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

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

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

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

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

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

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

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

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

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

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

During the hearing, Plaintiffs presented testimony from representatives of three universities within the University System of Geor

(See, e.g., Transcript of Dec. 3, 2021 Hearing (hereinafter, "Tr."), pp. 22–27 (testimony of Michael Shannon, Vice President and Deputy Chief Business Officer at Georgia Tech, that Georgia Tech has roughly 16,000 employees who work on contract

confers a conditional right to intervene," or "when [the] applicant's claim or defense and the main

suit and prior to any substantive decisions having been made by the Court. At the time the Motion to Intervene was filed, Defendants had not yet responded (or been required to respond) to any substantive requests for relief in the case. Indeed, the day after ABC filed its Motion to Intervene, Plaintiffs filed their Amended Complaint (and Amended Motion for Preliminary Injunction), superseding their prior pleadings. Finally, the Court finds that ABC's interests are represented inadequately by the existing Plaintiffs. ABC represents private entities, many of whom are considered small businesses, while the Plaintiffs are all governmental officials, entities, and agencies. ABC seeks to assert a clam for violation of the Small Business Regulatory Enforcement Fairness Act, which the existing Plaintiffs have not asserted (and may not be able to assert even if they desired to do so). (See doc. 48-1, p. 40.) Additionally, the evidence presented to the Court indicates that ABC's members generally bid on and perform different types of contracts as compared to the wider-ranging types of contracts the Plaintiffs typically bid on and perform, and Plaintiffs and ABC also have different administrative systems and costs when it comes to managing their employees and workforce. Accordingly, ABC's members (as private entities) have economic interests and concerns that differ from those of the Plaintiffs.[4] See, e.g., Kleissler v.

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

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

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

II. Standing

"[The] standing doctrine . . . requi

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

Defendants have focused much of their standing challenge on arguing that Plaintiffs have not "provide[d] [any] evidence that they are (1) parties to a federal contract that already has the challenged clause; or (2) parties to an existing covered contract that is up for an option, extension, or renewal that must include the clause," and that they have not "identif[ied] any specific, covered solicitations that they plapla

Additionally, ABC, which the Court permits, through this Order, to intervene as a Plaintiff, has standing. An organization may sue "on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Greater Birmingham Ministries v. Sec'y of Ala., 992 F.3d 1299 (11th Cir. 2021). ABC, a construction industry trade association, has provided sworn declarations showing that at least two of its members "intended to bid" on

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

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

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

III. Motions for Preliminary Injunction

A. Standard of Review

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

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

B. Likelihood of Success on the Merits

The likelihood of success on the merits is generally considered the most important of the four factors. Garcia-Mir v. Meese, 781 F.2d 1450, 1453 (11th Cir. 1986). If Plaintiffs cannot satisfy their burden with respect to this factor, the Court need not consider the other thrxtra(r)3.ds ir

Procurement Act was “designed to centralize Government property management and to introduce

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to the President, through the Procurement Act, of "particularly direct and broad-ranging authority

Even if, however, EO 14042 did not trigger the specific requirement that Congress "speak clearly" in authorizing the challenged executive action, the Court additionally finds that Plaintiffs have a likelihood of proving that EO 14042 does not have a sufficient nexus to the purposes of the

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

2. Other Grounds Upon Which Plaintiffs Challenge EO 14042

In further support of their request for a preliminary injunction, Plaintiffs also claim that Defendants issued the Task Force Guidance and the FAR Deviation Clause, which they claim constitute final agency action, without complying with the Administrative Procedure Act's notice-

C. Irreparable Injury Requirement

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

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

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

D. Balancing of the Harms

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

Plaintiffs' employees as Plaintiffs would be required to decide whether an employee who refuses to be vaccinated can, in practicality, be reassigned to another office or another task or whether the

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

CONCLUSION

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

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

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

Complaint filed on the docket includes ABC-Georgia (which has not been allowed to intervene)