2021 WL 5998204
Only the Westlaw citation is currently available.
United States District Court,
E.D. Missouri, Eastern Division.

State of MISSOURI, et al., Plaintiffs,
v.
Joseph R. BIDEN, in his official Capacity as President of the United States, et al., Defendants.

No. 4:21 CV 1300 DDN
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Signed 12/20/2021

Synopsis

Background: Ten states sued President of the United States, bringing challenges under the United States Constitution, the Administrative Procedures Act (APA) and federal procurement law against federal guidelines created pursuant to an executive order that required federal contractors to ensure that their covered employees were vaccinated against COVID-19, subject to legal accommodations. States moved for preliminary injunction.

Holdings: The District Court, David D. Noce, United States Magistrate Judge, held that:

[1] states did not have Article III standing to bring a quasi-sovereign parens patriae action;

[2] Missouri, Alaska, Arkansas, and Montana established Article III standing to bring sovereign interest claims;

[3] Wyoming, Iowa, and Missouri had Article III standing as a federal contractors;

[4] states were likely to succeed on the merits of their claim that the vaccine mandate exceeded the President's powers under the Federal Property and Administrative Services Act (FPASA);

[5] states were not likely to succeed on the merits of their claim that the vaccine mandate violated the Spending Clause and the Tenth Amendment;

[6] states established that they would suffer irreparable harm to their proprietary interests in the absence of injunctive relief; and

[7] balance of the harms and the public interest weighed in favor of a preliminary injunction.

Motion granted.

Procedural Posture(s): Motion for Preliminary Injunction.

West Headnotes (33)

[1] Injunction Extraordinary or unusual nature of remedy

A preliminary injunction is an extraordinary remedy never awarded as of right.

[2] Injunction Grounds in general; multiple factors

In determining whether to issue a preliminary injunction, the court must consider four factors: (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting an injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.

[3] Injunction Balancing or weighing factors; sliding scale

None of the four factors to be considered in determining whether to issue a preliminary injunction is determinative, and each must be examined in the context of the relative injuries to the parties and the public.

[4] Injunction Grounds in general; multiple factors

District courts have discretion to apply the four-factor preliminary injunction test in a pragmatic, flexible way.

[5] **Action** Stay of Proceedings

Injunction Equitable considerations in general

Whether to grant a stay or injunction militates against a wooden application of probabilities, because at base, the question is whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined.

[6] **Federal Civil Procedure** In general; injury or interest

Standing is a threshold inquiry in every federal case that determines whether the court has the power to decide the case.

[7] **Federal Civil Procedure** In general; injury or interest

Federal Civil Procedure Causation; redressability

Federal Courts Case or Controversy Requirement

To satisfy the case or controversy requirement of Article III, which is the irreducible constitutional minimum of standing, a plaintiff must, generally speaking, demonstrate that he has suffered an injury in fact, that the injury is fairly traceable to the actions of the defendant, and that the injury will likely be redressed by a favorable decision. U.S. Const. Art. 3, § 2, cl. 1.

[8] **Federal Courts** Injury, harm, causation, and redress

To satisfy the case or controversy requirement of Article III, plaintiffs' injury-in-fact must be both particularized and concrete. U.S. Const. Art. 3, § 2, cl. 1.

[9] **Federal Civil Procedure** In general; injury or interest

For an injury to be "particularized," as required for Article III standing, it must affect the plaintiff in a personal and individual way. U.S. Const. Art. 3, § 2, cl. 1.

[10] **Federal Civil Procedure** In general; injury or interest

For purposes of Article III standing, a "concrete injury" is a de facto injury that actually exists. U.S. Const. Art. 3, § 2, cl. 1.

[11] **Federal Civil Procedure** In general; injury or interest

To establish Article III standing, a plaintiff must also establish, as a prudential matter, that he or she is the proper proponent of the rights on which the action is based. U.S. Const. Art. 3, § 2, cl. 1.

[12] **Federal Civil Procedure** In general; injury or interest

Where one plaintiff establishes Article III standing to sue, the standing of other plaintiffs is immaterial. U.S. Const. Art. 3, § 2, cl. 1.

[13] **States** Capacity of state to sue in general

United States Review of presidential actions

States did not have Article III standing to bring a quasi-sovereign parens patriae action on behalf of states' citizens to seek federal government's compliance with federal statutes and the Constitution, in action challenging executive order that created a requirement that federal contractors ensure that their covered employees were vaccinated against COVID-19; states' claims were best understood as challenges to the operation of the federal vaccine mandate, and not a claim for purported harms to their citizens. U.S. Const. Art. 3, § 2, cl. 1.

[14] **States** Capacity of state to sue in general

United States Review of presidential actions

States of Missouri, Alaska, Arkansas, and Montana established an injury-in-fact sufficient to confer Article III standing to bring sovereign interest claims in action challenging executive order that created a requirement that federal contractors ensure that their covered employees were vaccinated against COVID-19; each state alleged that the contractor mandate preempted validly-enacted state statutes regarding vaccine mandates, creating an injury in fact by preventing states from enforcing their statutes which was fairly traceable to the executive order and was redressable through an order enjoining enforcement of the mandate. U.S. Const. Art. 3, § 2, cl. 1.

[15] **States** Preemption in general

States Capacity of state to sue in general

Preemption of a validly-enacted state statute is an injury in fact, for purposes of a state's Article III standing, such that state will not be able to enforce the statute. U.S. Const. Art. 3, § 2, cl. 1.

[16] **Education** Bidding and bid protests

Public Contracts Parties; standing

States Preferences; conditions and restrictions on bidders

States Capacity of state to sue in general

United States Review of presidential actions

United States Parties; standing

State of Iowa established an injury-in-fact sufficient to confer Article III standing as a federal contractor to bring action challenging executive order that created a requirement that federal contractors ensure that their covered employees were vaccinated against COVID-19, where the United States Department of Energy had made a unilateral modification to an Iowa State University contract for the purpose of implementing the executive order. U.S. Const. Art. 3, § 2, cl. 1.

[17] **Public Contracts** Parties; standing

States Preferences; conditions and restrictions on bidders

States Capacity of state to sue in general

United States Review of presidential actions

United States Parties; standing

State of Missouri established an injury-in-fact sufficient to confer Article III standing as a federal contractor to bring action challenging executive order that created a requirement that federal contractors ensure that their covered employees were vaccinated against COVID-19, although state did not provide date of renewal of federal contracts; state identified three contracts between federal government and the Missouri Department of Health and Senior Services that would be subject to the executive order, and state's reliance on contracts to pay employees' salaries made it likely that state would continue to bid on federal contracts. U.S. Const. Art. 3, § 2, cl. 1.

[18] **Public Contracts** Constitutional and statutory provisions

United States Statutory provisions

The Federal Property and Administrative Services Act (FPASA) was designed to centralize government property management and to introduce into the public procurement process the same flexibility that characterizes such transactions in the private sector. 40 U.S.C.A. § 101.

[19] **Public Contracts** Constitutional and statutory provisions

United States Statutory provisions

Under the Federal Property and Administrative Services Act's (FPASA) purpose of creating an economical and efficient system for federal procurement, "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. 40 U.S.C.A. § 101.

[20] **United States** Authority for particular actions

The Federal Property and Administrative Services Act (FPASA) vests broad discretion in the President. 40 U.S.C.A. § 101.

[21] **United States** Authority for particular actions

The President's powers under the Federal Property and Administrative Services Act (FPASA) are not a blank check to fill at his will; the procurement power must be exercised consistently with the structure and purposes of the statute that delegates that power. 40 U.S.C.A. § 101.

[22] **Injunction** Employment and Compensation

States that brought action challenging executive order that created a requirement that federal contractors ensure their covered employees were vaccinated against COVID-19 were likely to succeed on the merits of their claim that the vaccine mandate exceeded the President's powers under the Federal Property and Administrative Services Act (FPASA), as supported a preliminary injunction enjoining enforcement of the mandate; executive order's goal of decreasing worker absences did not establish sufficient nexus with FPASA's purpose of creating an economical and efficient system for federal procurement since "covered employees" included those who did not themselves work on or in connection with a federal contract, and vaccine mandate was not analogous to past presidential uses of FPASA power. 40 U.S.C.A. § 101.

[23] **Injunction** Employment and Compensation

States that brought action challenging executive order that created a requirement that federal contractors ensure their covered employees were vaccinated against COVID-19 were not likely to succeed on the merits of their claim that the vaccine mandate exceeded Congress' enumerated powers under the Spending Clause and infringed on the authority of the states in violation of the Tenth Amendment, as weighed against issuance of preliminary injunction enjoining enforcement of the mandate on these grounds; mandate's impact on the terms of federal procurement contracts did not violate the Spending Clause, and thus did not exceed Congress' enumerated powers at the expense of the states. U.S. Const. art. 1, § 8; U.S. Const. Amend. 10.

[24] **States** Powers of United States and Infringement on State Powers

The Tenth Amendment restrains the power of Congress, but this limit is not derived from text of the Tenth Amendment itself, which is essentially a tautology; rather, it confirms that the power of the federal government is subject to limits that may, in given instance, reserve power to the states. U.S. Const. Amend. 10.

[25] **Injunction** Clear, likely, threatened, anticipated, or intended injury

Injunction Irreparable injury

Plaintiffs seeking a preliminary injunction must show more than a mere possibility of irreparable harm, but they need not show a certainty; rather, they need to demonstrate irreparable injury is likely in the absence of an injunction.

[26] **Injunction** Employment and Compensation

States that brought action challenging executive order that created a requirement that federal contractors ensure their covered employees were

vaccinated against COVID-19 did not establish that they would suffer irreparable harm to their sovereign or quasi-sovereign interests, as required for a preliminary injunction enjoining enforcement of the vaccine mandate, where states were not likely to succeed on the merits of their claim that the mandate violated either the Spending Clause or the Tenth Amendment. U.S. Const. art. 1, § 8; U.S. Const. Amend. 10.

[27] **Injunction** Public employees and officials

States that brought action challenging executive order that created a requirement that federal contractors ensure their covered employees were vaccinated against COVID-19 established that they were likely to suffer irreparable harm to their proprietary interests as federal contractors, supporting a preliminary injunction enjoining enforcement of the vaccine mandate, although compensation could be available under the Contract Disputes Act; states submitted declarations from officials describing the business and financial effects of the resignation or suspension of the estimated one-quarter of employees who would refuse to be vaccinated, as well as nonrecoverable compliance and monitoring costs. 28 U.S.C.A. § 149; 140 U.S.C.A. § 101.

[28] **Injunction** Balancing or weighing hardship or injury

When determining whether a plaintiff seeking a preliminary injunction has shown that the balance of equities tips in their favor and that an injunction is in the public interest, the court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.

[29] **Injunction** Injunctions against government entities in general

When the party opposing a preliminary injunction is the federal government, the balance-of-harms factor merges with the public-interest factor.

[30] **Injunction** Public employees and officials

Balance of the harms and the public interest weighed in favor of a preliminary injunction enjoining enforcement of executive order that created a requirement that federal contractors ensure their covered employees were vaccinated against COVID-19, in action brought by states that were federal contractors, although the public had a strong interest in combatting the spread of COVID-19; states were likely to succeed on the merits of their argument that the vaccine mandate exceeded the President's powers under the Federal Property and Administrative Services Act (FPASA), and it would not harm the federal government to maintain the status quo while the courts decide the issues of the President's authority and the implications for federalism. 40 U.S.C.A. § 101.

[31] **United States** Governmental powers in general

The government may not act unlawfully even in pursuit of desirable ends.

[32] **Injunction** Public interest considerations

In the context of a motion for a preliminary injunction, there is no public interest in the enforcement of an unlawful action.

[33] **Equity** Grounds of jurisdiction in general

Equitable remedies, like remedies in general, are meant to redress injuries sustained by particular plaintiff in particular lawsuit.

Attorneys and Law Firms

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MEMORANDUM AND ORDER

David D. Noce, UNITED STATES MAGISTRATE JUDGE

***1** This matter is before the Court on plaintiff-States' motion for preliminary injunction, pursuant to Federal Rule of Civil Procedure 65, to enjoin the enforcement of the COVID-19 vaccine mandate for certain federal contractors and subcontractors. (Doc. 8.) The parties have consented to the exercise of plenary authority by the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(c).

For the following reasons, plaintiffs' motion for preliminary injunction is sustained.

BACKGROUND

On January 20, 2021, President Biden ("the President") signed Executive Order 13,991, 86 Fed. Reg. 7045, which established the Safer Federal Workforce Task Force ("Task Force"). The Task Force is charged with providing "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. at 7046 (§ 4(a)). On September 9, 2021, the President announced that he had signed Executive Order 14,042 ("EO 14,042"), requiring the Task Force to issue Guidance regarding adequate COVID-19 safeguards.

On September 24, 2021, the Task Force issued Guidance implementing EO 14,042. The Guidance required that federal contractors ensure that their covered employees were vaccinated against COVID-19, subject to legal accommodations; in addition, the Guidance required masking and physical distancing in covered contractor workplaces. Also on September 24, the Acting Office of Management and Budget ("OMB") Director published in the Federal Register her determination that the Task Force Guidance will improve economy and efficiency.

To implement EO 14,042 and the Task Force's Guidance, as approved by OMB, on September 30, 2021, the Federal Acquisition Regulatory Council ("FAR Council") issued a memorandum to "agencies that award contracts under the Federal Acquisition Regulation with initial direction for the incorporation of a clause into their solicitations and contracts to implement" the Guidance. This included allowing a sample clause that may be included in contracts via a deviation. [1]

On November 10, 2021, the Task Force updated the Guidance, changing the date contractors' employees were required to be fully vaccinated from December 8, 2021, to January 18, 2022. Also on November 10, the Acting Director of OMB filed for publication in the Federal Register her determination that the updated Guidance "will promote economy and efficiency in Federal contracting if adhered to by Government contractors and subcontractors." Federal agencies have issued agency-specific class deviations directing procurement officers to include the COVID-19 safety clause in contracts until the FAR Council issues its final government-wide regulation.

***2** Plaintiff-States maintain significant contracts with the federal government. According to the System for Award Management, in calendar 2020, federal contracts performed in plaintiff-States were worth billions of dollars, ranging from $386 million in Wyoming to $16 billion in Missouri. (Doc. 27-1 at 98-99.)

On October 29, 2021, plaintiffs – the States of Missouri, Nebraska, Alaska, Arkansas, Iowa, Montana, New Hampshire, North Dakota, South Dakota, and Wyoming – commenced this judicial action to challenge the mandate. (Doc. 1.) Plaintiffs allege in their complaint that the mandate violates the U.S. Constitution, the Administrative Procedures Act ("APA"), and federal procurement law. [2] On November 4, plaintiffs moved for preliminary injunction. (Doc. 8.) Defendants filed their response in opposition on November

18, and plaintiffs filed their reply on November 22. (Docs. 20, 23.) The parties also filed supplemental briefing on December 10. (Docs. 28, 29.)

RELEVANT LEGAL PRINCIPLES

[1] **[2]** "A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 24, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). In determining whether to issue a preliminary injunction, the Court must consider four factors: "(1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981).

[3] **[4]** **[5]** None of the four factors "is determinative," and each must be examined "in the context of the relative injuries to the parties and the public." *Id.* at 113. District courts have discretion to apply the *Dataphase* test in a pragmatic, "flexible" way. *Richland/Wilkin Joint Powers Auth. v. United States Army Corps of Eng'rs*, 826 F.3d 1030, 1036 (8th Cir. 2016) (citations omitted). Whether to grant a stay or injunction "militates against a wooden application" of probabilities, because "[a]t base, the question is whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined." *Dataphase Sys.*, 640 F.2d at 113.

DISCUSSION

A. Standing

In their supplemental briefing, defendants raised the issue of standing. They argue that plaintiffs lack standing to bring *parens patriae* claims against the federal government for any claim and that they cannot claim irreparable injury for any purported harms to their citizens. (Doc. 29 at 15.) They also contend that plaintiffs have failed to show standing based on their status as federal contractors. (*Id.* at 16.) Lastly, they argue that plaintiffs' claim of direct sovereign injuries cannot create standing. (*Id.* at 19.)

[6] **[7]** **[8]** **[9]** **[10]** **[11]** **[12]** Standing is a threshold inquiry in every federal case that determines whether the court has the power to decide the case. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). "To satisfy the 'case' or 'controversy requirement' of Article III, which is the 'irreducible constitutional minimum' of standing, a plaintiff must, generally speaking, demonstrate that he has suffered an 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett v. Spear*, 520 U.S. 154, 162, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) (citations omitted). Plaintiffs' injury-in-fact must be both particularized and concrete. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 136 S. Ct. 1540, 1545, 194 L.Ed.2d 635 (2016) (citing *Friends of the Earth, Inc. v. Laidlaw Env't. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000)). "For an injury to be particularized, it must affect the plaintiff in a personal and individual way." *Id.* at 1548 (internal quotation marks omitted). Further, a "concrete" injury is a de facto injury that actually exists. *Id.* Finally, "a plaintiff must also establish, as a prudential matter, that he or she is the proper proponent of the rights on which the action is based." *Haskell v. Washington Twp.*, 864 F.2d 1266, 1275 (6th Cir. 1988) (citations omitted). "[W]here one plaintiff establishes standing to sue, the standing of other plaintiffs is immaterial." *Nat'l Wildlife Fed'n v. Agric. Stabilization and Conservation Serv.*, 955 F.2d 1199, 1203 (8th Cir. 1992) (quoting *Bowen v. Kendrick*, 487 U.S. 589, 620 n.15, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988)).

***3** **[13]** The Court concludes that plaintiffs do not have standing with regard to their quasi-sovereign *parens patriae* interests. Despite plaintiffs' argument that they seek the federal government's compliance with federal statutes and the Constitution, their claims are best understood as challenges to the operation of the federal vaccine mandate. Plaintiffs do not have standing to make such a claim. *See Gov't of Manitoba v. Bernhardt*, 923 F.3d 173, 176 (D.C. Cir. 2019) (citing *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 610 n.16, 102 S.Ct. 3260, 73 L.Ed.2d 995 (1982)); *Massachusetts v. EPA*, 549 U.S. 497, 520 n.17, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007).

[14] **[15]** Missouri, Alaska, Arkansas, and Montana have alleged sufficient injuries to establish standing for

their sovereign interest claims. Each state alleges that the contractor mandate ostensibly preempts state statutes regarding vaccine mandates. (Doc. 9 at 38-39.) Preemption of a validly enacted state statute is an injury in fact, such that the state will not be able to enforce the statute,[3] and the injury is fairly traceable to EO 14,042. The injury is redressable because EO 14,042 does not preempt state statutes if it is not enforced.

In support of their motion for preliminary injunction, plaintiffs submitted ten declarations from state officials in Missouri, Iowa, New Hampshire, North Dakota, Wyoming, Alaska, and Nebraska. (Docs. 9-6 through 9-15.) Defendants argue that all but the Wyoming declaration fail to provide evidence sufficient to show standing. As defendants argue, several of the declarations provide the total number and/or value of federal contracts but fail to identify contracts with sufficient specificity to establish that they are subject to EO 14,042. (Docs. 9-6, 9-8, 9-9, 9-12, 9-13, 9-15.)

[16] Defendants concede that Wyoming has standing with respect to its status as a federal contractor. (Doc. 29 at 19; Doc. 9-11.) The Court also concludes that Iowa has standing as a federal contractor to challenge the mandate. The United States Department of Energy ("DOE") made a unilateral modification to an Iowa State University contract pursuant to agency-specific authority. (Doc. 29 at 18; Doc. 9-7 at ¶ 6.) Because the agency's authority did not depend on EO 14,042, defendants contend that the modification is not "fairly traceable" to the EO and cannot confer standing. (Doc. 29 at 18-19 n.9.) The DOE order, though, states as its purpose: "To ensure the continued operation of DOE sites and facilities under health and safety emergencies as designated by the President and implement Executive Order 14042, *Ensuring Adequate COVID Safety Protocols for Federal Contractors*." U.S. DEPT. OF ENERGY, DOE O 350.5, COVID SAFETY PROTOCOLS FOR FEDERAL CONTRACTORS (2021) (italics in original). The text of the order shows that it was issued to implement the challenged EO, so the modification is fairly traceable to the challenged conduct.

[17] Missouri also has standing as a federal contractor. It identifies three contracts between the federal government and its Department of Health and Senior Services that would be subject to EO 14,042. (Doc. 9-14.) When a claim involves a challenge to a future contracting opportunity, the pertinent question is whether plaintiffs have "made an adequate showing that sometime in the relatively near future [they] will bid on another Government contract." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). The declaration states that at least 24 employees receive all or part of their salaries under one federal contract, and at least 22 employees receive all or part of their salaries under another. (Doc. 9-14.) Although the declaration does not provide the date of renewal, given its reliance on the contracts to pay its employees' salaries, it is likely that Missouri will continue to bid on federal contracts.

***4** The Court concludes that at least three states, Wyoming, Iowa, and Missouri, have standing as federal contractors to challenge the mandate. Because Missouri has standing with regard to both sovereign interests and federal contractor status, its standing is sufficient to permit review. *Massachusetts v. EPA*, 549 U.S. at 518, 127 S.Ct. 1438.

B. Likelihood of Success on the Merits

In support of their motion for preliminary injunction, plaintiffs argue that the contractor vaccine mandate (1) exceeds the President's statutory authority under the Federal Property and Administrative Services Act (FPASA); and (2) is unconstitutional because it exceeds the limits of Congress's enumerated powers and infringes on traditional areas of state authority. (Doc. 9 at 15-16.)[4]

1. Authority Under the FPASA

Plaintiffs argue that the federal contractor vaccine mandate is inconsistent with the FPASA's purpose and outside of its scope. They contend that there is no nexus between the mandate and likely savings to the government, that the mandate impermissibly delegates power to OMB and the Task Force, and that rules of statutory construction establish that the FPASA does not authorize the mandate. (Doc. 9 at 18-24.) In response, defendants argue that Congress authorized the President to direct federal procurement, that EO 14,042 satisfied the "lenient" nexus standard, and that the President can delegate his policymaking authority to the OMB director. (Doc. 20 at 10-17.)

[18] **[19]** The purpose of the FPASA "is to provide the Federal Government with an economical and efficient

system" for federal procurement, including contracting. 40 U.S.C. § 101. It gives the President the authority to "proscribe policies and directives that the President considers necessary to carry out" the Act. 40 U.S.C. § 121(a). The FPASA "was designed to centralize Government property management and to introduce into the public procurement process the same flexibility that characterizes such transactions in the private sector." *AFL-CIO v. Kahn*, 618 F.2d 784, 787 (D.C. Cir. 1979) (en banc). " 'Economy' and 'efficiency' are not narrow terms; they encompass those factors like price, quality, suitability, and availability of goods or services that are involved in all acquisition decisions." *Id.* at 789.

Through the FPASA, Congress granted to the president a broad delegation of power that presidents have used to promulgate a host of executive orders. *See, e.g.*, *UAW-Labor Employment and Training Corp. v. Chao*, 325 F.3d 360, 366 (D.C. Cir. 2003) (holding that FPASA authorized the president to require contractors to post notices at all facilities informing employees of certain rights); *Kahn* at 793 (holding that FPASA authorized the president to require contractors to comply with price and wage controls); *Albuquerque v. U.S. Dept. of Interior*, 379 F.3d 901, 905 (10th Cir. 2004) (holding that FPASA authorized executive order setting out priorities "for meeting Federal space needs in urban areas"). For decades, "the most prominent use of the President's authority under the FPASA [was] a series of antidiscrimination requirements for Government contractors." *Kahn*, 618 F.2d at 790.

***5** **[20]** **[21]** The FPASA "does vest broad discretion in the President." *Chamber of Commerce of the United States v. Reich*, 74 F.3d 1322, 1330 (D.C. Cir. 1996). However, the President's powers under the Act are not "a blank check to fill at his will." *Reich* at 1330 (quoting *Kahn* at 793). "The procurement power must be exercised consistently with the structure and purposes of the statute that delegates that power." *Id.* at 1330-31. Any order based on the President's FPASA authority must be based on a "sufficiently close nexus" to "the values of 'economy' and 'efficiency.' " *Kahn* at 792 (quoting 40 U.S.C. § 471 (1976) (now codified as amended at 40 U.S.C. § 101).

There is no dispute in this case that the FPASA authorizes the President to direct federal procurement. Rather, plaintiffs argue that the vaccine mandate exceeds the President's statutory authority under the FPASA. The Court concludes that plaintiffs are likely to succeed on this issue.

[22] On the record currently before the Court, plaintiffs are likely to succeed on the issue of whether there is a sufficiently close nexus between efficiency and economy in procurement and the vaccination mandate. Defendants argue that EO 14,042 and its implementing guidance sufficiently establish the nexus by stating that the mandate "will decrease worker absence, reduce labor costs, and improve the efficiency of contractors and subcontractors at sites where they are performing work for the Federal Government." EO 14,042 § 1. (Doc. 20 at 14.) However, if the statement in EO 14,042 establishes a sufficient nexus, then the President would be able to mandate virtually any public health measure that would result in a healthier contractor workforce. The Court concludes plaintiffs are likely to succeed on their argument that such an interpretation of the President's powers under the FPASA is not consistent with the structure and purposes of the statute.

Defendants assert that "[p]ast [presidential] practice does not, by itself, create power, but 'long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent.' " (Doc. 20 at 12, quoting *Dames & Moore v. Regan*, 453 U.S. 654, 686, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981).) As discussed above, past presidential uses of power under the FPASA include requiring contractors to post notices of certain rights; requiring contractors to comply with price and wage controls; setting out priorities for selecting office space in urban areas; and requiring contractors to comply with certain nondiscrimination provisions. *Chao* at 366; *Kahn* at 793; *Albuquerque v. U.S.* at 905; *Kahn* at 790. The mandate at issue in this case diverges, both in scope and in kind, from the past practice which defendants argue Congress implicitly endorsed.

First, the Task Force Guidance defines "covered contractor employee" as "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." (Doc. 27-1 at 30-31.) "This includes employees of covered contractors who are not themselves working on or in connection with a covered contract." (*Id.* at 31.)

Second, the vaccine mandate is not analogous to past presidential uses of FPASA power. As the parties stipulated in their joint statement of material facts, the FPASA has never been used to require contractors to ensure that their employees were vaccinated against any disease. (Doc. 27 at ¶ 18.) The uses of presidential power under the FPASA cited above relate to the interactions between contractors and their employees in the workplace, e.g. notification of employee rights, wage controls, and nondiscrimination. The vaccine mandate would reach beyond the workplace and into the realm of public health. The Court concludes that plaintiffs are likely to succeed on the issue of whether the mandate exceeds the scope of the power granted to the President by the FPASA.

2. Congress's Enumerated Powers and Authority of the States

***6** **[23]** Plaintiffs argue that the federal contractor vaccine mandate exceeds Congress's enumerated powers and unconstitutionally infringes on the authority of the States. They contend that the mandate usurps power belonging to the States and that the mandate is not justified by the Spending Clause, Const. Art. I, § 8, cl. 1. (Doc. 9 at 33-37.) Defendants respond that the mandate was a valid exercise of the President's authority under the FPASA, which was a valid exercise of Congress's power under the Spending Clause. They further argue that the mandate does not commandeer state officials or violate the Spending Clause or nondelegation doctrine. (Doc. 20 at 26-35.)

As analyzed above, the President did not have authority to mandate vaccination under the FPASA. Therefore, the mandate cannot be regarded as a valid exercise of the President's authority under the FPASA, as granted to the President by Congress's power under the Spending Clause.

Plaintiffs argue that the mandate fails to "unambiguously" establish the contract terms and that the mandate is not "related to the federal interest in particular national projects or programs," citing *Pennhurst State School & Hospital v. Halderman* and *Van Wyhe v. Reisch*. (Doc. 9 at 35); 451 U.S. 1, 17, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981); 581 F.3d 639, 650 (8th Cir. 2009). Defendants argue that adopting plaintiffs' position would make imprecisions in federal procurement contracts matters of constitutional magnitude. (Doc. 20 at 31.)

Plaintiffs cite no authority for the proposition that the *Pennhurst* or *Van Wyhe* standards apply to federal contracts. As defendants point out, "when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 589, 118 S.Ct. 2168, 141 L.Ed.2d 500 (1998). The Court concludes that plaintiffs are not likely to succeed on the issue of whether the mandate violates the Spending Clause.

[24] The Tenth Amendment "restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which ... is essentially a tautology." *New York v. United States*, 505 U.S. 144, 156-57, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992). Rather, it "confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States." *Id.* at 157, 112 S.Ct. 2408. Because the Court has concluded that the mandate likely does not violate the Spending Clause, one of Congress's enumerated powers, it also concludes that plaintiffs are not likely to succeed on their claim of Tenth Amendment violation.

C. Threat of Irreparable Harm

[25] The Court must next determine whether plaintiffs have shown that they are "likely to suffer irreparable harm in the absence of preliminary relief." *Benisek v. Lamone*, ––– U.S. ––––, 138 S. Ct. 1942, 1944, 201 L.Ed.2d 398 (2018) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008)). Plaintiffs must show more than a mere "possibility," but they need not show a certainty; rather, they need to demonstrate "irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22, 129 S.Ct. 365.

[26] Plaintiffs allege irreparable harm to their sovereign, quasi-sovereign, and proprietary interests. Plaintiffs argue that the mandate is an attempt by the President to supersede and preempt any State policies that differ from federal policies. (Doc. 9 at 37.) They also contend that they face injuries to their proprietary interests in the form of compliance costs and economic disruption due to resignations. (Doc. 9 at 40-41.)

Defendants argue that plaintiffs have not alleged irreparable harm to their position as federal contractors, and their declarations supporting the claim of harm to contractors are insufficient. (Doc. 20 at 35.) Defendants also contend that the mandate preempts conflicting state laws, so there is no harm to plaintiffs' sovereign interests. (*Id.* at 38.)

***7** Because the Court has found that plaintiffs are not likely to succeed on their claim of Spending Clause or Tenth Amendment violation, they are not likely to suffer irreparable harm to their sovereign interests.

[27] In support of their claim of irreparable injury to proprietary interests, plaintiffs submitted declarations from officials in the States that describe the extent of their federal contracts and the likely effect that the mandate will have on their operations. (Docs. 9-6 through 9-15.) Plaintiffs also offer a survey wherein 72 percent of respondents indicated that they would give up their jobs rather than comply with a vaccine mandate. Kaiser Family Foundation Survey (Oct. 28, 2021), https://www.kff.org/coronavirus-covid-19/press-release/1-in-4-workers-say-their-employer-required-them-to-get-a-covid-19-vaccine-up-since-june-5-of-unvaccinated-adults-say-they-left-a-job-due-to-a-vaccine-requirement/. Even if the number of unvaccinated workers that resign rather than comply with the mandate is less than 72 percent, the survey indicates that it is likely that federal contractors subject to the mandate will face significant disruption due to resignations.

In conceding that Wyoming has standing to challenge the mandate, defendants assert that Wyoming cannot claim irreparable injury because it may seek compensation under the Contract Disputes Act, 28 U.S.C. § 1491. (Doc. 29 at 19.) If a contractor, such as Wyoming, were to challenge the procurement regulation as suggested by defendants, the court may award declaratory or injunctive relief, but "any monetary relief shall be limited to bid preparation and proposal costs." *Id.* § 1491(b)(2). Wyoming, and other similarly situated federal contractors, would still incur the business and financial effects of a lost or suspended employee, as well as nonrecoverable compliance and monitoring costs. *See* *BST Holdings, LLC v. Occupational Safety and Health Admin.*, 17 F.4th 604, 618 (5th Cir. 2021). The Court concludes that plaintiffs will suffer irreparable harm in their capacity as federal contractors.

D. Balance of Harms and Public Interest

[28] **[29]** Lastly, the Court must determine whether plaintiffs have shown that the "balance of equities tips in [their] favor" and that "an injunction is in the public interest." *Winter*, 555 U.S. at 20, 129 S.Ct. 365. The Court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Id.* at 24, 129 S.Ct. 365. When the party opposing the injunction is the federal government, the balance-of-harms factor "merge[s]" with the public-interest factor. *Nken v. Holder*, 556 U.S. 418, 435, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009).

[30] Plaintiffs argue that the public interest favors an injunction because the mandate implicates important principles of federalism. (Doc. 9 at 42.) Defendants contend that an injunction would hamper the efficiency of federal contractors and harm the federal government's efforts to slow the spread of COVID-19. (Doc. 20 at 40.)

[31] **[32]** "It is indisputable that the public has a strong interest in combatting the spread of" COVID-19. *Ala. Ass'n of Realtors v. Dept. of Health and Human Servs.*, —— U.S. ——, 141 S. Ct. 2485, 2490, 210 L.Ed.2d 856 (2021). However, the government may not "act unlawfully even in pursuit of desirable ends." *Id.* (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582, 585-86, 72 S.Ct. 863, 96 L.Ed. 1153 (1952)). The Court recognizes that the world is entering the third year of the COVID-19 pandemic and that slowing the spread of the virus is critical. Still, there is no public interest in the enforcement of an unlawful action. *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir.2016). It will not harm the federal government to maintain the status quo while the courts decide the issues of the President's authority and the implications for federalism. The Court concludes that, on balance, consideration of the harms and the public interest weigh in favor of a preliminary injunction.

E. Scope of Injunction

***8** **[33]** "Equitable remedies, like remedies in general, are meant to redress the injuries sustained by a particular plaintiff in a particular lawsuit." *Dep't of Homeland Sec. v. New York*, —— U.S. ——, 140 S.Ct. 599, 600, 206 L.Ed.2d 115 (2020) (Gorsuch, J., concurring). Only the injuries

alleged by the plaintiff-States are properly before the Court. Therefore, the Court's injunction applies to plaintiff-States: Missouri, Nebraska, Alaska, Arkansas, Iowa, Montana, New Hampshire, North Dakota, South Dakota, and Wyoming.

CONCLUSION

For the reasons set forth above,

IT IS HEREBY ORDERED that plaintiffs' motion for a preliminary injunction **(Doc. 8) is sustained.** Defendants are enjoined from enforcing the vaccine mandate for federal contractors and subcontractors in all covered contracts in Missouri, Nebraska, Alaska, Arkansas, Iowa, Montana, New Hampshire, North Dakota, South Dakota, and Wyoming.

IT IS FURTHER ORDERED that plaintiffs' motion to expedite preliminary injunction briefing **(Doc. 10) is denied as moot.**

APPENDIX

Claims considered in sustaining the motion for preliminary injunction

Count 1: Violation of the Federal Property and Administrative Services Act: *plaintiffs likely to succeed on the merits*

Count 2: Violation of the Procurement Policy Act: *not determined*

Count 3: Unlawful Usurpation of the States' Police Powers: *plaintiffs not likely to succeed on the merits*

Count 4: Violation of the Anti-Commandeering Doctrine: *plaintiffs not likely to succeed on the merits*

Count 5: Procedural Violation of the APA: *not determined*

Count 6: Substantive Violation of the APA: *not determined*

Count 7: Substantive Violation of the APA, Agency Action not in Accordance with Law and in Excess of Authority: *not determined*

Count 8: APA Violations – Agency Action that is not in Accordance with Law and is in Excess of Authority: *not determined*

Count 9: APA and Statutory Violations – Arbitrary and Capricious Agency Action and Violation of Notice-and-Comment Requirements: *not determined*

Count 10: Separation of Powers: *plaintiffs not likely to succeed on the merits*

Count 11: Violation of the Tenth Amendment and Federalism: *plaintiffs not likely to succeed on the merits*

Count 12: Unconstitutional Exercise of the Spending Power: *plaintiffs not likely to succeed on the merits*

All Citations

--- F.Supp.3d ----, 2021 WL 5998204

Footnotes

1 A federal government contract deviation has been described thus: "Where a government contract is awarded under competitive bidding, deviations from advertised specifications may be waived by the contracting officer, provided that the deviations do not go to the substance of the bid or work an injustice to other bidders. A substantial deviation is defined as one which affects either the price, quantity, or quality of the article offered." *Monument Realty LLC v. Washington Metropolitan Area Transit Authority*, 540 F. Supp.2d 66, 78 (D.D.C. 2008) (quotation marks and citations omitted).

2 Plaintiff-States' claims are listed in the Appendix to this Memorandum and Order.

3 Defendants' challenge to plaintiffs' sovereign interests standing merges the standing and preliminary injunction analyses. (Doc. 29 at 19.) While plaintiffs' claim of sovereign injuries may be insufficient to establish irreparable injury, it is sufficient to establish injury in fact.

4 Upon agreement by the parties during the status conference on November 24, 2021, the Court defers consideration of plaintiffs' APA claims. The FAR Council is currently in the process of promulgating a regulation through notice-and-comment rulemaking. The deferral will allow defendants to prepare an administrative record for review by the Court.