional grounds, *see Farmer*, 329 F.2d at 10,²¹ while *Farkas* held that the Plaintiff had failed to allege "the essential allegations of state action" necessary to sustain his action. *Farkas*, 329 F.2d at 634. Nonetheless, both courts found (although arguably only in dicta) that the Procurement Act authorized the anti-discrimination executive orders.

The first case to tackle this issue directly is *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971), which involved a challenge to an order by the Secretary of Labor purporting to implement an executive order by "requir[ing] that bidders on any federal or federally assisted construction contracts for projects in a five-county area around Philadelphia, the estimated total cost of which exceeds \$500,000, shall submit an acceptable affirmative action program which includes specific goals for the utilization of minority manpower." *Id.* at 163 (footnote omitted). In finding that the order could be upheld as an exercise of the President's Procurement Act authority, the court held: "[n]o less than in the case of defense

²⁰ *Farmer* also notes that "[t]he case appears to be the first of its kind in the Federal courts." *Farmer*, 329 F.2d at 4.

²¹ The court explained: "[W]e know of no announced overriding federal common law permitting a right of action by an employee against his employer for the latter's failure to comply with the nondiscrimination provision in a government contract."

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procurement it is in the interest of the United States in all procurement to see that its suppliers are not over the long run increasing its costs and delaying its programs by excluding from the labor pool available minority workmen.” *Id.* at 170. However, the court also impliedly found a significant limitation on the President’s authority in this area:

While all federal procurement contracts must include an affirmative action covenant, the coverage on federally assisted contracts has been extended to construction contracts only. This ... demonstrates that the Presidents were not attempting by the Executive Order program merely to impose their notions of desirable social legislation on the states wholesale. Rather, they acted in the one area in which discrimination in employment was most likely to affect the cost and the progress of projects in which the federal government had both financial and completion interests.

Id. at 171.

It was with this jurisprudential backdrop in mind that the D.C. Circuit made its ruling in *Kahn*. That case concerned an order by President Carter that, in effect, “den[ied] Government contracts above \$5 million to companies that fail[ed] or refuse[d] to comply with ... voluntary wage and price standards.” 618 F.2d at 785. The court, “consider[ing] the procurement compliance program in its real-world setting,” expected that “to the extent compliance with the wage and price standards is widespread a corresponding reduction (or more gentle increase) in Government expenses should take place.” *Id.* at 792. The more subtle “real-world” influence on the court’s decision, expressed almost in an offhanded fashion, was the idea that “the inflation problem is too serious for businessmen and workers not to understand the importance of compliance.” *Id.* The court thus found “no basis for rejecting the President’s conclusion that any higher costs incurred ... will be more than offset by the advantages gained ... in those cases where the lowest bidder is in compliance with the voluntary standards and his bid is lower than

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... in the absence of standards.” *Id.* at 793. Nonetheless, the court concluded, “our decision today does not write a blank check for the President to fill in at his will.” *Id.* Instead, the court expressed its “wish to emphasize the importance to our ruling today of the nexus between the wage and price standards and likely savings to the Government.” *Id.*

The next major case to give serious consideration to the President’s authority under the Procurement Act was also heard by the D.C. Circuit.²² In *UAW-Labor Employment & Training Corp. v. Chao*, 325 F.3d 360 (D.C. Cir. 2003), the court held that an executive order requiring contractors to “include a provision requiring contractors to post notices at all of their facilities informing employees of what are commonly known as *General Motors* and *Beck* rights” was lawfully promulgated as an exercise of Procurement Act power. *Id.* at 362. The executive order in question claimed a nexus to economy and efficiency based on the notion that “[w]hen workers are better informed of their rights, including their rights under the Federal labor laws, their productivity is enhanced.”²³ While recognizing that “[t]he link may

²² Several other cases, including one in this Circuit that the Supreme Court summarily vacated, discussed procurement power in general or in particular. *See, e.g., United States v. New Orleans Pub. Serv., Inc.*, 553 F.2d 459, 466–67 (5th Cir. 1977) (“First, the President has express authority over direct federal procurement practices, under [the Procurement Act]. ... [M]ore recent decisions involving Executive Order 11246 have candidly acknowledged the validity of the use by the President or Congress of the procurement process to achieve social and economic objectives. *See Rossetti Contracting Co. v. Brennan*, 508 F.2d 1039, 1045 n.18 (7th Cir. 1975); *Northeast Const. Co. v. Romney*, 485 F.2d 752, 760 (D.C. Cir. 1973). Those cases stand for the proposition that equal employment goals themselves, reflecting important national policies, validate the use of the procurement power in the context of the Order.”) (footnote omitted and inline citations cleaned up), *vacated*, 436 U.S. 942 (1978). But none of these contained a direct, full examination of presidential authority under the Procurement Act.

²³ Notification of Employee Rights Concerning Payment of Union Dues or Fees, 66 Fed. Reg. 11221 (Feb. 17, 2001).

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seem attenuated,” the D.C. Circuit held that “under *Kahn*’s lenient standards, there is enough of a nexus.” *Chao*, 325 F.3d at 367.

The Supreme Court has had little occasion to review presidential authority under the Procurement Act, and even its most direct consideration is not particularly direct. In *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), the Supreme Court considered the validity of a regulation adjacent to an anti-discrimination executive order; the latter “prohibit[ed] discrimination on the basis of ‘race, creed, color, or national origin’ in federal employment or by Government contractors.” *Id.* at 286 n.1. However, the Court held that, “[f]or purposes of this case, it is not necessary to decide whether [the executive order] as amended is authorized by the [Procurement Act]” or another statute. *Id.* at 304. Nonetheless, the Supreme Court noted in a footnote that “[l]ower courts have suggested that [the Procurement Act] was the authority for predecessors of [the executive order].” *Id.* at 304 n.34 (citing *Farmer*, 329 F.2d 3; *Farkas*, 375 F.2d 629; and *Contractors Assn.*, 442 F.2d 159). The nearest the Court came to evaluating the scope of the Procurement Act was as follows: “The Act explicitly authorizes Executive Orders ‘necessary to effectuate [its] provisions.’ However, nowhere in the Act is there a specific reference to employment discrimination.”²⁴ *Id.* (citation omitted).

In sum, while there is no direct, binding authority on the scope of presidential authority under the Procurement Act, courts have generally landed

²⁴ One could (and the Plaintiff States do, “Just as the Act contains no reference to remedying employment discrimination, it never remotely refers to contractor vaccination or public health more generally”) take this dicta from the Supreme Court as a narrowing instruction for interpretation of the Procurement Act. However, this interpretation is not supported by the rest of the footnote in question, let alone the rest of the opinion. *See, e.g., Chrysler*, 441 U.S. at 308 (“This is not to say that any grant of legislative authority to a federal agency by Congress must be specific before regulations promulgated pursuant to it can be binding What is important is that the reviewing court reasonably be able to conclude that the grant of authority contemplates the regulations issued.”).

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on a “lenient” standard, *Chao*, 325 F.3d at 367, under which the President must demonstrate a “sufficiently close nexus” between the requirements of the executive order and “the values of ‘economy’ and ‘efficiency.’” *Am. Fed.*, 618 F.2d at 792.²⁵

2. Modern Practice

In the years between these cases and now, the Procurement Act has been utilized by multiple presidents in a manner not dissimilar to that of President Biden. Two executive orders in particular merit discussion, one of which a district court reviewed and another of which has not been squarely presented for judicial review.

The first, Executive Order 13465, was issued by President George W. Bush.²⁶ The Order mandated that all federal contractors “agree to use an electronic employment eligibility verification system ... to verify the employment eligibility of: (i) all persons hired during the contract term ... to perform employment duties within the United States; and (ii) all persons assigned by the contractor to perform work within the United States on the Federal

²⁵ See also *Liberty Mut. Ins. Co. v. Friedman*, 639 F.2d 164, 170 (4th Cir. 1981) (“Assuming, without deciding, that the Procurement Act does provide constitutional authorization for some applications of Executive Order 11,246, we conclude that, in any event, the authorization could validly extend no farther than to those applications satisfying the nexus test used in *Contractors Association* and *Kahn*. Applying that test here, we are satisfied that it is not met.”).

However, this Court does not today determine whether or not the “close nexus” test is the proper test for evaluating the lawfulness of executive orders under the Procurement Act. The Eleventh Circuit has made a compelling case that the text and structure of the Procurement Act are inconsistent with this test, see *Georgia v. President of the United States*, No. 21-14269, 2022 WL 3703822 at *8-11 (11th Cir. 2022). In any case, such a determination is not necessary for resolution of the case before us.

²⁶ Amending Executive Order 12989, as Amended, 73 Fed. Reg. 33285 (June 6, 2008).

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contract.”²⁷ The Chamber of Commerce of the United States of America, among others, brought suit in the District Court of Maryland to challenge the legality of the executive order and its implementing documents. *Chamber of Com. of U.S. v. Napolitano*, 648 F. Supp. 2d 726 (D. Md. 2009). Finding that “President Bush explained how requiring contractors to use E-Verify would promote efficiency and economy in procurement,” the court held that the order was consistent with the Procurement Act and noted that “[t]he President and his Administration are in a better position than this Court to make such determinations.” *Id.* at 738.²⁸

More recently, President Barack Obama issued Executive Order 13706, by which he sought “to increase efficiency and cost savings in the work performed by parties that contract with the Federal Government by ensuring that employees on those contracts can earn up to 7 days or more of paid sick leave annually, including paid leave allowing for family care.”²⁹ The President justified the order by stating: “[p]roviding access to paid sick leave will improve the health and performance of employees of Federal contractors and bring benefits packages at Federal contractors in line with model employers, ensuring that they remain competitive employers These savings and quality improvements will lead to improved economy and efficiency in

²⁷ *Id.* at 33286.

²⁸ It appears that the parties stipulated to dismissal before the Fourth Circuit could hear the case. See *Chamber of Com. of U.S. v. Napolitano*, No. 8-CV-3444 docket entry 60 (D. Md. 2009).

²⁹ Establishing Paid Sick Leave for Federal Contractors, 80 Fed. Reg. 54697 (Sep. 7, 2015).

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Government procurement.”³⁰ However, it appears that the order was never challenged in federal court, with only passing references present in the case law.³¹

3. *Limitations*

The “close nexus” test combined with appropriate deference to presidential determinations leaves the President with nearly unlimited authority to introduce requirements into federal contracts. Hypothetically, the President could mandate that all employees of federal contractors reduce their BMI below a certain number on the theory that obesity is a primary contributor to unhealthiness and absenteeism. Under the Government’s theory of the case, the only practical limit on presidential authority in this sphere is the executive’s ability to tie policy priorities to a notion of economy or efficiency. To an extent, this is borne out by the statutory text. The statute introduces no serious limit on the President’s authority and, in fact, places discernment explicitly in the President’s hands: “[t]he President may prescribe policies and directives that *the President considers necessary* to carry out this subtitle.”³²

³⁰ *Id.*

³¹ See *Hurst v. Wilkie*, No. 19-CV-0540, 2021 WL 1534471, at *2 (D. N.M. Apr. 19, 2021) (“Under EO 13706, federal contractors must provide personnel with a specified minimum amount of paid sick leave, vacation days, and holidays”), *Glocoms, Inc. v. United States*, 149 Fed. Cl. 725, 734 (2020) (“Glocoms argues that Coastal’s quotation is not technically acceptable, because the [terms] would violate ... Executive Order 13706. ... But, even if true, the Court agrees with the government that such compliance issues are matters of contract administration that fall beyond the Court’s bid protest jurisdiction.”), and *Ne. Illinois Reg’l Commuter Rail Corp. v. Int’l Ass’n of Sheet Metal, Air, Rail, & Transportation Workers - Transportation Div.*, 578 F. Supp. 3d 985, 993 (N.D. Ill. 2022) (“Under the circumstances, the Court cannot say that Metra’s noncompliance with Executive Order 13706 amounts to evidence that it is not, or does not consider itself to be, a federal contractor.”)

³² 40 U.S.C. § 121 (emphasis added).

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It bears considering, therefore, whether there are other extra-statutory limitations on the President's authority under the Procurement Act. The district court found one such limitation in the form of the Tenth Amendment. The President's authority is undoubtedly circumscribed by the bounds of the Constitution. President Biden could not, for example, require that all federal contractors be Catholic.³³ But given the Supreme Court's general admonition to avoid finding constitutional problems where unnecessary, *see Harmon v. Brucker*, 355 U.S. 579, 581 (1958) (“[i]n keeping with our duty to avoid deciding constitutional questions presented unless essential to proper disposition of a case, we look first to petitioners' nonconstitutional claim”), and given the existence of another potential limitation by which this case may be decided, this Court does not address the Tenth Amendment argument today.

Another theoretical limitation suggested but not explored in the case law is the notion that market forces will prevent overreach. If private corporations and individuals believe this mandate to be a bridge too far, they can choose not to contract with the federal government. After all, “no one has a right to a Government contract.” *Kahn*, 618 F.2d at 794. However, this argument does not withstand serious inquiry; the federal government is no ordinary market participant subject to the same whims of free enterprise as others, if for no other reason than its aims are greater than profit.³⁴ To its credit, the Government does not advance this argument.

³³ *See* U.S. CONST. amend. I.

³⁴ *See* U.S. CONST. pmbl. (“We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”).

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When considering the related vaccination mandate imposed by the Occupational Safety and Health Administration (“OSHA”), the Supreme Court suggested that another limitation may apply. The Court ruled that the OSHA mandate was “no ‘everyday exercise of federal power.’” *NFIB*, 142 S. Ct. at 665 (2022) (quoting *In re MCP No. 165*, 20 F.4th at 272 (Sutton, C. J., dissenting)). More than that, the Court continued, “[i]t is instead a significant encroachment into the lives—and health—of a vast number of employees. ‘We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance.’ There can be little doubt that OSHA’s mandate qualifies as an exercise of such authority.” *Id.* (quoting *Alabama Assn. of Realtors v. Department of Health and Human Servs.*, 141 S. Ct. 2485, 2489, (2021) (*per curiam*)). OSHA’s mandate may have been larger in scope than the mandate at issue in this case, but not perhaps by as much as may be expected. The Department of Labor has suggested that roughly “one-fifth of the entire U.S. Labor Force” is “employed by federal contractors.”³⁵ The guidance document issued by the Safer Federal Workforce Task Force suggests that the vaccination requirement applies to “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. This includes employees of covered contractors who are not themselves working on or in connection with a covered contract.”³⁶

This so-called “Major Questions Doctrine” – that is, that “[w]e expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance,” *id.* – serves as a bound on Presidential authority. The Government submits that the Major Questions

³⁵ Dep’t of Labor, History of Executive Order 11246, perma.cc/6ZXJ-WGR.

³⁶ COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors at 3-4.

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Doctrine does not apply here as it applies only to interpretations of statutes that result in “enormous and transformative expansion[s] in ... regulatory authority without clear congressional authorization.” *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 324, (2014). As this federal contractors mandate is neither an “enormous and transformative expansion” nor an exercise of “regulatory authority,” the Government suggests, the major questions doctrine is inapplicable. Instead, the Government would have us say that as this is an exercise of the President’s “proprietary authority, as purchaser of services,” it is not subject to the major questions doctrine. The Government suggests this is more akin to the vaccine mandate imposed on Medicare and Medicaid facilities than the OSHA mandate. The Supreme Court upheld the former in a *per curiam* decision that did not mention the major questions doctrine. *Biden v. Missouri*, 142 S. Ct. 647 (2022) (*per curiam*). There, the Court held that “a vaccination requirement under these circumstances is a straightforward and predictable example of the ‘health and safety’ regulations that Congress has authorized the Secretary to impose.” *Missouri*, 142 S. Ct. at 653.

In stark contrast, this federal contractor mandate is neither a straightforward nor predictable example of procurement regulations authorized by Congress to promote “economy and efficiency.” The Government notes that “large numbers of private employers—including AT&T, Bank of America, Google, Johnson & Johnson, and Microsoft—have established vaccination requirements for their workforces.” At issue in this case, though, is not whether the federal government may (analogously) force its employees to get vaccinated against COVID-19,³⁷ but whether the federal government may place such a requirement in its contracts with third parties, including the

³⁷ That issue is being considered by our court *en banc* in *Feds for Medical Freedom v. Biden*, Case No. 22-40043.

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Plaintiff States. The Government has provided no examples of such contracts in the private sector.

Nor is the Government's analogy to the mandate upheld as to employees of Medicare and Medicaid facilities apt. The decision in *Missouri* rested in part on ordinary practices: "Vaccination requirements are a common feature of the provision of healthcare in America: Healthcare workers around the country are ordinarily required to be vaccinated for diseases such as hepatitis B, influenza, and measles, mumps, and rubella." *Missouri*, 142 S. Ct. at 653. The Supreme Court likewise emphasized "the longstanding practice of Health and Human Services in implementing the relevant statutory authorities." *Id.* at 652. Indeed, as the D.C. Circuit recognized in *Kahn*, "the President's view of his own authority under a statute is not controlling, but when that view has been acted upon over a substantial period of time without eliciting congressional reversal, it is 'entitled to great respect.'" *Kahn*, 618 F.2d at 790 (quoting *Bd. of Governors of Fed. Rsv. Sys. v. First Lincolnwood Corp.*, 439 U.S. 234, 248, (1978)). And as this Court has elsewhere noted, "where there exists a longstanding judicial construction, 'Congress is presumed to be aware of the interpretation ... and to adopt that interpretation [if] it reenacts that statute without change.'" *Silva-Trevino v. Holder*, 742 F.3d 197, 202 (5th Cir. 2014) (alterations in original) (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)).

At best, it is questionable, however, whether the historical record supports the Government's contention that this mandate is within the longstanding practice and construction of the President's Procurement Act authority. As the D.C. Circuit noted in the first major Procurement Act case, "the early anti-discrimination orders were issued under the President's war powers and special wartime legislation." *Kahn*, 618 F.2d at 790. It was not until the 2001 executive order at issue in *Chao* that it appears Presidents routinely and explicitly relied upon Procurement Act authority to issue social-

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policy oriented procurement orders to contracting entities. *See Chao*, 325 F.3d at 367.

Even assuming, *arguendo*, that as a matter of historical practice and judicial construction that the Procurement Act has been used to advance policy positions, this argument fails to account for the dramatic difference between this mandate and other exercises of Procurement Act authority. The nearest analogue to this mandate is President Obama’s Paid Sick Leave executive order, which sought to impose a sick leave requirement on federal contractors in order to “improve the health and performance of employees of Federal contractors and bring benefits packages at Federal contractors in line with model employers, ensuring that they remain competitive employers in the search for dedicated and talented employees.”³⁸ Again, though, the Sick Leave order was never considered by a federal court. More significantly, a vaccine mandate is “strikingly unlike” the sick leave policy or any other Procurement Act exercises for several reasons, not least of which is that “[a] vaccination ... ‘cannot be undone at the end of the workday.’” *NFIB*, 142 S. Ct. at 665 (quoting *In re MCP*, 20 F.4th at 274) (Sutton, C. J., dissenting)). Most significantly, unlike the non-discrimination, E-Verify, *Beck* rights, and sick leave orders, which govern the conduct of *employers*, the vaccine mandate purports to govern the conduct of *employees* – and more than their conduct, purports to govern their individual healthcare decisions.³⁹

³⁸ Establishing Paid Sick Leave for Federal Contractors, 80 Fed. Reg. 54697.

³⁹ The dissent argues that there is no real distinction between this executive order and, for example, the one relating to E-Verify: “Neither of these necessarily govern the conduct of employees, or ... they both [do.]” To be clear: unlike the E-Verify order, this vaccine mandate requires employees to take an action not limited temporally or physically to their place of employment and unrelated to any statutory scheme – that is, to get vaccinated or lose their job. No such action is required by employees under the E-Verify order. The E-Verify order also tracks with a statutory scheme – namely, the Illegal

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To allow this mandate to remain in place would be to ratify an “enormous and transformative expansion in” the President’s power under the Procurement Act. *Util. Air Regul. Grp.*, 573 U.S. at 324. Under Supreme Court precedent, this Court cannot permit such a mandate to remain in place absent a clear statement by Congress that it wishes to endow the presidency with such power.⁴⁰

4. Effectively Boundless Scope

Imagine that the President had issued an alternative but similar executive order. In this order, to “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,”⁴¹ the President instructed executive agencies to incorporate a clause into all contracts specifying that all contractors and subcontractors “comply with all guidance for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force.”⁴² This hypothetical order, however, would instruct the Task Force to issue guidance relating to the dangers of tobacco, and this Task Force would issue guidance requiring that all covered contractors

Immigration Reform and Immigrant Responsibility Act of 1996 and related immigration and work authorization laws. Pub. L. No. 104–208, 110 Stat. 545.

⁴⁰ The dissent takes issue with our analysis of the major questions doctrine, suggesting that it “is only invoked when there are potential anti-delegation issues to agencies” rather than the President. However, the Supreme Court has never explicitly limited the major questions doctrine to delegations to agencies rather than to the President. As Article II of the Constitution “makes a single President responsible for the actions of the Executive Branch,” *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2203 (2020) (quoting *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 496-97 (2010)), delegations to the President and delegations to an agency should be treated the same under the major questions doctrine.

⁴¹ 86 Fed. Reg. at 50985.

⁴² *Id.*

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ensure that all covered contractor employees refrain from smoking or from being in the presence of smoking. As we now know better than ever, smoking and exposure to second-hand smoke contribute to significant and lasting health issues. It is no stretch at all to say that contractual requirements that all employees of federal contractors refrain from smoking or being in the presence of smoking at all times would result in a gain to economy and efficiency in federal contracting.⁴³ Nor would it be much different than this mandate, which likewise makes demands of individuals inside and outside the workplace. This order could certainly pass the “close nexus” test already discussed, and yet it would undoubtedly strike reasonable minds as too great a stretch under the Procurement Act.

At oral argument, the Government dismissed such hypotheticals as outlandish and suggested that they would not be upheld in a court of law. We agree that no court would uphold them, but the Government provided no dividing line by which a court might rule out the one and uphold the other. Though the government suggests that the “close nexus” test provides such a line, respectfully, that line is no line at all. The President would have little difficulty, under the close nexus test, finding a close relationship between economy and efficiency and a requirement that all federal contractors certify that their employees take daily vitamins, live in smoke-free homes, exercise three times a week, or even, at the extremity, take birth control in order to reduce absenteeism relating to childbirth and care.⁴⁴

⁴³ It is this element of the hypothetical order that makes it analogous to the case at hand and which the dissent misses. Smoking may be prohibited at federal facilities, but what about at the homes of federal employees? Likewise, this “contractor” mandate places demands on individuals employed by federal contractors in and out of the workplace.

⁴⁴ The Government suggested at oral argument that this last, hyperbolic hypothetical may run into un-elaborated independent constitutional issues. Whether or not this is so, the point remains that the close nexus test – the only non-constitutional limitation

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The difference here, the Government suggested, is at least in part that we are facing a “once-in-a-century” pandemic. The Constitution is not abrogated in a pandemic. Nor, as the Supreme Court’s COVID-related decisions make clear, are our legal principles of statutory interpretation. *See NFIB*, 142 S. Ct. at 665. And nor, for that matter, is Congress, who could have drafted vaccination-related laws or even made clear its intent regarding the President’s proprietary authority in federal contracting or employing. Congress has also provided in certain laws for special and extraordinary powers to be placed in the hands of the President.⁴⁵ No such provision exists in the Procurement Act to justify this intrusive command. The pandemic, challenging as it has been for the President, the legislature, the courts, and especially the populace, does not justify such an enormous and transformative expansion of presidential authority.

As to the distinction between regulatory and non-regulatory power, on which the Government relied in its briefing to distinguish this action from the OSHA mandate, it is here a distinction without a difference. Certainly, “the Government has a much freer hand in dealing ‘with citizen employees [and government contractors] than it does when it brings its sovereign power to bear on citizens at large.’” *NASA v. Nelson*, 562 U.S. 134, 148 (2011) (quoting *Engquist v. Oregon Dept. of Agriculture*, 553 U.S. 591, 598 (2008)). And were this mandate to apply only to federal contractors on, for example, federal job sites, this distinction may carry more weight. As it is, though, the

on Procurement Act authority that the Government recognized – would not in itself prevent the President from issuing such an order.

⁴⁵ *See, e.g.*, 42 U.S.C. § 247d (“If the Secretary determines, after consultation with such public health officials as may be necessary, that—(1) a disease or disorder presents a public health emergency; or (2) a public health emergency, including significant outbreaks of infectious diseases or bioterrorist attacks, otherwise exists, the Secretary may take such action as may be appropriate to respond to the public health emergency”).

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mandate covers *any and all* employees – *full-time or part-time* – who work for a contractor at any location “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.”⁴⁶ “This includes employees of covered contractors who are not themselves working on or in connection with a covered contract.”⁴⁷ The Government seeks to paint this mandate as “the Government act[ing], not as a regulator, but as the manager of its internal affairs.” *NASA*, 562 U.S. at 153. The vast scope of its mandate belies that contention. There is little internal about a mandate which encompasses even employees whose sole connection to a federal contract is a cubicle in the same building as an employee working “in connection with”⁴⁸ a federal contract – especially as the Supreme Court has called the phrase “in connection with” “essentially ‘indeterminat[e]’ because connections, like relations, ‘stop nowhere.’” *Maracich v. Spears*, 570 U.S. 48, 59 (2013) (quoting *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (internal quotation marks omitted)).

This is not an exercise in determining what type of power is being used by evaluating “practical effects” of the order, as the Government suggests. Nor are we blind to the effect of political accountability on a president’s decisions. By its own terms, this mandate and its implementing documents require immense action not just from internal contract employees but also from an all-but-boundless number of employees whose employer has at least one federal contract. No matter what else is or is not regulatory, this certainly is.

⁴⁶ COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors at 4.

⁴⁷ *Id.*

⁴⁸ COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors at 3.

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5. Conclusion

“When an agency claims to discover in a long-extant statute an unheralded power to regulate ‘a significant portion of the American economy,’ we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’”⁴⁹ *Util. Air Regul. Grp.*, 573 U.S. at 324 (quoting *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 123 (2000)). As the Government’s brief makes clear, questions surrounding the vaccine and the pandemic generally are undoubtedly of “vast economic and political significance.” *Id.* Congress has not spoken clearly to authorize such a dramatic shift in the exercise of the President’s power under the Procurement Act. Nor are historical exercises of that power sufficient to demonstrate a long-standing understanding that the Procurement Act could be used in this way. The President’s use of procurement regulations to reach through an employing contractor to force obligations on *individual employees* is truly unprecedented. As such, Executive Order 14042 is unlawful, and the Plaintiff States have consequently demonstrated a strong likelihood of success on the merits.⁵⁰

B. Equitable Factors

1. Irreparable Harm

The district court found that the Plaintiff States had carried their burden to show irreparable harm in the form of “nonrecoverable compliance costs,” *Texas v. EPA*, 829 F.3d at 433 (quoting *Thunder Basin Coal*, 510 U.S.

⁴⁹ *Id.* (quoting *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 123 (2000)).

⁵⁰ As it need not do so, the Court takes no stance today on the procedural validity of the implementing documents.

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at 221), such as “diversion of resources necessary to identify covered employees and manage their vaccination status.” The district court also identified as irreparable harm the choice the states would have to make if an employee refused to get vaccinated against COVID-19: a choice between “releasing the employee and all accompanying efficiency, institutional memory, and operational know-how or foregoing federal contracts.” A showing of irreparable harm requires a demonstration of “harm for which there is no adequate remedy at law.” *Daniels Health Scis., L.L.C. v. Vascular Health Scis., L.L.C.*, 710 F.3d 579, 585 (5th Cir. 2013) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). As the district court identified, “complying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs.” *Texas v. EPA*, 829 F.3d at 433 (quoting *Thunder Basin Coal*, 510 U.S. at 220–21 (alteration in original)).⁵¹ Such harm, however, must be more than “speculative;” “there must be more than an unfounded fear on the part of the applicant.” *Texas v. EPA*, 829 F.3d at 433 (quoting *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985)).

The Government suggests, first, that to hold compliance costs as irreparable harm “would encompass every case in which a litigant complains of a new contract requirement” and thereby impermissibly broaden the scope of irreparable harm. But not all compliance costs are “nonrecoverable”; to the extent that compliance costs are recoverable, they are not irreparable. The loss of an employee and the associated costs – monetary and otherwise

⁵¹ In response to this statement, the Government cites two cases from other circuits for the proposition that “ordinary compliance costs are typically insufficient to constitute irreparable harm.” *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005) (citing *Am. Hosp. Ass’n v. Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980)). Although this quote appears to apply only to recoverable compliance costs, we are bound regardless by *Texas v. EPA* and not *Freedom Holdings*.

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– are nonrecoverable costs. Should an employee be fired and a new employee hired due to this mandate, it is undisputed that the Plaintiff States would be harmed and would have no recourse for this harm. The Government’s second contention also serves as a sort of retort to their own argument: “Plaintiffs similarly failed to introduce evidence substantiating their claim that the Executive Order will cause mass disruptions to their labor forces.”⁵² The Government points to a study which noted that “only ‘1% of all adults ... say they left a job because an employer required them to get vaccinated.’”⁵³ The district court appears to have credited the testimony of at least one Louisiana employee that she expected the State to fire her alongside as many as 96 other state employees in her department after each of them had a religious accommodation request denied. In any case, as this Circuit has previously noted, “[w]hen determining whether injury is irreparable, ‘it is not so much the magnitude but the irreparability that counts.’” *Texas v. EPA*, 829 F.3d at 433–34 (quoting *Enter. Int’l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472 (5th Cir. 1985)). Even if the Government is right and only one percent⁵⁴ of, for example, the state of Louisiana’s employees left their job because of this mandate, Louisiana alone would lose nearly 700

⁵² *Id.* at 48.

⁵³ *Id.* at 49 (quoting Kaiser Family Found., *The KFF COVID-19 Vaccine Monitor* (Oct. 28, 2021), <https://perma.cc/ENL7-E7HE>).

⁵⁴ To be clear, the report the Government cites only states that one percent of *all* adults left their job due to a workplace vaccine mandate. This number does not account for the figure elsewhere in the same study which noted that only 25% of all employers had a vaccine mandate when the study was published. Nor does it account for the statistic also compiled in the study that when faced with a choice between (a) getting vaccinated, (b) undergoing weekly COVID-19 testing (an option not likely available under this mandate), or (c) leaving their job, only 11% of unvaccinated employees said they would get vaccinated, while a full 37% said they would leave their job. *See* Kaiser Family Found., *The KFF COVID-19 Vaccine Monitor* (Oct. 28, 2021), <https://perma.cc/ENL7-E7HE>.

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employees.⁵⁵ Obviously, this Court cannot accurately predict how many employees would be fired were this injunction to be lifted. Under our precedent, it is sufficient to show that even under the Government’s best theory of the case, enough employees would likely leave as to constitute “more than de minimis” harm, *Enter. Int’l*, 762 F.2d at 472 (quoting *Canal Authority v. Callaway*, 489 F.2d 567, 574 (5th Cir. 1974)), at which point “‘it is not so much the magnitude but the irreparability that counts,’” *Texas v. EPA*, 829 F.3d at 433–34 (quoting *Enter. Int’l*, 762 F.2d at 472).

2. Balance of Harms and the Public Interest

The Government summarily dismisses the district court’s analysis of the balance of harms and the public interest, noting that “[d]elaying implementation of the Executive Order will lead to productivity losses in the performance of federal contracts from schedule delays as well as leave and health care costs for workers who are sick, isolating, or quarantined.” As “the virus continues to pose complex and dynamic challenges to the delivery of services to the American people,” the Government continued, “[h]ow to address the evolving challenges the virus poses ... is a question best left to the President ... not to unelected courts.” In the eyes of the President, however: “The pandemic is over. If you notice, no one’s wearing masks. Everybody seems to be in pretty good shape.”⁵⁶ Regardless, we have noted before that “[t]here is generally no public interest in the perpetuation of unlawful agency

⁵⁵ Byron P. Decoteau, Jr., *State Civil Service Annual Report: Fiscal Year 2020-2021*, LOUISIANA STATE CIVIL SERVICE AGENCY (November 3, 2021), https://www.civilservice.louisiana.gov/files/publications/annual_reports/AnnualReport20-21.pdf (noting that “[a]t the close of Fiscal Year 2020-2021, Louisiana state government employed 69,906 employees.”).

⁵⁶ *President Joe Biden: The 2022 60 Minutes Interview*, (Sep. 18, 2022), <https://www.cbsnews.com/news/president-joe-biden-60-minutes-interview-transcript-2022-09-18/>.

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action.’” *State v. Biden*, 10 F.4th 538, 560 (5th Cir. 2021) (quoting *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016)). And, as with the OSHA mandate, “any abstract ‘harm’ a stay might cause the Agency 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. The balance of harms and the public interest favors an injunction.

V. Conclusion

We do not, and cannot, rule on the efficacy of any vaccine, the wisdom of the President’s action, or even whether or not this action would, in fact, increase economy and efficiency in federal contracting. Today, we are asked, where Congress has not authorized the issuance of this mandate, whether the President may nonetheless exercise this power. We hold that he may not. Accordingly, we AFFIRM the district court’s grant of an injunction.

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JAMES E. GRAVES, JR., *Circuit Judge*, dissenting:

The majority conjures up the most extreme and unlikely scenarios to deny the President his authority under the Procurement Act. But it is important to ask where the Procurement Act began. It began with anti-discrimination requirements, *See, e.g.*, Exec. Order No. 11,246, 30 Fed. Reg. 12,319, 12,319 (Sept. 24, 1965) (forbidding civilian contractors from discriminating on the basis of race, creed, color, or national origin). It is also indisputable that it allowed the President to require contractors to inform their employees that they have a right to not pay union dues. Exec. Order No. 12,800, 57 Fed. Reg. 12,985, 12,985 (Apr. 13, 1992). It allowed for a president to require federal contractors to use the E-Verify system to verify the lawful immigration status of employees. Exec. Order No. 13,465, 73 Fed. Reg. 33,285, 33,285 (June 6, 2008). And it allowed a requirement that federal contractors provide their employees with paid sick leave. Exec. Order No. 13,706, 80 Fed. Reg. 54,697, 54,697 (Sept. 7, 2015). All these executive orders were issued pursuant to the president's authority under the Procurement Act. And all were either ruled constitutional, or not even challenged in court. *See, e.g., Contractors Ass'n of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159, 170 (3d Cir. 1971) (upholding anti-discrimination orders); *Farkas v. Texas Instrument, Inc.*, 375 F.2d 629, 632 n.1 (5th Cir. 1967) (same); *UAW-Labor Employment & Training Corp. v. Chao*, 325 F.3d 360, 366 (D.C. Cir. 2003) (upholding union notices); *Chamber of Commerce v. Napolitano*, 648 F. Supp. 2d 726, 738 (D. Md. 2009) (upholding the E-Verify System).¹ Because the executive order here is consistent with what is allowed under the Procurement Act, I respectfully dissent.

¹ *See also* Justin C. Van Orsdol, *An Administrative Solution to the Student Loan Debt Crisis*, 80 Wash. & Lee L. Rev. Online 35, 51 & n.59 (2022) (discussing unsuccessful challenges to executive orders on adopting affirmative action plans).

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I.

The Procurement Act states that “[t]he President may prescribe policies and directives that the President considers necessary” to ensure the “economical and efficient administration and completion of Federal Government contracts.” 40 U.S.C. § 121. The Procurement Act gives the President both “necessary flexibility and broad-ranging authority” in setting procurement policies reasonably related to the statute’s aims, *UAW-Labor Emp’t & Training Corp. v. Chao*, 325 F.3d 360, 366 (D.C. Cir. 2003) (citation omitted), including policies that in the President’s judgment will improve the economy and efficiency of federal contractors’ operations. Acting as Chief Operating Officer of the Executive Branch, the President has the authority in making judgments about how best to promote economy and efficiency in the federal government’s contracting and procurement.

The majority tries to make a distinction between this use of the Procurement Act and all the others (each upheld by federal courts). The majority argues that “[m]ost significantly, unlike the non-discrimination, E-Verify, *Beck* rights, and sick leave orders, which govern the conduct of *employers*, the vaccine mandate purports to govern the conduct of *employees* – and more than their conduct, purports to govern their individual healthcare decisions.” But this is not quite true. For example, the E-Verify system mandated that federal contractors use E-Verify to electronically verify the employment eligibility of employees working under covered federal contracts. Exec. Order No. 13,465, 73 Fed. Reg. 33,285, 33,285 (June 6, 2008). In turn, the COVID-19 Procurement Act Order directs federal agencies to include in certain contracts a clause requiring covered contractor employees to follow COVID-19 safety protocols, which include vaccination requirements. Exec. Order No. 14,042. 86 Fed. Reg. 50,985 (Sept. 14, 2021). Neither of these necessarily govern the conduct of employees, or, taking the majority’s logic, they both govern the conduct of employees. Both Executive

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Orders require something of employers, namely that the employer use the E-Verify system to verify the immigration eligibility of its workers, and that the employer uses a system to verify the vaccine eligibility of its workers. Both necessarily touch the employees, namely that employees working for federal contractors must be verified under the E-Verify system or be subject to termination, and that employees working for federal contractors must be verified as being COVID-19 vaccine compliant or be subject to termination. These two executive orders are almost indistinguishable regarding how they affect federal contract workers.²

II.

In *Am. Fed'n of Lab. & Cong. of Indus. Organizations v. Kahn*, 618 F.2d 784, 790 (D.C. Cir. 1979) (en banc), a case analyzing a challenge to an executive order which was issued under the Procurement Act, the District of Columbia Circuit Court held that Section 205(a)'s language "recognizes that the Government generally must have some flexibility to seek the greatest advantage in various situations." *Id.* at 788–89. The court continued, "[e]conomy' 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. And in *Kahn*, the court recognized that "there may be occasional instances where a low bidder will not be awarded a contract." *Id.* at 793. That was acceptable for the court because there was "no basis for rejecting the President's conclusion that any higher costs incurred in those transactions will be more than offset by the

² The majority distinguishes the contractor vaccine mandate, in part, because it is "unrelated to any statutory scheme." Setting aside the many public health statutory schemes, a plain reading of the Procurement Act makes it clear that the action does not have to be tied to any outside statutory scheme. If that were so, Congress would have mandated that requirement.

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advantages gained in negotiated contracts and in those cases where the lowest bidder is in compliance with the voluntary standards and his bid is lower than it would have been in the absence of standards.” *Id.* This was permitted because “it is important to consider the procurement compliance program in its real-world setting.” *Id.* at 792.

Courts after *Kahn* consistently upheld the President’s broad authority under the Procurement Act. In *UAW-Labor Employment & Training Corp. v. Chao*, 325 F.3d 360 (D.C. Cir. 2003), President George H.W. Bush’s executive order “sought to connect its requirements to economy and efficiency as follows”

[w]hen 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.

Id. at 366. The court was clearly skeptical of this reasoning; “[t]he link may seem attenuated (especially since unions already have a duty to inform employees of these rights), and indeed one can with a straight face advance an argument claiming opposite effects or no effects at all.” *Id.* at 366–67. Yet the court recognized *Kahn*’s “lenient standards” and found “enough of a nexus.” *Id.* at 367.

The majority notes that some of “the executive orders promulgating these [anti-discrimination] requirements did not themselves cite the Procurement Act as the source of their authority.” Rather, they contend, “[t]hat reliance was instead a creature of case law.” But Executive Orders are not required to lay out the specific statute that the President’s authority falls under. For example, Executive Order No. 11,246, 30 Fed. Reg. 12,319,

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12,319 (Sept. 24, 1965) bases its authority “[u]nder and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States. . . .” No court has ever held that the President’s executive order lacks certain “magic words” which transforms an otherwise legal executive order into an illegal one. Regardless, as the majority concedes, both *Farmer v. Phila. Elec. Co.*, 329 F.2d 3 (3d Cir. 1964) and *Farkas v. Texas Instrument, Inc.*, 375 F.2d 629 (5th Cir. 1967)—two cases dealing with anti-discriminatory executive orders—“found (although arguably in dicta) that the Procurement Act authorized the anti-discrimination executive orders.” And as *Kahn* recognized, for the period from 1953 to 1964, only the Procurement Act “could have provided statutory support for the [anti-discrimination] Executive action[s].” 618 F.2d 784 at 790–91. The majority briefly discusses Executive Order No. 13,465, 73 Fed. Reg. 33,285, 33,285 (June 6, 2008) (E-Verify) and Executive Order No. 13,706, 80 Fed. Reg. 54,697, 54,697 (Sept. 7, 2015) (paid sick leave), and concludes that “courts have generally landed on a lenient standard, under which the President must demonstrate a sufficiently close nexus between the requirements of the executive order and the values of economy and efficiency.” (internal citations and quotations omitted). I agree.

III.

The majority seems to anchor its decision on the major question’s doctrine. This reliance, however, is misplaced. The major questions doctrine provides that “[w]e expect Congress to speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’” *Util. Air Regul. Grp. v. EPA (UARG)*, 573 U.S. 302, 324 (2014) (quoting *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)). Additionally, the major questions doctrine has been described as a skepticism of agency interpretations that “would bring about an enormous and transformative expansion in . . . regulatory authority without clear congressional

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authorization.” *Id.* The doctrine requires that an agency “must point to ‘clear congressional authorization’ for the power it claims.” *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (quoting *UARG*, 573 U.S. at 324). As Judge Anderson points out in his concurrence in *Georgia v. President of the United States*,

[w]hile I agree this is a question of major economic and political significance, we are not dealing with delegation to an agency. Instead, the delegation is to the President who does not suffer from the same lack of political accountability that agencies may, particularly when the President acts on a question of economic and political significance. *Cf. Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 513–14, 130 S. Ct. 3138, 3164, 177 L.Ed.2d 706 (2010) (holding that the structure of an independent agency violated the Constitution because the President, “who is accountable to the people for executing the laws,” did not have the ability to hold the independent agency accountable).

46 F.4th 1283, 1308-17 (Anderson, J. concurring/dissenting opinion). It is important to note that the major questions doctrine is only invoked when there are potential anti-delegation issues to agencies, and that is not the situation here. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 513 (2010). Furthermore, as pointed out above, this is not an “enormous and transformative expansion in” regulatory authority, but rather is a standard exercise of the federal government’s *proprietary* authority. Therefore, the injunction cannot be grounded in reasoning under the major question’s doctrine.

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IV.

Regardless, the majority decides that this must be the first executive order under the president's Procurement Act authority to be struck down. Even in doing so, it recognizes that analyzing the text of the statute could lend the President the power to issue the Executive Order in question: "[t]he statute introduces no serious limit on the President's authority and, in fact, places discernment explicitly in the President's hands: '[t]he President may prescribe policies and directives that *the President considers necessary* to carry out this subtitle.'" But, according to the majority, "[i]t bears considering, therefore, whether there are other extra-statutory limitations on the President's authority under the Procurement Act."

It is true that there must be limiting principles to the President's authority under the Procurement Act. But it must be fact specific to the precise issue before the court. When actions taken are in the mainstream of American businesses, that points towards permitting the executive order. Economic factors would prevent the President from handicapping the contractor workforce with extreme contractual terms. If the President attempted to insert into contracts forced abortions, BMI restrictions, or other draconian measures outside the mainstream of American companies, he or she would hear from the people or from Congress. The majority conjures up an example where the President could

instruct the Task Force to issue guidance relating to the dangers of tobacco, and this Task Force would issue guidance requiring that all covered contractors ensure that all covered contractor employees refrain from smoking or from being in the presence of smoking. As we now know better than ever, smoking and exposure to second-hand smoke contribute to significant and lasting health issues. It is no stretch at all to say that contractual

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requirements that all employees of federal contractors refrain from smoking or being in the presence of smoking at all times would result in a gain to economy and efficiency in federal contracting.

The government can and certainly does have the authority to prohibit smoking on federal facilities. *See* 41 C.F.R. § 102-74.315.³ It is simply another example of an Executive Order that curtails the *employees* actions. Just like requiring vaccine mandates, the reason to prohibit smoking while at a federal facility is to prevent dangerous disease from spreading, whether it be COVID or harms from secondhand smoke, which hampers the economy and efficiency of federal contractors' operations.⁴

The majority dismisses the argument that “market forces will prevent overreach.” After all, “no one has a right to a Government contract.” *Kahn*, 618 F.2d at 794. To the majority, “this argument does not withstand serious inquiry; the federal government is no ordinary market participant subject to the same whims of free enterprise as others, if for no other reason than its aims are greater than profit.” (footnote omitted). But it deserves further inquiry. Again, no company has a right to a federal contract. If the company does not want to abide by the clauses of the government contract, the government is not forcing companies to contract with it. And there are reasons to think that the government has *greater* control in designing their contracts than private businesses. Unlike private contracts, the government

³ Note, this regulation was first enacted via Executive Order 13058.

⁴ The majority distinguishes the “smoking” hypothetical because it places “demands on individuals employed by federal contractors in and out of the workplace.” However, getting the vaccine does not require any lasting affirmative or prohibitive activity of the employee outside the workplace like a demand that a worker quits smoking at home.

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has authority to unilaterally terminate a contract for no reason at all. *See* FAR 43.103(b).

Additionally, the largest workforce in the United States—the employees of the federal government—achieved over 97% compliance with the COVID-19 vaccine requirement, with every government agency having at least a 95% compliance rate.⁵ Roughly 40% of employers in the United States have some type of vaccine mandate for their employees.⁶ These include American companies such as AT&T, Bank of America, Google, Johnson & Johnson, and Microsoft. The largest airline in the United States, American Airlines, achieved a 99.7% vaccination rate and fired only 232 employees out of its 67,000 U.S. based employees.⁷ Some agencies also require employees *and* contractors be vaccinated for diseases such as influenza.⁸ And other Department of Defense contractors are required to get

⁵ [Update on Implementation of COVID-19 Vaccination Requirement for Federal Employees, The White House \(Dec. 9, 2021\)](https://www.whitehouse.gov/omb/briefing-room/2021/12/09/update-on-implementation-of-covid-%E2%81%A019-vaccination-requirement-for-federal-employees/), <https://www.whitehouse.gov/omb/briefing-room/2021/12/09/update-on-implementation-of-covid-%E2%81%A019-vaccination-requirement-for-federal-employees/>.

⁶ Robert Iafolla, [Vaccine Mandates at Work Part of ‘New Normal,’ Employers Say, Bloomberg Law \(May 3, 2022 at 11:01 PM\)](https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/X42AKRF4000000?bna_news_filter=daily-labor-report), https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/X42AKRF4000000?bna_news_filter=daily-labor-report.

⁷ Jemima McEvoy, [United Airlines Firing 232 Employees Who Refused Covid Vaccine, CEO Says, Forbes \(April 21, 2022 at 9:32 AM\)](https://www.forbes.com/sites/jemimamcevoy/2021/10/13/united-airlines-firing-232-employees-who-refused-covid-vaccine-ceo-says/?sh=5f1f8c4399), <https://www.forbes.com/sites/jemimamcevoy/2021/10/13/united-airlines-firing-232-employees-who-refused-covid-vaccine-ceo-says/?sh=5f1f8c4399>.

⁸ James N. Stewart, [DoD Immunization Program, Office of the Under Secretary of Defense for Personnel and Readiness \(July 23, 2019\)](https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/620502p.pdf?ver=2019-07-23-085404-617), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/620502p.pdf?ver=2019-07-23-085404-617> (“For HCP working under contract to any DoD Component, seasonal influenza immunizations may be provided by the DoD medical treatment facilities, if stated in the contract agreement. Otherwise, contracting companies will provide influenza vaccines to their employees.”)

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vaccines for overseas assignments. *See, e.g., Griffin v. Sec’y of Health & Hum. Servs.*, No. 13-280V, 2014 WL 1653427, at *2 (Fed. Cl. Apr. 4, 2014), *aff’d*, 602 F. App’x 528 (Fed. Cir. 2015). While the government does not exist to make a profit, it does favor the “economical and efficient administration and completion of Federal Government contracts.” 40 U.S.C. § 121. There is an “expressed federal policy of selecting the lowest responsible bidder.” *Student Loan Servicing All. v. D.C.*, 351 F. Supp. 3d 26, 62 (D.D.C. 2018) (quoting *Leslie Miller, Inc. v. State of Ark.*, 352 U.S. 187, 190 (1956)). There is no compelling reason why federal government contractors should be treated differently than private businesses in this situation.

V.

The Procurement Act authorizes the President’s action in issuing Executive Order 14042. Therefore, the States fail to establish a substantial likelihood of success on the merits. The district court abused its discretion in granting the injunction.

Even if the States showed a likelihood of success on the merits, there is no irreparable harm. A showing of irreparable harm requires a demonstration of “harm for which there is no adequate remedy at law.” *Daniels Health Scis., L.L.C. v. Vascular Health Scis., L.L.C.*, 710 F.3d 579, 585 (5th Cir. 2013) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). The district court identified irreparable harm as the choice the states would have to make if an employee refused to get vaccinated: a choice between “releasing the employee and all accompanying efficiency, institutional memory, and operational know-how or foregoing federal contracts.” The loss of an employee is typically not a nonrecoverable cost, save for certain types of contracts where institutional knowledge might be necessary, such as large research and development contracts. More importantly, the monetary cost would be recoverable. First, this Executive

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Order does not apply to any existing contracts. Any future contract modification here would be a bilateral modification under FAR 43.103(a)(1), which requires “negotiable equitable adjustments resulting from the issuance of a change order.” To provide another example, in the various government shutdowns in the last decade, the federal government had to suspend countless contracts and was forced to negotiate different prices to recall contractors back after the shutdown ended.⁹ And similar actions occurred when President Obama issued Executive Order 13658 to establish the minimum wage increases; the federal government simply renegotiated the contract prices. Therefore, the idea that the States show irreparable harm in the form of “nonrecoverable compliance costs” is not availing. Accordingly, there is no irreparable harm.

“[T]he irreparable harm and the public interest inquiries are intertwined, and we consider them jointly.” *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 623 (5th Cir. 1985). Delaying the implementation of the Executive Order will lead to widespread economic harm in the economical and efficient administration and completion of federal government contracts. Absenteeism will affect the cost and progress of all federal contracts, regardless of the type. Increased delays necessarily equal increased costs to the government because it either delays a program or delays other contractors. Absenteeism from contractors with COVID-19 causes delays or non-performance in government contracts, which will cost the government—and therefore citizens and taxpayers—unnecessary time

⁹ David H. Carpenter, [How a Government Shutdown Affects Government Contracts](https://www.google.com/url?sa=i&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=0CAQQw7AJahcKEwjQx5GntKT7AhUAAAAAHQAAAAAQAg&url=https%3A%2F%2Ffas.org%2Fsgp%2Fcrs%2Fmisc%2FLSB10243.pdf&psig=AOvVaw0bbpShAyjKpUV2qEJejsvY&ust=1668196910139790), Congressional Research Service (Jan. 10, 2019) <https://www.google.com/url?sa=i&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=0CAQQw7AJahcKEwjQx5GntKT7AhUAAAAAHQAAAAAQAg&url=https%3A%2F%2Ffas.org%2Fsgp%2Fcrs%2Fmisc%2FLSB10243.pdf&psig=AOvVaw0bbpShAyjKpUV2qEJejsvY&ust=1668196910139790>.

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and money. The balance of harms weighs against the States. The district court abused its discretion in granting the injunction.

Respectfully, I dissent.

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION**

STATE OF LOUISIANA ET AL

CASE NO. 21-cv-3867

-vs-

JUDGE DRELL

JOSEPH R BIDEN JR ET AL

MAGISTRATE JUDGE PEREZ-MONTES

**RULING AND ORDER ON MOTIONS
FOR PRELIMINARY INJUNCTION AND TO STAY**

As we near the end of 2021, COVID-19 still presents a threat. Seeking to minimize that threat within the United States, the President is flexing the delegated authority of his Office and of the agencies within his control to impose vaccinations. Through the Occupational Safety and Health Administration (“OSHA”) under the Department of Labor, the President imposed employee vaccinations on employers with one hundred or more employees. See 86 Fed. Reg. 61,402-01. Through the Centers for Medicare and Medicaid Services (“CMS”) under the Department of Health and Human Services, the President imposed employee vaccinations on health care facilities participating in Medicare and Medicaid programs. See 86 Fed. Reg. 61555-01. Through the Department of Defense, the President imposed vaccinations on active-duty service members. See memorandum “Mandatory Coronavirus Disease 2019 Vaccination of Defense Service Members” issued by Secretary of Defense Lloyd J. Austin III on August 25, 2021. Last but not least, directly through his own authority, the President issued Executive Orders 14042 (“EO 14042”) imposing employee vaccinations on federal contractors, 86 Fed. Reg. 50985, and Executive

Order 14043 imposing the same on federal employees, 86 Fed. Reg. 50989. Each of these exercises of authority is being challenged across the country.

In the case at bar, the Plaintiff States of Louisiana, Mississippi, and Indiana seek to enjoin EO 14042. Quoting from Judge Van Tatenhoven of the Eastern District of Kentucky, “[T]his is not a case about whether the vaccines are effective. They are. Nor is this case about whether the government, at some level, and in some circumstances, can require citizens to obtain vaccines. It can.” Kentucky v. Biden, No. 3:21-CV-00055-GFVT, 2021 WL 5587446, at *1 (E.D. Ky. Nov. 30, 2021). Nonetheless, EO 14042 presents concern over the President’s delegated authority only under the Federal Property and Administrative Services Act (40 U.S.C. § 101 *et seq.*, “FPASA”) and the limits of the execution of that authority to impose COVID vaccinations. Generally speaking, FPASA is the principal procurement statute which provides for the means and methods through which the U.S. contracts with other entities for goods and services. Plaintiff’s claim EO 14042 is beyond the President’s authority delegated through FPASA and that is implementation furthers those issues and presents new ones.

For the reasons explained below, the pending motion for preliminary injunction will be **GRANTED**. However, the grant is limited to contracts, grants, or any other like agreement by any other name between the Plaintiff States and the national government. Plaintiff States’ motion for preliminary injunction is **DENIED**, without prejudice, to the extent that it seeks to enjoin the application of EO 14042 against contracts between private contractors and the national government. At this

time, there is not a single plaintiff representative of private contractors nor has there been any presentation of evidence of EO 14042's effect on private contractors for this court to enjoin the national government from enforcing EO 14042 on private contractors. Further, this distinction is presently not considered because of the national injunction imposed against EO 14042 by Judge Baker in the US District Court for the Southern District of Georgia. Georgia v. Biden, No. 1:21-CV-163, 2021 WL 5779939, at *12 (S.D. Ga. Dec. 7, 2021). Lastly, we rule that the injunction imposed against EO 14042 applies only to the Plaintiff States as opposed to non-plaintiff states.

1. FACTS

We begin by noting that most of the underlying factual backdrop necessary for decision here is found in a stipulation of the parties, with accompanying attachments. Doc. 26. What follows is a summary of relevant portion of the stipulations and further facts adduced herein.

The Safer Federal Workforce Task Force was established by President Biden 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." 86 Fed. Reg. 7045-48, 7046, Executive Order 13991 (Jan. 20, 2021). Seeking ostensibly to increase the COVID-19 vaccination rate, the President issued on September 9, 2021, EO 14042 charging the Safer Federal Workforce Task Force with determining "adequate COVID-19 safeguards" applicable to all federal contractors and subcontracts by September 24, 2021. §§ 1, 2(b). The

order further specified that the “safeguards” would be mandatory if the Office of Management and Budget (“OMB”) approved the guidance and determined that it would promote economy and efficiency in contracting. Id. And finally, EO 14042 charged the Federal Acquisition Regulatory Council (“FAR Council”) with taking initial step to implement the guidance by amending the Federal Acquisition Regulations to incorporate the Task Force Guidance once approved by the OMB. Id. at § 3.

On September 24, 2021, the Task Force issued Guidance containing “safeguards” which required all employees of federal contractors and subcontractors to be fully vaccinated¹ by December 8, 2021, unless entitled to an accommodation. Doc. 26-3, “Safer Federal Workforce Task Force, COVID-19 Workplace Safety: Guidance for Federal Contractors” issued Sept. 24, 2021. On September 28, 2021, again pursuant to the mandate the OMB approved the Task Force Guidance. According to the OMB, the guidance would promote economy and efficiency in contracting, thereby making the Task Force Guidance mandatory. Doc. 26-4, “Determination of Promotion of Economy and Efficiency in Federal Contracting Pursuant to Executive Order 14042” published Sept. 28, 2021. On September 30, 2021, the FAR Council issued preliminary guidance (“FAR Memo”) to include an implementation clause that incorporated the Task Force Guidance commonly

¹ Task Force Guidance defines “fully vaccinated” as two weeks after the second dose from a two dose vaccine regimen or two weeks after a single dose from a single dose vaccine regimen.

referred to as the deviation clause. Doc. 26-5, “Issuance of Agency Deviations to Implement Executive Order 14042”.

There are, however, some bizarre coverage differences between EO 14042 and the FAR Memo. EO 14042 applies to new contracts, new solicitations, extensions or renewals, and exercised options if a contract is either (i) “for services, construction, or a leasehold interest in real property”, (ii) “for services covered by the Services Agreement Act, (iii) for “concessions”, (iii) “for concessions”, and (iv) “in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public.” § 5(a). EO 14042 does not apply to existing or current contracts. Id. Nor does it apply to (i) grants, (ii) contracts with Indian Tribes, (iii) contracts equal to or under \$250,000, (iv) work performed outside the United States, and, particularly oddly, (v) contracts for products. Id. § 5(b).

The application and exclusion sections of the FAR Memo reads quite differently. Doc. 26-5. The “Applicability and Effective Dates” section first provides effective dates for including the clause in new contracts and solicitations. Id. Immediately following that, the Memo includes a directive “[t]o maximize the goal of getting more people vaccinated” by “strongly encourage[ing] agencies to apply the requirements of [the] guidance broadly... by including the clause in” any contract regardless of when awarded or solicited, and “contracts that are not covered or directly addressed by [EO 14042] because the contract ... is under [\$250,000] or is a contract... for the manufacturing of products.” Id. Following this direction, the “Exclusions” section of the FAR Memo precludes application of the Task Force

Guidance to contracts with Indian Tribes and contracts performed outside the United States. Notably missing from the directive of broad application and from the exclusion section is any guidance regarding grants.

Plaintiff States filed their Complaint on November 4, 2021, raising, among other claims, a rule-making procedural defects by the OMB Council issuing the OMB determination and by the FAR Council issuing the FAR Memo. Doc. 1. On November 10, 2021, the OMB rescinded its prior statement and again approved the Task Force Guidance. Doc. 26-6, "Determination of the Acting OMB Director Regarding the Revised Safer Federal Workforce Task Force Guidance for Federal Contractors and the Revised Economy & Efficiency Analysis" published Nov. 16, 2021. This time, however, the OMB provided a more detailed explanation of its determinations on economy and efficiency in contracting and pushed the fully vaccinated date of December 8, 2021 to January 18, 2022. See *Id.* The new statement also provided a comment and response period to pacify the complaint of the existence of a procedural defect.²

On November 12, the Plaintiff States sought this preliminary injunction against EO 14042 and its implementation. Doc. 10. The motion maintained the rule-making procedural defect claims. Once the case was assigned to this judge, a telephone conference was held on November 18, 2021, to set a deadline for the

² As is discussed *infra* Part 3.A(2), the included comment period does not pacify these complaints because calling January 18, 2022 the "effective date" is arbitrary to those individuals compelled to comply weeks before January 18, 2022, and thus, inconsistent with the purpose of the Administrative Procedures Act.

Defendants' response in opposition to the motion for preliminary injunction, to set a hearing for December 6, 2021, and to inform counsel for both parties of the briefing schedule. Thereafter, with the court's approval, the preliminary injunction was amended and restated. Doc. 22. Defendants filed their opposition on December 2, 2021 and the hearing was held December 6, 2021.

During the hearing, two witnesses for the Plaintiff States testified. Dr. Henderson, President and CEO of the University of Louisiana system including the University of Louisiana at Lafayette ("ULL"), testified that the National Institute of Health ("NIH") contacted ULL and requested compliance with the Task Force Guidance through the inclusion of a deviation clause in an existing grant. Although EO 14042 explicitly did not apply to any grants regardless of when entered or existing contracts, the NIH pushed the deviation clause onto ULL. Dr. Henderson testified to the university's lack of bargaining power and to a lack of any guarantee by the NIH that the grant would continue if ULL didn't comply or that future contracts wouldn't be impacted if ULL chose to not modify the existing grant. The Defendants provide no explanation as to why the NIH sought inclusion of the deviation clause in its grant with ULL when EO 14042 clearly excludes grants.

Megan Breaux, the Director of Operational Review for ULL, testified to having been required by operation of EO 14042 to obtain a fully vaccinated status by January 18, 2022 or be fired from her position. Ms. Breaux claimed a religious exemption and had always complied with ULL's masking and testing requirements before EO 14042. Again, although EO 14042 supposedly would have allowed for a well founded

religious exemption, hers was denied. As Ms. Breaux testified, there is uncertainty as to whether any accommodation for a religious exemption is sufficient to comply with the Task Force Guidance and FAR Memo as imposed upon ULL. As a result, Ms. Breaux was informed that such exemptions, regardless of the legitimacy of her religious views, would not be allowed, and her previous compliance with ULL's accommodation standard of masking and testing would be inadequate. In short, if she refused she would be terminated.

2. STANDING

Before we can address the merits of Plaintiff States' motion for a preliminary injunction, we must determine whether the plaintiffs have standing. Town of Chester, NY v. Laroe Estates, Inc., 137 S.Ct. 1645 (2017). Supreme Court precedent is clear, and the parties do not dispute, that where multiple parties petition for injunctive relief only one of the plaintiffs must establish it possesses standing. Massachusetts v. EPA, 579 U.S. 497, 498 (2007); Town of Chester, 137 S.Ct. at 1651. Plaintiff States claim they possess both *parens patriae* standing and Article III standing and in support they rely heavily on the contract between the State of Louisiana and the United States. We first address whether the Plaintiff States have *parens patriae* standing.

A. *Parens Patriae*

Parens patriae standing originated in English common law where the crown undertook to protect and act for minors and incompetents. The doctrine was adopted by United States courts and has expanded to allow for suits by a state against private

defendants or other states to protect quasi-sovereign interests in the health and economy of the plaintiff state. At issue here is whether or not the Plaintiff States have *parens patriae* standing to sue the national government regarding EO 14042.

Defendants argue Supreme Court precedential cases, namely Commonwealth of Massachusetts v. Mellon, 262 U.S. 447 (1923) and Alfred L. Snapp & Son v. Puerto Rico, ex rel., Barez, 458 U.S. 592 (1982), clearly establish states do not have *parens patriae* standing to sue the national government. This denial of standing is commonly referred to as the Mellon bar. Plaintiff States contend the most recent case from the Supreme Court on the issue, Massachusetts v. EPA, 549 U.S. 497 (2007), creates an exception to the Mellon bar and that exception applies to this matter.

As we noted, whether a state has *parens patriae* standing to sue the national government on behalf of its citizens was first addressed in Commonwealth of Massachusetts v. Mellon, 262 U.S. 447 (1923). Therein, our Supreme Court held:

It cannot be conceded that a state, as *parens patriae*, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof. While the state, under some circumstances, may sue in that capacity for the protection of its citizens (Missouri v. Illinois and Chicago District, 180 U. S. 208, 241, 21 Sup. Ct. 331, 45 L. Ed. 497), it is no part of its duty or power to enforce their rights in respect of their relations with the federal government. In that field it is the United States, and not the state, which represents them as *parens patriae*, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status.

Id. at 485–86.

While the Mellon decision clearly established the bar, it did not say that there were or were not exceptions to the bar. It also was decided in a much simpler time.

However, in Snapp, albeit in a footnote by Chief Justice Roberts, the Supreme Court more equivocally suggested that no exceptions applied. In Snapp, the Commonwealth of Puerto Rico sought declaratory relief against East Coast apple growers who were violating federal laws which preferred domestic laborers over foreign temporary laborers. The federal district court in Harrisonburg, Virginia dismissed the case for lack of standing; the Fourth Circuit Court of Appeals reversed and remanded; and the Supreme Court granted writs to determine whether Puerto Rico had standing to pursue the claims on behalf of its citizens pursuant to *parens patriae*.

The Supreme Court found that Puerto Rico did have standing to pursue the claims against the individuals and companies of Virginia pursuant to *parens patriae*. However, in a footnote immediately after reasons for its holding, the Court distinguished the case as one where the state was “seeking to secure the federally created interests of its residents against private defendants” not one against the United States. Snapp 458 U.S. at 610, n. 16. It reiterated approvingly its decision in Mellon stating “[a] State does not have *parens patriae* to bring an action against the Federal Government” and quoted Mellon: “While the State under some circumstances, may sue in that capacity for the protection of its citizens it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government. In that field, it is the United States, and not the State, which represents them as *parens patriae*.” Id.

Based upon Mellon and Snapp, it seemed clear that states could not assert *parens patriae* standing to bring suit against the United States. In 2007, the

Supreme Court examined whether the Commonwealth of Massachusetts could file suit against the Environmental Protection Agency to regulate carbon dioxide emissions under the Clean Air Act. In a majority opinion, the Court found that the state of Massachusetts had “special solicitude” and thus standing to bring the case. Yet, the Court ultimately found that *parens patriae* standing was not necessary to case determination as the plaintiffs met the traditional standing requirements under Article III.

Many courts and scholars have debated whether Massachusetts v. EPA really did create an exception to Mellon. It is important to note, in the context of COVID vaccinations, that, without state *parens patriae* standing, individuals who believe they cannot or should not be compelled to be vaccinated are relegated to the cost prohibitive remedy of filing individual suits against the national government, yea the President, to assert their rights. Neither Mellon, Snapp nor EPA involve constitutional issues, and it seems wrong to assume that the Mellon bar has such a broad umbrella to preclude states from protecting their citizen from a perceived unconstitutional exercise of national government power or from the overreach of national government power into constitutionally and historically reserved state police powers, as is the case here.

Regardless of whether Mellon did or does bar *parens patriae* in this suit, we do not find that to be necessary to a decision because Plaintiffs States may proceed as they possess Article III standing.

B. Article III

“Article III of the Constitution limits federal courts’ jurisdiction to certain “Cases” and “Controversies. As we have explained, “[n]o principle is more fundamental to the judiciary’s proper role in our system of government than the constitutional limitation on federal-court jurisdiction to actual cases or controversies.” Clapper v. Amnesty Int’l USA, 568 U.S. 398, 408 (2013) citing DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341 (2006) (internal quotation marks omitted). To establish standing, a plaintiff must show 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 argue that Plaintiff States lack Article III standing because the contracts upon which Plaintiff States rely, particularly research contracts between ULL and NIH with a contract term of 2019 through 2022, are not the type of contract contemplated by EO 14042. The Defendants observe that only new contracts with the national government are covered, and further NIH grants are excluded under § 5(b). We agree with our sister court in Kentucky that this claim is disingenuous. Kentucky, 2021 WL 5587446 at *4. “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).

It is undisputed that the national government has nearly \$100 million dollars in contracts with the States of Louisiana, Mississippi, and Indiana. It is also undisputed that these states intend to continue to bid on new contracting opportunities. That this is true was made abundantly clear by the exemplar testimony of Dr. Henderson. If the Plaintiff States or their agencies had to wait to see if they were in mandate compliance until they secured a new contract, it would reasonably and likely result in even more harm than they face now. The various agencies of the states would have to make a choice whether or not to comply with EO 14042. If they did, they would risk losing their workforce because of many situations like or similar to that of Megan Breaux. If they didn't, they would be ineligible to bid on those contracts. It is indeed a "Hobson's choice." *Accord Kentucky*, 2021 WL 5587446 at *4.

Defendants' argument that modifications to current contracts, such as the one between ULL and NIH, are not covered by EO 14042 because the contractor has a choice to comply with deviation clause is completely disingenuous. Defendants argue inclusion of the deviation clause is a bilateral decision, but it was clear from testimony at our hearing that Plaintiffs have no bargaining power in the matter. In this instance, the NIH submitted the deviation clause to ULL with a short deadline within which ULL was to sign and return the modification. There was no provision that the contract would continue through the term if ULL didn't assent. There was no guarantee that ULL's position to bid on future contracts wouldn't be impacted if it

chose not to modify its existing contract. It was simply a heavy handed sign and return proposition, even though EO 14042 by its terms should not apply to any grant.

If indeed EO 14042 applied to only new contracts and excluded grants, no such deviation would need to have been included in ULL's NIH grants. But again, Dr. Henderson testified the NIH imposed upon ULL the deviation clause for an existing grant. As outlined above, the FAR Memo "strongly encourages" the inclusion of the requirement in current contracts and does not explicitly exclude grants. Thus, even if EO 14042 supposedly excludes either existing contracts or any grants, the FAR Memo does not. During oral argument, the Defendants posited that any interpretation of EO 14042 to apply to current contracts and grants did not come from EO 14042, and they simultaneously claimed the FAR Memo was non-final agency action not subject to review. The Defendants hope that this strategic arrangement will simultaneously shield both an Executive order and "initial" agency action forcefully imposed beyond the order's scope. Dr. Henderson testified to feeling powerless against the NIH's "request" and afraid of losing funding; thus he and ULL felt compelled to sign. The FAR Memo is in no way only a sample of what contracting officers might use to implement the Executive Order, and it clearly extends far beyond the reach of EO 14024 by encouraging the strong-arming of contractors to include deviation clauses into existing contracts and grants.

In light of the foregoing, we find that the Plaintiffs have sufficiently demonstrated they have suffered injury in fact and will most likely continue to do so. They face a Hobson's choice in that they must decide whether to maintain current

contracts and whether they want to be a bid on future contracts. That injury is more than fairly traceable to the FAR Memo and EO 14024 as the FAR Memo would not exist but for the executive order. We further find that providing injunctive relief will redress the Plaintiffs' injuries. Accordingly, Plaintiffs have standing to pursue their claims on behalf of the States of Louisiana, Mississippi, and Indiana.

3. PRELIMINARY INJUNCTION STANDARD OF REVIEW

"Injunctive relief is an extraordinary and drastic remedy, not to be granted routinely, but only when the movant, by a clear showing, carries the burden of persuasion." Holland Am. Ins. Co. v. Succession of Roy, 777 F.2d 992, 997 (5th Cir. 1985).

"To be entitled to a preliminary injunction, a movant must establish (1) a likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted; and (4) that the grant of an injunction will not disserve the public interest."

Ladd v. Livingston, 777 F.3d 286, 288 (5th Cir.2015) (quoting Trottie v. Livingston, 766 F.3d 450, 451 (5th Cir.2014)).

A. Likelihood of Success

(1) FPASA

The FPASA is a procurement statute, plain and simple. It was enacted with the "purpose... to provide the Federal government with an economical and efficient system for the following activities: (1) [p]rocuring and supplying property and nonpersonal services, and performing related function ...[,] (2) [u]sing available property[,] (3) [d]isposing of surplus property[, or] (4) [r]ecord management." 40 USC

§101. “‘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.” Am. Fed'n of Lab. & Cong. of Indus. Organizations v. Kahn, 618 F.2d 784, 789 (D.C. Cir. 1979).

Generally, an obligation imposing a secondary policy will survive attacks so long as there is a close nexus between the obligation and the Government’s primary policy under FPASA to procure and manage properties and services in an economical and efficient manner. Kahn, 618 F.2d at 792. Indeed, the Executive branch pursuant to the FPASA, or its predecessors, has imposed several secondary policies that survived judicial scrutiny. See, e.g., Id. at 790 (discussing the historical uses of the Executive power to push anti-discriminatory employment practices); Id. at 792 (Executive Order 12092: “to encourage noninflationary pay and price behavior”); Am. Fed'n of Gov't Emp., AFL-CIO v. Carmen, 669 F.2d 815 (D.C. Cir. 1981) (President Carter’s April 5, 1979 national address: “Steps will be taken to eliminate free parking for Government employees in order to reduce the waste of energy, particularly gasoline, in commuting to and from work”); UAW-Lab. Emp. & Training Corp. v. Chao, 325 F.3d 360 (D.C. Cir. 2003) (Executive Order 13201: “When workers are better informed of their [federal labor] rights, their productivity is enhanced.”); City Of Albuquerque v. U.S. Dep't Of Interior, 379 F.3d 901 (10th Cir. 2004) (Executive Order 12072: federal “use of space in urban areas” to “encourage the development and redevelopment of cities”); Chamber of Com. of U.S. v. Napolitano, 648 F. Supp. 2d 726

(D. Md. 2009) (Executive Order 12989: increasing stability of federal contractor by discouraging the employment of illegal immigrants).

However, in those cases, there was no palpable conflict with any other federal statute or the Constitution. *Accord* Chamber of Com. of U.S. v. Reich, 74 F.3d 1322, 1333 (D.C. Cir. 1996) (distinguishing Kahn); Kahn, 618 F.2d at 796 (“Although the Executive Order represents an important external factor in the economic environment surrounding collective bargaining, it does not subvert the integrity of that process.”); Chao, 325 f.3d at 363 (reversing district court’s finding that a federal labor law preempted Executive order only because the district court’s analysis of the preemption was misguided). When conflict does exist, and that conflict is “unacceptable,” the Executive’s action may be enjoined. See Reich, 74 f.3d at 1333, 1337 (“No state or federal official or government entity can alter the delicate balance of bargaining and economic power that the [National Labor Relations Act] establishes, whatever his or its purpose may be.”).

We agree with the argument that a reasonably sufficient nexus can exist between EO14042 and the government’s policy under FPASA to procure and manage properties and services in an economical and efficient manner. It is not unreasonable to assume that a vaccinated labor pool will be more reliable during surges of viral transmission than an unvaccinated labor pool. Nonetheless, the court is convinced that EO 14042 conflicts with the Tenth Amendment.³

³ Our limited concern is not to be read as an opinion regarding any other challenge against EO 14042.

“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.” U.S. Const. amend. X. “Our Constitution principally entrusts ‘[t]he safety and the health of the people’ to the politically accountable officials of the States ‘to guard and protect.’” S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring) (citing Jacobson v. Massachusetts, 197 U.S. 11, 38 (1905)). Against this constitutional reservation of delegated authority, the President has on more than one occasion publicly announced his disappointment regarding the country’s supposedly low COVID-19 vaccination rate and expressed his intent to increase the vaccination rate by using Executive authority. Thus, EO 14042, although supported upon a nexus of economy and efficiency, was clearly and unequivocally motivated by public health policy first and foremost. See Reich, 74 F.3d at 1337 (“The President has, of course, acted to set procurement policy rather than labor policy. But the former is quite explicitly based—and would have to be based—on his views of the latter.”). “Whatever one’s views on the [vaccine mandate’s ability to increase economy and efficiency in procurement], [EO 14042] surely goes to the heart of [the Tenth Amendment].” Id. See Kentucky, 2021 WL 5587446; at *10 (“The Court is also concerned that the vaccine mandate intrudes on an area that is traditionally reserved to the States.”); Cf. BST Holdings, L.L.C. v. Occupational Safety & Health Admin., United States Dep’t of Lab., 17 F.4th 604, 617 (5th Cir. 2021) (“[T]he [OSHA] 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.”).

(2) Administrative Procedures Act

Procedural compliance by the rule making agency is an indispensable component of the Administrative Procedures Act (“APA”). 5 USC § 706(2)(D). Plaintiff States argue that 41 U.S.C. § 1707(a) requires the FAR Memo and the OMB determination to be published in the Federal Register for sixty days before it can take effect.

Regarding the FAR Memo, Defendants claim is it not final agency action subject to review under § 1707 because EO 14042 instructed the FAR council to “take initial steps to implement” the contract clause. However, this comment is not dispositive, but merely a factor. When considering whether agency action is ripe for review, the Fifth Circuit considers “(1) whether the issues presented are purely legal; (2) whether the agency's pronouncement is a “final agency action” within the meaning of 5 U.S.C. §§ 551(13) & 704; (3) whether the impact on the petitioners is direct and immediate; and (4) whether resolution of the issues will foster effective administration of the statute.” *Merchants Fast Motor Lines, Inc. v. I.C.C.*, 5 F.3d 911, 920 (5th Cir. 1993).

Here, the issue is purely legal because Plaintiff States challenge EO 14042, the FAR Memo and the OMB determination as beyond the reach of Executive authority; Plaintiff States have demonstrated that Executive Department agencies are pushing for the inclusion of the contract clause into existing agreements making the impact

direct and immediate; and resolution of executive reach under FPASA will foster effective administration of FPASA. These factors clearly outweigh, and effectively pierce the shield created by, EO 14042's instruction to take only "initial steps." As such, we find the FAR Memo does constitute agency action ripe for review and subject to the rule-making procedural requirements of § 1707, which absent "urgent and compelling circumstances [that] make compliance with the [comment period] impracticable" requires a sufficient comment period. *Id.* at (d). Defendants argue that the pandemic presents urgent and compelling circumstances. However, we doubt that the pandemic makes compliance with a relatively short comment period impracticable⁴ two years into the pandemic, given that we have much greater scientific knowledge and that the medical community has a much better handle on treatment modalities.

Even if the FAR Memo complied with § 1707, its applicability and exclusions sections clearly and unequivocally apply beyond EO 14042's authorized scope provided in § 5 of the order. The FAR Memo "strongly encourages agencies apply the requirements of its guidance broadly... by including the clause in" all contracts regardless when entered or solicited, except for those performed outside the United States and those with Indian Tribes. Further, there is no exclusion of grants. Given the directive to apply the requirement broadly, we read the FAR Memo to also encourage the application of the requirement in grants. From the testimony of Dr.

⁴ Impracticable - 1) impassable; 2) not practicable: incapable of being performed or accomplished by means employed or at command. <https://www.merriam-webster.com/dictionary/impracticable>; last viewed Dec. 9, 2021.

Henderson, the NIH would appear to agree. EO 14042 does not authorize such an expansive application. Thus, even assuming that EO 14042 could be construed as constitutional, the FAR Memo is an unacceptable deviation from the limitation on existing contracts in EO 14042 making the FAR Memo “an abuse of discretion ... not in accordance” with EO 14042, “contrary to constitutional ... power” conferred upon the FAR Council by EO 14042 and “in excess of ... authority” granted in EO 14042. 5 U.S.C. § 706 (A)-(C).

Regarding the OMB determination, Defendants claim the determination is shielded because it issued on November 10 implementing a comment period terminating December 16 and extended the compliance date to January 18 in accordance with §1707. Indeed, this does adhere to the text of 41 U.S.C. § 1707, but, it only does so textually. Compliance requires action by employees weeks before the effective date to obtain a fully vaccinated status. Thus, labeling January 18, 2022 the effective date is disingenuous and arbitrary to those who would have to take steps to comply before January 18, and as a result circumvents the APA’s purpose.

Among other reasons, Congress enacted the APA

“to provide suitable arrangements through which Federal agencies, assisted by outside experts, may cooperatively study mutual problems, exchange information, and develop recommendations for action by proper authorities *to the end that private rights may be fully protected* and regulatory activities and other Federal responsibilities may be carried out expeditiously *in the public interest* [and] to promote more effective *public participation* and efficiency in the rulemaking process[.]”

5 U.S.C. § 591 (1), (2) (emphasis added). A regulation’s comment period is critical for affected citizens to assert their rights and for the cooperative development of regulations that balance the needs of the government and the rights of the public.

Because compliance requires significant action on the part of employees well before the effective date, these purposes were not preserved by the OMB's calendaring of the comment period. While we do not like to rely on the spirit of the law when the letter is clear, the actions of the OMB circumvent the protections envisioned under the APA by manipulating the letter.

Defendants again rely on § 1707(d)'s waiver for "urgent and compelling circumstances," but as already discussed above, we do not find compliance with a relatively short comment period to be impracticable two years into this pandemic.

B. Irreparable Harm

"[C]omplying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs." Texas v. EPA, 829 F.3d 405, 433 (5th Cir. 2016) (citing Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 220–21 (1994) (Scalia, J., concurring in part and in the judgment)). "When determining whether injury is irreparable, 'it is not so much the magnitude but the irreparability that counts....'" Texas, 829 F.3d at 433–34 (citing Enter. Int'l Inc. v. Corp. Estatal Petrolera Ecuatoriana, 762 F.2d 464, 472–73 (5th Cir. 1985)). At a minimum, compliance by contractors requires the diversion of resources necessary to identify covered employees and manage their vaccination status. If a covered employee, such as the one who testified at the hearing, refuses to receive a vaccination, the Plaintiff States and their agencies must decide between releasing the employee and all accompanying efficiency, institutional memory, and operational know-how or foregoing federal contracts. Compliance by an employee requires vaccination, which

cannot be undone. Further, Plaintiff States “have an interest in seeing their constitutionally reserved over public health policy defended from federal overreach.” Texas, 829 F.3d at 433. Clearly, there is a substantial threat of irreparable harm.

C. Balance of Harms

Defendants claim the risk of the pandemic outweighs enjoining EO 14042. We disagree. We are now nearly two years into the COVID-19 pandemic that comes and goes in waves and the economy is recovering. Without denying the existence of the pandemic or the potential risk it imposes, we find that EO 14042, the OMB determination and the FAR Memo present a greater risk to the rights of covered employees and contractors and to the interests of the Plaintiff States to defend constitutionally reserved police powers from federal overreach.

D. Public Interest

We agree with and adopt the Fifth Circuit’s finding of public interest in its recent decision to enjoin the OSHA vaccine mandate.

[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. Of course, the principles at stake when it comes to the [EO 14042] are not reducible to dollars and cents. The public interest is also served by maintaining our constitutional structure and maintaining the liberty of individuals to make intensely personal decisions according to their own convictions—even, or perhaps particularly, when those decisions frustrate government officials.

BST Holdings, 17 F.4th at 618–19 (5th Cir. 2021). Therefore, Plaintiff States have established each element necessary to obtain a preliminary injunction.

4. SCOPE OF THE INJUNCTION

Lastly, we consider the scope of the injunction. As explained *supra* Part II.A, under current Supreme Court precedent the Plaintiff States may not have *parens patriae* to defend their citizens from EO 14042, although we suggest and believe it should be otherwise when the issue involves perceived unconstitutional or overreaching actions by the national government. Additionally, there are no named private entity plaintiffs other than the states of Louisiana, Mississippi, and Indiana. Therefore, it appears that private contractor seeking to evade EO 14042 and its implementation must file suit to enjoin the national government from enforcing EO 14042, See, e.g., Liberty Mut. Ins. Co. v. Friedman, 639 F.2d 164, 172 (4th Cir. 1981) (enjoining EO 11246 from applying to plaintiffs only), even if that jurisprudence conflicts with notions of judicial economy.

Thus, at this time the preliminary injunction will be limited to all contracts, grants, or any other like agreement by any other name between the Plaintiff States and the national government. Moreover, we find no reason at this time to extend the injunction nationally, whether or not we have authority to do so, because the record before us is limited to evidence of contracts and grants between the Plaintiff States and national government and there was presented no evidence in this record of any significant spill-over into non-plaintiff states.

5. MOTION TO STAY

On December 11, 2021, after the hearing in this case, Defendants filed a Motion to Stay these proceedings, largely relying on the supposition that a stay would

somehow preserve resources and foster judicial efficiency. But, “stay” means “delay.” That a delay would be appropriate at this time, especially when a cardinal point of EO 14042 was the supposed need for rapid action for vaccination in incongruous. However, we think, to the extent it can be avoided, a delay in issuance of this injunction only prolongs the inherent uncertainty in litigation.

From our conversations with counsel for both sides at the hearing, we believe it obvious that the issues in many or all of the injunction cases related to Presidential vaccine mandates will most likely be litigated in the appellate courts around the country. That being the case, it is better for us to have as many matters determined in the district courts in advance of those likely appeals. For those reasons, we decline to stay the issuance of this ruling on preliminary injunction.

Nevertheless, we will and do stay further proceedings leading to any trial on a permanent injunction pending further appellate action on this case. Either party may, however, by motion request a lifting of the stay. Upon any grant of that relief, we will issue appropriate case management orders.

6. CONCLUSION

For the reasons explained above, it is **ORDERED** that the Motion for Preliminary Injunction, Doc. 22, is **GRANTED** to enjoin the national government from enforcing the Task Force Guidance and FAR Memo in any contract, grant, or any other like agreement by any other name, whether for services or product and whether existing or new, between the Plaintiff States or their agencies and the national government.

THUS DONE AND SIGNED in Alexandria, Louisiana this 15th day of
December, 2021.

A handwritten signature in black ink, appearing to read "Dee D. Drell", written over a horizontal line.

DEE D. DRELL, SENIOR JUDGE
UNITED STATES DISTRICT COURT