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

STATE OF MISSOURI, STATE OF NEBRASKA, STATE OF ALASKA, STATE OF ARKANSAS, STATE OF IOWA, STATE OF MONTANA, STATE OF NEW HAMPSHIRE, STATE OF NORTH DAKOTA, STATE OF SOUTH DAKOTA, STATE OF WYOMING, *Plaintiffs*, v. JOSEPH R. BIDEN, et al., *Defendants*.	No. 4:21-cv-01300

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

The Government's contractor vaccine mandate went into effect in September after OMB issued a "determination," encompassing one column of one page of the Federal Register, with a bare recital that the mandate would improve economy and efficiency in federal contracting (the "September Determination"). That determination was the fig-leaf justifying a massive incursion into the sovereign rights of the Plaintiff States and their citizens that had no basis in law or the Constitution. The Government now tries to patch up the manifest insufficiency of the September Determination by providing new *post hoc* justifications—adopted in response to litigation—for the same old policy (the "November Rationalization"). Both attempts are equally unlawful.

The problem is that the mandate itself is indefensible as a matter of law and logic. The Government's position rests on an extraordinary claim of executive power over federal procurement to impose vaccine mandates on those only tangentially involved with federal contracts. That claim would transform a law promoting "economy and efficiency" in federal procurement into a law that would give the Executive near-plenary power to federalize all public-health policy. That "is a wafer-thin reed on which to rest such sweeping power." *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021)

ARGUMENT

I. The Plaintiff States are likely to succeed on the merits.

A. Plaintiff States are likely to succeed on their Procurement Act challenge.

The Government argues that the President has authority to issue EO 14042 because the Procurement Act's "nexus" requirement, as interpreted by other federal courts, is quite broad, and the vaccine mandate supposedly fits within it. *See* ECF 20, at 10–17. Both arguments fail.

1. The President cannot use the Procurement Act to circumvent the Constitution and other duly enacted laws.

As the Federal Government admits, if the executive order conflicts with other, superseding law, it is void. *See* ECF 20, at 15. Thus, in *Chamber of Commerce of U.S. v. Reich*, the D.C. Circuit held that if an executive order "conflict[ed] with the NLRA," it would be "unnecessary [for the court] to decide whether, in the absence of the NLRA, the President would be authorized (with or without appropriate findings) under the Procurement Act and the Constitution to issue the Executive Order." 74 F.3d 1322, 1332 (D.C. Cir. 1996). So too here: EO 14042 conflicts with the Constitution, as set out below and earlier, *see* ECF 9, at 33–37, and the Procurement Policy Act. While the Procurement Policy Act does permit agencies besides the FAR Council to "implement Government-wide policies and procedures," ECF 20, at 16–17 (quoting 41 U.S.C. § 1303(a)(2)(A)), it does so only "*within the agency*." § 1303(a)(2)(A) (emphasis added).

2. The contractor mandate is not a valid exercise of the President's Procurement Act authority.

The Government rests heavily on its claims about the broad discretion the Procurement Act vests in the President and the "lenient" standard by which his actions are judged—namely, that they "have a 'sufficiently close nexus' to the values of providing the government an 'economical and efficient system for … procurement and supply,'" *UAW-Labor Employment and Training Corp. v. Chao*, 325 F.3d 360, 366 (D.C. Cir. 2003). *See* EDF 20, at 10–16. In support, the Government points to numerous out-of-circuit cases upholding executive orders under the Procurement Act. *See* Opp. at 11–12, 15–16. But however broad that authority,[1] it is not unlimited. If it were, it would be unconstitutional for multiple reasons, such as by violating the nondelegation doctrine. *See, e.g.*, *Mistretta v. United States*, 488 U.S. 361, 372 (1989). EO 14042 and the contractor mandate exceed that limit.

[1] The Government overstates the persuasive value of the cases it relies on. Many statements about the Procurement Act, for example, are clearly dicta. *See Farmer v Phila. Elec. Co.*, 329 F.2d 3, 8 (3d Cir. 1964); *Farkas v. Tex. Instrument, Inc.*, 375 F.2d 629, 632 n.1 (5th Cir. 1979).

First, the plain text of the statute contradicts the Government's position. As the Plaintiff States point out, the Procurement Act's text permits the President to "prescribe policies and directives;" by contrast, the GSA Administrator "may prescribe regulations." 40 U.S.C. § 121(a). Importantly, the Federal Government never disputes that EO 14042 is a regulation, as opposed to a policy or directive, instead arguing in a footnote with non-binding authority that the terms are synonyms. *See* ECF 20, at 12 n.7. But "when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *DePierre v. United States*, 564 U.S. 70, 83 (2011). That canon applies here—especially given the well-established distinction between regulations and statements of policy in administrative law. *See, e.g.*, 5 U.S.C. § 553(b) (exempting "general statements of policy" from notice-and-comment); *Iowa League of Cities v. EPA*, 711 F.3d 844, 855 (8th Cir. 2013) (same). And even if "directive" and "regulation" can have similar meanings in certain contexts, the two are not necessarily the same, as "directives" can be more like policy statements. *See Directive*, WEBSTER'S 3D NEW INTERNATIONAL DICTIONARY (1961) ("something that serves to direct, guide, and usu. impel toward an action, attainment, or end"). And because "directives" appears with "policies," but not "regulation," it plainly reflects the cited definition. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 196–98 (2012) (*noscitur a sociis* applies when "terms [are] conjoined in such a way to indicate that they have some quality in common").

Finally, as Plaintiff States point out, numerous canons of construction and clear-statement rules militate against reading the Procurement Act's purposes, *see* 40 U.S.C. § 101, to permit the contractor mandate. *See* ECF 9, at 21–24. Indeed, the Government does not dispute that the contractor mandate intrudes on areas of traditional state power and pushes the limits of its constitutional authority—and cites to no cases allowing Procurement Act regulations in similar

contexts—and so requires a "clear indication" in the statute. *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001). The contractor mandate also purports "to exercise powers of "vast economic and political significance," thus requiring "exceedingly clear language," which the statute does not contain. *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs*., 141 S. Ct. 2485, 2489 (2021).

The Federal Government never purports to identify such a "clear indication" or "exceedingly clear language." Instead, it does the exact opposite: It relies on *vague* language in the Procurement Act, which it construes broadly, *see* ECF 20, at 11; historical practice like requiring contractors engage in certain labor practices, *see id.* at 12; and the "lenient" nexus standard, *see id.* at 13–16. The first argument is categorically insufficient under cases like *SWANCC* and *Alabama Association of Realtors*. The second argument, based on historical practice, cuts directly against the Government, because the Procurement Act has never been used to justify a nationwide *vaccine mandate* before. Whatever the President has done under the Procurement Act, and whatever Congress has acquiesced in it or not, he has never used his authority to mandate that federal contractors' employees and their subcontractors' employees get vaccinated against a disease like COVID-19, and so Congress has never acquiesced to that. *See Dames & Moore v. Regan*, 453 U.S. 654, 680 (1981) ("Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement."); *see also AFL-CIO v. Khan*, 618 F.2d 784, 790 (D.C. Cir. 1979) (en banc). *Contrast* ECF 20, at16 n.9 (providing, as an example of historic practice, prohibiting discriminatory employment practices).

As to the third, no matter how "lenient" the nexus standard is, ECF 20, at 11 (quoting *Chao*, 325 F.3d at 367), it cannot be stretched to violate the statute and the Constitution. *See, e.g.*,

Chrysler Corp. v. Brown, 441 U.S. 281, 307–08 (1979). Again, one of the Federal Government's cases, *Liberty Mutual Insurance Co. v. Friedman*, 639 F.2d 164 (4th Cir. 1981), cuts squarely against the vaccine mandate here. In that case, the Fourth Circuit held that an Executive Order and attendant regulations prohibiting contractors and subcontractors from engaging in certain discriminatory practices, which was issued under the Procurement Act, could not apply to subcontractor that was "not itself a federal contractor and so [had] no direct connection to federal procurement," and without any findings showing that the work the subcontractor did—providing workers' compensation insurance to employers "that hold federal contracts"—increased costs or that subcontractors engaged in discriminatory practices that drove up costs. *See id.* at 171. The connection "between the cost of workers' compensation policies" and "any increase in the cost of federal contracts that could be attributed to discrimination by these insurers is simply too attenuated … ." *Id.*

The contractor mandate is of the same ilk. It sweeps incredibly broadly—for example, it covers employees whose only connection to a federal contract is passing in the hall a coworker who works on such a contract, *see* Ex. A, at 10–11. Nowhere does the Federal Government attempt to justify that breadth, and so here, as in *Liberty Mutual*, the necessary nexus is absent.

B. The Plaintiff States are likely to succeed on the merits of their APA and procedural claims

1. These claims are justiciable.

The Federal Government argues that OMB's determination that the contractor mandate will promote efficiency and economy is not justiciable because the November rationalization moots the Plaintiff States' challenge to the September determination, and because "the OMB Determination is not agency action" under the APA or Procurement Policy Act but is instead presidential action. *See* ECF 20, at 17–18 (quotations omitted).

The latter argument is a merits question. *See, e.g.*, *Nat. Res. Def. Council v. U.S. Dep't of State*, 658 F. Supp. 2d 105, 107, 109 (D.D.C. 2009). It doesn't block Plaintiff States' claim that the Federal Government acted unconstitutionally or *ultra vires*, which are subject to non-statutory review. *See, e.g.*, *id.* at 109 n.5; *see also Hagemeier v. Block*, 806 F.2d 197, 203 (8th Cir. 1986). It is also plainly wrong. "[T]hat [OMB's] regulations are based on the President's Executive Order hardly seems to insulate them from judicial review under the APA … ." *Reich*, 74 F.3d at 1327. The principle that the President is not an agency subject to review for abuse-of-discretion "is limited to those cases in which the President has final constitutional or statutory responsibility for the final step necessary for the agency action to directly affect the parties." *Pub. Citizen v. U.S. Trade Representative*, 5 F.3d 549, 552 (D.C. Cir. 1993); *see also Detroit Int'l Bridge Co. v. Canada*, 189 F. Supp. 3d 85, 104 (D.D.C. 2016). But here, the President directed *OMB* to execute the decision to impose a contractor vaccine mandate by determining that the Task Force's guidance would "promote economy and efficiency." EO 14042 § 2(a). OMB, unlike the President, is subject to the APA. Since EO 14042 claims a "specific statutory foundation" (the Procurement Act), no law precludes judicial review, and there is "an objective standard by which a court can judge the agency's action" (*viz.* "promote economy and efficiency"), Plaintiff States challenge agency action. *City of Albuquerque v. U.S. Dep't of Interior*, 379 F.3d 901, 913–15, 918 (10th Cir. 2004) (concluding that a city could bring an APA challenge based on an agency's violation of an executive order issued pursuant to the Procurement Act) (first quote from *City of Carmel-By-The-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1166 (9th Cir. 1997)).[2]

As for mootness, as the Government's own case notes, "[T]he voluntary repeal of a

[2] *See also Nat'l Mining Ass'n v. United Steel Workers*, 985 F.3d 1309, 1327 (11th Cir. 2021); *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 770–71 (9th Cir. 2018); *Nat'l Ass'n Mfrs. v. Perez*, 103 F. Supp. 3d 7, 21 (D.D.C. 2015).

regulation does not moot a case if there is reason to believe the agency will reinstitute it." *Akiachack Native Cmty. v. U.S. Dep't of Interior*, 827 F.3d 100, 106 (D.C. Cir. 2016). There is such reason here. The Task Force Guidance OMB approved in November is substantively *the same* as the one approved in September. *See* Ex. B (comparing the two); *cf.* Ex. C (providing the new guidance document). Indeed, the Federal Government admits that. In arguing that OMB provided a sufficient explanation for its decision, the government says, "by superseding its old determination with a new Determination that *further* details why it *initially* approved the Task Force Guidance, OMB provided 'a fuller explanation of the agency's reasoning *at the time of the agency action*,' which is the opposite of *post-hoc* rationalization." ECF 20, at 22–23 (quoting *Homeland Security v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1907–08 (2020)) (emphases added). That is, in arguing that OMB didn't act arbitrarily or capriciously, the Government says the agency expanded on its rationale for the September determination—not that OMB engaged in new agency action. There is no mootness issue.[3]

2. OMB's determination is arbitrary and capricious.

The Plaintiff States are also likely to succeed on their arbitrary and capricious claim even with the November rationalization. The Court need go no farther than noting what OMB has never said. Where an agency changes its policy position, it must "display awareness that it *is* changing position." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). But OMB did not do so here in at least two instances. *First*, the contractor mandate requires employers to evaluate the sincerity of "religious belief, practice, or observance" of employees to determine whether a vaccine exemption is required, *see* FAQs, and to single them out for disparate treatment regarding mask-

[3] If there is, the Plaintiff States respectfully ask for leave to file an amended complaint. That shouldn't stop the Court from ruling on the preliminary injunction, however, as the Plaintiff States seek to enjoin enforcement of "similar order[s]" as the original mandate. ECF No. 8.

wearing, *see* Ex. A, at 3–4; Ex. C, at 6. Yet since at least 1941, the federal government has used its authority, including authority under the Procurement Act, to prohibit discrimination on the basis of religion or "creed." *See, e.g.*, 79 Fed. Reg. 72,985, 72,985 (Dec. 9, 2014); *Farmers*, 329 F.2d at 4. OMB fails to describe why, after the government's previous policy that "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," *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159, 171 (3d Cir. 1971), the federal government reversed course to allow such discrimination here.

Second, OMB made "no serious attempt to explain why" the executive branch was "against vaccine mandates before they were for one here." *BST Holdings v. OSHA*, 2021 WL 5279381, at *5 (5th Cir. Nov. 12, 2021). The vaccines were available at the start of the year; presumably, economy and efficiency issues were present then—indeed, they were probably worse. OMB does not address why it became necessary to address this issue, and change course, in September.

OMB's proffered reasons are also deficient. As the Federal Government all but admits, OMB's September determination was entirely devoid of reasoning, thus rendering the November rationalization impermissible "*post hoc* rationalizations." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971). To avoid that bar, the Federal Government claims the rationalization provides "further details" as to why OMB "initially approved the" mandate. ECF 20, at 22. Those may sometimes be permissible, but they "'must be viewed critically' to ensure that the recession is not upheld on the basis of impermissible 'post hoc rationalization.'" *Regents*, 140 S. Ct. at 1908. OMB could only "elaborate" on the reasons it provided in September; it could not provide new ones. *Id.* Because OMB provided *no* details in September, the new reasons are just that: *new* reasons for an *old* action—a quintessential "*post hoc* rationalization." *Id.*

In any event, the new reasons that OMB now provides are unsupported. OMB justified the September determination merely by reciting that the mandate would "improve economy and efficiency by reducing [1] absenteeism and [2] decreasing labor costs for contractors and subcontractors," with no further elaboration. 86 Fed. Reg. at 63,692. But OMB did not provide evidence regarding absenteeism in the November rationalization. The study the agency now cites for the proposition that "COVID-19 vaccines provide strong and persistent protection against infection, illness, and hospitalization," 86 Fed. Reg. at 63,422, "did not include persons with … COVID-19 who did not require hospitalization," Mark W. Tenforde et al., *Sustained Effectiveness of Pfizer-BioNTech and Moderna Vaccines Against COVID-19 Associated Hospitalizations Among Adults—United States, March-July 2021*, 34 MORBIDITY & MORTALITY WEEKLY REP. 1156, 1161 (2021). Thus, the study did not evaluate vaccine-mediated protection against infections that did not result in hospitalization. All it found was "evidence for sustained high protection from severe COVID-19 requiring hospitalization, which is consistent with data demonstrating mRNA COVID-19 vaccines have the capacity to induce durable immunity, particularly in limiting the severity of disease." *Id.* at 1160. And while that study cites two papers arguing that there may be durable protection against infection, both also qualify that conclusion with the need for further research or the preliminary nature of that conclusion.[4]

The problem is that infections drive absenteeism, and OMB's evidence fails to address the degree to which vaccines reduce infections. OMB, for example, calculated the cost of absenteeism by using the CDC's quarantine rules for *symptomatic* individuals—not just those with severe

[4] *See* Deborah Cromer et al., *Prospects for Durable Immune Control of SARS-CoV-2 and Prevention of Reinfection*, 21 NATURE REV. 395, 395 (2021); Jackson S. Turner et al., *SARS-CoV-2 mRNA Vaccine Induced Persistent Human Germinal Centre Response*, 596 NATURE 109, 112 (2021).

COVID-19 infection. *See* 86 Fed. Reg. at 63,422. So studies showing the robustness of vaccine protection against severe infection say nothing about absenteeism directly, and OMB compares apples to oranges. And OMB cited no such analysis in its September reasoning. That is a *post hoc* rationalization, and it is also arbitrary and capricious, given the significant evidence that vaccines do not play as strong a role in preventing *infection* as OMB seems to believe, though they do provide robust protection against severe health outcomes. *See* ECF 9-5, at ¶¶ 17–26.

As to costs, OMB assumes that costs of absenteeism are "borne by contractors." 86 Fed. Reg. at 63,422. But it never explains why that would be the case—and how much the cost of absenteeism is actually born by contractors surely turns on numerous, complicated issues that differ by industry. Its "explanation" is little better than bald assertion. By contrast, OSHA's vaccine mandate devotes over forty pages of the Federal Register to analyzing the economic effects of its rule. See 86 Fed. Reg. 61,402, 61,459–504 (Nov. 5, 2021).

Furthermore, the anecdotes OMB cites as claiming that vaccine mandates will not impose significant costs because workers will not quit do not, in fact, support that assertion. One article OMB cites to conclude that vaccine requirements "will not lead to any meaningful number of workers to quit their jobs," ECF 20, at 19, suggests that up to 5 percent of unvaccinated workers may quit because of vaccine mandates, *see* 86 Fed. Reg. at 63,422 & n.14 (citing Nate Rattner, *Some 5% of Unvaccinated Adults Quit Their Jobs Over COVID Vaccine Mandates, Survey Shows*, CNBC (Oct. 28, 2021), https://cnb.cx/3x2pli0). Another article OMB cites, *see id.*, says that for healthcare systems that are "already strained," "a loss of 1 percent of health-care workers" would result in a "considerable" impact. Meryl Kornfield & Annabelle Timsit, *Vaccine Mandates Stoked Fears of Labor Shortages. But Hospitals Say They're Working*, WASH. POST (Oct. 16, 2021), https://wapo.st/3Czj5iY (further quoting the head of New Mexico's health department as saying

the loss would be "a big deal"). Given those statistics, it blinks reality to conclude that the mandate will not negatively affect federal efficiency and economy. Relatedly, OMB never explains why its anecdotes about how a mandate affects *private* employers can predict how that mandate will affect *state* employers, such that even if OMB properly considered the effects on the former it considered the effects on the latter. *Contra* ECF 20, at 20 (making that claim). At very least, OMB had to address those important issues, and had to explain and justify the mandate in the face of those considerations. *See Regents*, 140 S. Ct. at 1910.

The November rationalization also fails to address any of the Plaintiff States' other concerns. Nowhere is the cost to States, or the intrusion their sovereignty, *see* ECF 9, at 28–29, discussed. OMB thus unlawfully "failed to consider important aspects of the problem." *Regents*, 140 S. Ct. at 1910 (cleaned up). The heterogeneity of workplaces and workforces (including, for examples, whether workers are inside or outside, the fact that people have had natural immunity, and the different affect COVID-19 has on different people, *see* ECF 9, at 29) and obvious, less restrictive alternatives (*see id.*) are absent. Indeed, if masks are, as OMB says, "effective in reducing the spread of COVID-19," 86 Fed. Reg. at 63,422, it is not clear why there must be a vaccine *and* mask mandate—a mask mandate, given OMB's analysis, is an "alternative within the ambit of the" agency's reasoning that would be less restrictive and costly. *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 51 (1983). As for reliance, it is obvious that fundamentally changing a workplace—as the contractor mandate requires—would upset many reliance interests—for example, for those that established workplaces in certain ways. *See* Roger McKinney, *Curators Approve COVID-19 Vaccine Mandate for Most University of Missouri Employees*, COLUMBIA DAILY TRIB. (Nov. 18, 2021), https://bit.ly/32eJSo5 (noting that University of Missouri system, which choose to comply with the mandate rather than lose money,

will now "try to segregate workers" to ensure they do not contact federal contractors). The scope of the contractor mandate might well be a "policy choice" left to the judgment of OMB, *see* ECF 20, at 21 (citing *Adventist Health System/SunBelt, Inc. v. U.S. Department of Health and Human Services*, 2021 WL 5170810, at *7 (8th Cir. 2021)), but OMB still had to "adequately explain[]" its decision, *Regents*, 140 S. Ct. at 1907. It did not.

All of that also highlights the fact that OMB's justifications are blatantly pretextual.[5] *See* ECF 9, at 30–31. "[V]iewing the evidence as a whole, [OMB's] decision … cannot be adequately explained in terms" of promoting economy and efficiency. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019). The mandate only came into being "[a]fter the President voiced his displeasure with the country's vaccination rate in September," and "the Administration pored over the U.S. Code in search of authority, or a 'work-around.'" *BST Holdings*, 2021 WL 5279381, at *4 & n.13 (quoting a retweet from the White House Chief of Staff). The slapdash September determination, and the belated, half-hearted November rationalization—as well as OMB's failure to grapple with key pieces of evidence and to read properly some of its own evidence—simply underscores that the contractor mandate is not the product of reasoned decisionmaking but of presidential diktat. Courts "are 'not required to exhibit a naiveté from which ordinary citizens are free.'" *Dep't of Commerce*, 139 S. Ct. at 2575 (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977)). OMB's justifications are nakedly pretextual.

3. OMB failed to follow the proper procedure.

As to the procedural requirements, the Government seeks refuge in 41 U.S.C. § 1707(d) and (e)'s waiver requirement. *See* ECF 20, at 23; 86 Fed. Reg. at 63,423–24. But as discussed

[5] While the Government argues the Court should ignore extra-record evidence, courts consider it "when it is necessary to determine whether the agency considered all the relevant factors." *Texas v. Biden*, 2021 WL 3603341, at *18 (S.D. Tex. Aug. 13, 2021).

above, the Government defends OMB's decision by treating the November rationalization as an expansion of the reasoning of the September one. It cannot cure the original procedural defect—and even if it could, it is facially implausible. OMB's latest decision to further delay the effective date fatally undermines any claim of "urgent and compelling circumstances [that] make compliance … impracticable," § 1707(d). *See BST Holdings*, 2021 WL 5279381, at *3 n.11 (noting, regarding a similar two-month delay, that OSHA's "failure to act promptly … may be evidence that a situation is not a *true* emergency") (quoting another source). And the fact that vaccines have been available since the start of the year and the Delta variant, *cf.* 86 Fed. Reg. at 63,423 (mentioning it), has been circulating since the summer, all without the need for a mandate, likewise undermines the time-sensitive nature of the rule. To the extent that the Government contends that the supposed "urgent and compelling circumstances" are the need to align with the OSHA and CMS mandate, *see* 86 Fed. Reg. at 63,423–24, the circumstance is self-inflicted. A failure to coordinate does not justify a failure to follow the rules. "[T]he Government should turn square corners in dealing with people." *Regents*, 140 S. Ct. at 1909 (quoting *St. Regis Paper Co. v. United States*, 368 U.S. 208, 229 (1961) (Black, J., dissenting)). OMB did not do so here. Moreover, the OSHA mandate is now indefinitely stayed, *BST Holdings*, 2021 WL 5279381, at *9—just as this mandate should be.

4. The FAR Guidance is arbitrary and capricious.

Substantively, the FAR Guidance is arbitrary and capricious for the same reason OMB's September determination was—it fails to articulate any justification for imposing the vaccine mandate on federal contractors. The core of the Government's argument to the contrary, ECF 20, at 25, is that the FAR Guidance is non-binding, non-final agency action. As to finality, the Government claims that the memo is not "the FAR Council's final word on the contract clause" because it is an interim measure precedent to development for a full contract clause. *See id.* at 24.

But labels agencies put on their actions are not determinative. *See Whitman*, 531 U.S. at 479. Nothing suggests the FAR Guidance is going to change, so "despite the potential for a different permanent decision," the Interim Values are final since it is not "subject to further consideration by the agency." *Nat. Res. Def. Council v. Wheeler*, 955 F.3d 68, 78 (D.C. Cir. 2020). Further, the Government is imposing the FAR Council's guidance on federal contracts *now*, so that guidance is clearly an action "by which rights or obligations have been determined," and "from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 178 (1997).

The Government also claims that the FAR Guidance is not final because it is not binding on other agencies that must decide whether to incorporate the clause in their contracts and so is thus "not a decision form which legal consequences will flow." ECF 20, at 24–25 (quotations omitted). The FAR Guidance implements § 3(a) of EO 14042, which says that FAR is to "take initial steps to implement appropriate policy direction to acquisition officers for use of the clause by recommending that agencies exercise their authority under subpart 1.4 of the Federal Acquisition Regulation." The clear intent of the EO is for agencies to use the FAR Guidance in their deviations, so it is a decision that has legal consequences for agencies. *See Bennett*, 520 U.S. at 169 (holding that an agency action is final and reviewable when it "alters the legal regime to which [another] agency is subject"); *see also U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 578 U.S. 590, 599–600 (2016) (noting that an order that did nothing "except give notice of how the [ICC] interpreted the relevant statute" was a final order, discussing *Frozen Food Express v. United States*, 351 U.S. 40 (1956)). Further, the FAR Guidance eliminates some of the procedural hoops agencies would have to go through in order to get a class deviation. *See* 48 C.F.R. § 1.404. That

is a sufficient legal consequence.[6] *Bennett*, 520 U.S. at 169-70.

Finally, for the reasons that the FAR Guidance is a final agency order with binding effects on other agencies, the Plaintiff States have Article III standing[7] to challenge it and the guidance needed to follow the procedures set forth in 41 U.S.C. § 1707.

C. Plaintiff States are likely to succeed on their constitutional claims.

The Plaintiff States are also likely to succeed on their constitutional claims. *First*, demanding compliance with vaccine requirements that may be "amended during the performance" of the contract violates the Spending Clause.[8] ECF 9-4, at 5. That the Federal Government seeks to pretermit review altogether, *see* ECF 20, at 30, simply admits the violation. But as the Supreme Court said, even in the federal contract context, "certain rights are protected against governmental action and, if such rights are infringed by the actions of officers of the Government, it is proper that the courts have the power to grant relief against those actions." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949); *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 238–39 (1995). That logically includes rights the Spending Clause protects, *see Ohio v. Yellen (Ohio I)*, 2021 WL 1903908, at *7 (S.D. Ohio May 12, 2021) (discussing the States' right to clear conditions), and is consistent with the view that spending clause legislation has at least "a contractual aspect," *Bennett v. Kentucky Department of Education*, 470 U.S. 656, 669 (1985).

[6] Even if the Court decides the FAR Guidance is not final agency action, but enjoins enforcement of the OMB determination and EO 14042, it should make clear that the FAR Guidance is enjoined insofar as it incorporates the Taskforce Guidance.

[7] The Federal Government's brief implies a unique standing requirement to challenge the FAR Guidance, *see* ECF 20, at 23, but the case it cites involves "Article III standing." *Transp. Workers Union of Am., AFL-CIO v. Transp. Sec. Admin.*, 492 F.3d 471, 474 (D.C. Cir. 2007). The Plaintiff States clearly have standing to challenge the contractor mandate, regardless of where it appears, for all the reasons why the mandate inflicts irreparable harm. *See, e.g.*, ECF 9, at 37–41.

[8] Because the Federal Government disclaims reliance on the Commerce Clause, *see, e.g.*, ECF 20, at 27, 29–30, the States do not discuss it further.

And while the Government faults the Plaintiff States for not providing a case applying Spending Clause limitations to the federal contracts, *see* ECF 20, at 30–31, the Government does not provide any case indicating that the Government may transcend the limits of Congress's spending power by putting "contract" on the memo line of the checks it writes. And the quote from *NEA v. Finley*, 524 U.S. 569 (1998), the Government cites, *see* ECF 20, at 31, at most establishes that spending provisions are not amendable to a due process vagueness challenge. *See* 524 U.S. at 589. It does not establish that the government may ignore the Constitution when drafting contracts. *See id.* at 587 ("[T]he First Amendment certainly has application in the subsidy context."). Indeed, the scarcity of direct authority in this context merely underscores the wholly unprecedented nature of the Government's action, which is itself a reason to reject it. *See Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2201 (2020).

On the merits, the Federal Government focuses only on whether the contractor mandate "unambiguously" conditions "the grant of federal moneys" on its conditions. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). But the *conditions themselves* must be clear and unambiguous at the time the States accept the contract, *see id.*, and no one could have anticipated a federal vaccine mandate from those conditions. The Plaintiff States also pointed out that the mandate is not related to federal interests in federal contracts, *see* ECF 9, at 35, and is unconstitutionally coercive, *see id.* at 35–36. The Federal Government does not even address those points, thus conceding the Plaintiff States' case.

In any event, the contractor mandate is unconstitutionally ambiguous. As the States point out, the Task Force and OMB may change it at any time without mutual assent—as the FAQs say: "Covered contractors are required to, for the duration of the contract, comply with all Task Force Guidance for contractor or subcontractor workplace locations, *including any new Guidance where*

the OMB Director approves the Guidance and determines that adherence to the Guidance will promote economy and efficiency in Federal contracting." Ex. A, at 15 (emphasis added). Neither *Bennett v. Kentucky Department of Education* nor *Mayweathers v. Newland*, 314 F.3d 1062 (9th Cir. 2002), involved a provision the government could change at will. *Bennett* even refused to hold that "States guaranteed that their performance under the grant agreements would satisfy whatever interpretation of the terms might later be adopted by the Secretary, so long as that interpretation" was not arbitrary or capricious. 470 U.S. at 670. And while some cases say that requiring "conformance to" amendments is constitutional, *see* ECF 20, at 31, such changes are "bound by fair notions of contract law" and cannot "so alter the program as to fundamentally change the basic agreement." *Ky., Dep't of Human Res. v. Donovan*, 704 F.2d 288, 299 n.17 (6th Cir. 1983). Vesting power in federal officials to change, with no notice, how federal contractors order their workplace, is not that. *See Ohio v. Yellen (Ohio II)*, 2021 WL 2712220, at *15 (S.D. Ohio July 1, 2021) (holding that a provision vesting plenary discretion in federal official to determine a violation was an unconstitutionally ambiguous condition).

Finally, as to the Tenth Amendment, the Federal Government misses the mark through their irrelevant discussion of "intergovernmental immunity." ECF 20, at 28. Plaintiff States are not suing federal contractors for violations of state law—but they might well wish to. *See, e.g.*, MONT. CODE ANN. §§ 49-2-501–512. An unlawful contractor mandate could provide an immunity defense and thus override state law, in derogation of the Tenth Amendment. Likewise, the contractor mandate, because it reaches employees with barely any connection to a federal contract at all, directs state agencies who are contractors to get *all* their employees vaccinated or to restructure their workplace to avoid interactions between the two. To put it another way, the contractor mandate uses the existence of *some* connection to the federal government to justify

federal direction of entire state workforces. That is clear, unconstitutional commandeering. *See, e.g.*, *Printz v. United States*, 521 U.S. 898, 935 (1997).

And if there is any doubt that the contractor mandate is unconstitutional, there is the fact that the mandate is *sui generis*. Such "lack of historical precedent" is "the most telling indication of a severe constitutional problem." *Seila Law*, 140 S. Ct. at 2201 (cleaned up).

II. The other equitable factors strongly favor a preliminary injunction.

Irreparable Harm: The Federal Government is also wrong to claim that the Plaintiff States will not suffer irreparable harm. To begin, the Federal Government basically concedes that if the States' merits claims succeed, they have shown irreparable injury to their sovereign interests. *See* ECF 20, at 38–39. "The States … have an interest in seeing their constitutionally reserved police power over public health policy defended from federal overreach." *BST Holdings*, 2021 WL 5279381, at *8. The Plaintiff States also bring *parens patriae* claims to vindicate their quasi-sovereign interests in the health and welfare of its citizens, *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 593 (1982), and thus the manifest irreparable harm to millions of their citizens must be considered. The Plaintiff States are only barred from suing "to protect [their] citizens from the operation of federal statutes," not from asserting their quasi-sovereign rights in the health and welfare of their residents by forcing the federal government to *comply* with federal statutes and the Constitution. *Massachusetts v. EPA*, 549 U.S. 497, 520 n.17 (2007) (quotations omitted). The Plaintiff States do the latter here. *See* ECF 9, at 40.

The Federal Government also attacks the harm the Plaintiff States will suffer in their role as contractors. *See* ECF 20, at 35–38. The crux of their claim is that at least *some* of the contracts the Plaintiff States cite do not meet the requirements of EO 14042 and that there are other methods of challenging inclusion of any COVID-19 related clauses. *See id.* That argument undermines the Government's basic position that *all* contractor employees *must* be vaccinated immediately. In

any event, the Government concedes that some contracts meet the requirements for inclusion of the contractor mandate, *see id.* at 37 n.16, and even concedes that the Plaintiff States "in general terms … contract with the federal government," *id.* at 36. Those concessions concede the States' irreparable injury. The Government also admits that the Plaintiff States, through their agencies and subdivisions, contract with the federal government—and logic shows that at least some of those contracts will be subject to the mandate. *See* Ex. D ¶ 5 (supplemental DNR declaration) (noting, given the new information in the Hoffman Declaration, that the agency has contracts that fall under the mandate). And even for those contracts where EO 14042 just "strongly encourages" the inclusion of the mandate, the federal government can still use its financial leverage to turn strong encouragement into strong-arming. *See* McKinney, *supra* (quoting the MU president and chancellor saying they "feel compelled" to vaccinate their employees because "[w]e have hundreds of millions of dollars in federal research and contracts."). Indeed, many of the Federal Government's own agencies seem to take the view that inclusion of mandates is required—at least in some circumstances—or are at least confused about the scope of EO 14042. *See* Ex. E. Preliminary relief would thus have immediate practical effects in ameliorating the Plaintiff States' harms and force the Government to define the scope of the rule.

So whether or not contracting agencies and subdivisions can receive relief later via the Tucker Act, *see* Opp'n 37–38, it is indisputable that the contractor mandate "places an immediate and irreversible imprint on all covered employers in America, and 'complying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs.'" *BST Holdings*, 2021 WL 5279381, at *8 (quoting another source); *see also* ECF 9, at 40.

Balance of Harms and Public Interest: As the last two factors, the Federal Government claims that enjoining the contractor mandate would hamper the efficiency of federal contracting,

undermine the public interest in stopping the spread of COVID-19, and interfere with the ability of the federal government to impose the vaccine mandate in future contacts. *See* ECF 20, at 40–41. But the Government's own conduct undermines its claim of "weighty and substantial" interests in the mandate. *Id.* at 41. The Government imposed the contractor mandate nine months after the vaccines received emergency use approval, *see* ECF 20, at 4–5 (giving the vaccine development timeline), and has now moved compliance back another two months, *see* 86 Fed. Reg. 63,423–24. Such delays undermine the Government's claim of urgency now. *BST Holdings*, 2021 WL 5279381, at *3 n.11. Indeed, if the point of delaying compliance was to match the compliance date for the OSHA ETS, *see* 86 Fed. Reg. at 63,424, a preliminary injunction would *further* that interest, since the OSHA rule has been stayed. *See BST Holdings*, 2021 WL 5279381, at *9. Those facts also undermine the Federal Government's claim that an injunction would not preserve the status quo, *see* ECF 20, at 41; for nine months, the status quo was no mandate.

Ultimately, "[a]ny interest [the Federal Government] may claim in enforcing an unlawful (and likely unconstitutional) ETS is illegitimate." *BST Holdings*, 2021 WL 5279381, at *8. And "[t]he 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." *Id.*; *see also Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2490 (2021) ("[O]ur system does not permit agencies to act unlawfully even in pursuit of desirable ends.").

CONCLUSION

For those reasons, the Plaintiff States respectfully ask the Court to enjoin the federal contractor mandate in its entirety.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on November 22, 2021, a true and correct copy of the foregoing and any attachments were filed electronically through the Court's CM/ECF system, to be served on counsel for all parties by operation of the Court's electronic filing system.

/s/ Justin D. Smith