BRIAN M. BOYNTON
Acting Assistant Attorney General

BRIGHAM J. BOWEN
CHRISTOPHER R. HALL
CARLOTTA P. WELLS
Assistant Directors

JOSEPH J. DEMOTT
CHRISTOPHER M. LYNCH
R. CHARLIE MERRITT
STEVEN A. MYERS
KEVIN J. WYNOSKY
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street NW
Washington, DC 20005
Phone: (202) 514-3367
Email: joseph.demott@usdoj.gov

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Mark Brnovich *et al.*,

Plaintiffs,

v.

Joseph R. Biden, *et al.*,

Defendants.

No. 2:21-cv-01568-MTL

DEFENDANTS' OPPOSITION TO PLAINTIFFS' RENEWED MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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INTRODUCTION

The United States is in the midst of the most serious public health crisis it has faced in at least a century. To date, COVID-19 has infected more than 45 million Americans, hospitalized more than 3 million, and killed over 740,000. *See* Centers for Disease Control, COVID Data Tracker Weekly Review, https://perma.cc/29AY-J7LX (updated Oct. 29, 2021). More than a year and a half into the COVID-19 pandemic, approximately 68,000 new cases are reported in the United States every day. *See id.*

Since the pandemic's earliest days, there has been broad agreement—from public health experts and leaders across the political spectrum—that the pandemic will not end until safe and effective vaccines are broadly administered across the population. Three such vaccines—one developed by Pfizer, Inc. and BioNTech; another by Moderna TX, Inc.; and a third by Janssen Biotech, Inc., which is owned by Johnson & Johnson—are now widely available in the United States. Hundreds of millions of doses have been administered, and there is no question that the vaccines are safe and highly effective. Yet as of this week, only 69% of adults in the United States are fully vaccinated. *See id.* And in October 2021—many months after COVID-19 vaccines became widely available to adults at no cost—over 40,000 Americans died of COVID-19. *See* CDC, COVID DATA Tracker – Daily and Total Trends (updated Nov. 4, 2021), https://perma.cc/B3JG-99AL.

The illness and mortality caused by COVID-19 have led to serious disruptions for employers across the United States, and the federal government is no exception. Accordingly, on September 9, 2021, President Biden issued two executive orders aimed at combatting the spread of COVID-19 within the federal workforce—and the millions of Americans it serves—and preventing disruptions in the provision of government services by federal contractors. *See* Exec. Order No. 14043, 86 Fed. Reg. 50,989 (Sept. 14, 2021) (federal civilian employees); Exec. Order No. 14042, 86 Fed. Reg. 50,985 (Sept. 14, 2021) (federal contractors). Executive Order ("EO") 14043 requires each federal agency to "implement, to the extent consistent with applicable law, a program to require COVID-19 vaccination for all of its federal employees." 86 Fed. Reg. at 50,990. Executive Order 14042 instructs federal agencies, "to the extent

permitted by law," to ensure that federal contracts include a clause requiring the contractor or subcontractor to comply with COVID-19 safety protocols published by the Safer Federal Workforce Task Force ("Task Force"). 86 Fed. Reg. at 50,985. On September 24, 2021, the OMB Director determined that these safety protocols will promote economy and efficiency in federal contracting. *See* Notice, Determination of the Promotion of Economy and Efficiency in Federal Contracting Pursuant to EO 14042, 86 Fed. Reg. 53,691–53,692.

Plaintiff John Doe[1] is allegedly a longtime federal employee who works in the State of Arizona. Am. Compl. ¶ 27, ECF No. 14. According to the Amended Complaint, he "strongly opposes the COVID-19 vaccine" and "has not taken it." *Id.* He also "strongly opposes" the vaccination requirement established by Executive Order 14043 and seeks declaratory and injunctive relief to invalidate it. *Id.* But his claims are unripe because of his pending request for a medical exception to the vaccination requirement. Plaintiff Doe asserts that he will be injured either by receiving an unwanted vaccination or by losing his job, *see* Am. Compl. ¶ 107, but neither of these alleged injuries will occur if his exception request is granted. In any event, his claims—all of which relate to the terms of his federal employment—would almost certainly be precluded by the Civil Service Reform Act ("CSRA").

Plaintiff State of Arizona, represented by its Attorney General, Plaintiff Mark Brnovich, seeks declaratory and injunctive relief from both executive orders. But this Court lacks jurisdiction over Arizona's claims as well. Arizona's attempt to challenge the Executive Orders on behalf of "Arizona residents," Am. Compl. ¶ 104, and "Arizona businesses," Pls.' Renewed Mot. for TRO & Prelim. Inj. ("Mot.") at 29, ECF No. 34, runs afoul of the well-established principle that States cannot bring *parens patriae* suits against the federal government. Arizona's claims that the Executive Orders will harm its economy are too vague and speculative to satisfy Article III; Arizona speculates that layoffs and resignations *might* harm the economy, depending on how individuals respond to vaccination requirements, but it is far more likely that economic gains associated with having a vaccinated workforce will outweigh any such

[1] While this brief refers to the individual as "Plaintiff Doe" for ease of reference, Defendants reserve their right to oppose the pending Motion to Proceed Pseudonymously.

effects. And Arizona's attempt to challenge Executive Order 14042 on behalf of "State agencies and political subdivisions [that] qualify as 'government contractors,'" *id.* ¶ 105, cannot proceed in this forum because contractual disputes with the federal government are subject to exclusive jurisdiction elsewhere.

In addition to these jurisdictional defects, Plaintiffs fail to satisfy any of the requirements for a preliminary injunction. *First*, Plaintiffs are unlikely to succeed on the merits of their claims. Count One, an equal protection challenge, fails because the Executive Orders do not target any suspect class and, in any event, federal employees and contractors are not similarly situated to unlawfully present noncitizens. Count Two lacks merit because Executive Order 14042 is reasonably related to the Procurement Act's broad purpose of ensuring efficiency and economy in government procurement. Count Three misses the mark because the Office of Procurement Policy ("OFPP") Act applies only to executive agencies; it does not apply to the President or to the OMB Director when she acts pursuant a lawful delegation of the President's authority under 3 U.S.C. § 301. Count Four fails because Plaintiffs lack a private right of action to enforce section 564 of the Federal Food, Drug, and Cosmetics Act ("FDCA") and, in any event, they misinterpret its "informed consent" requirement. Count Five is meritless because, for more than a century, courts have uniformly upheld vaccination requirements as rationally related to the government's legitimate interest in promoting health and safety. And Count Six cannot succeed because the Tenth Amendment does not bar the federal government from regulating its own employees and contractors, under lawfully enacted statutory authority, even in areas where States also have regulatory authority.

Second, Plaintiffs have not shown they are likely to suffer irreparable harm absent preliminary relief. Plaintiff Doe will not suffer *any* harm if his request for a medical exception is granted. In any event, potential removal from federal employment—the most severe penalty Plaintiff Doe might face for refusing to become vaccinated—does not constitute irreparable harm because reinstatement would provide an adequate legal remedy. Similarly, the only harm that Arizona even potentially has Article III standing to assert—economic loss, incurred by state agencies in their capacity as federal contractors—could be remedied by money damages.

Third, the equities and the public interest weigh heavily against the entry of preliminary injunctive relief. Granting the requested injunction would harm important public interests such as (1) slowing the spread of COVID-19 within the federal government's own workforce, its contractors' workforce, and the members of the public with whom they interact; and (2) promoting the efficiency of the federal civil service and avoiding disruptions to services provided by federal government contractors. These compelling interests easily outweigh the potential economic harm that might befall Plaintiffs absent preliminary relief.

Accordingly, Plaintiffs' motion for preliminary injunction should be denied.

BACKGROUND

I. The COVID-19 Pandemic

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

In July 2021, the United States began to experience "a rapid and alarming rise in . . . COVID-19 case and hospitalization rates," driven by an especially contagious strain of SARS-CoV-2 known as the Delta variant. *See* CDC, Delta Variant: What We Know About the Science (updated Aug. 26, 2021), https://perma.cc/5CAA-WC8A. As of the filing of this brief, community transmission rates of SARS-CoV-2 remain high in 40 states, and substantial in the other 10 states and the District of Columbia.[2] *See* CDC, COVID DATA Tracker – Cases, Deaths, and Testing (updated Nov. 4, 2021), https://perma.cc/BS4C-UY9G.

[2] The Court may take judicial notice of these statistics and other factual information available on government websites. *See Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322–23 (2007); *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010).

II. The Development and Authorization of COVID-19 Vaccines

The Food and Drug Administration ("FDA") has authority to review and approve "biological products," including vaccines, as safe and effective for introduction into interstate commerce for their intended uses. *See* 42 U.S.C. § 262(a)(1), (i)(1). Under section 564 of the FDCA, 21 U.S.C. § 360bbb-3, FDA may issue an "emergency use authorization" ("EUA") even before such approval, which permits the marketing of vaccines (and other products) "intended for use" in responding to a public health emergency.

In March 2020, the Secretary of Health and Human Services ("HHS") determined that "circumstances exist justifying the authorization of emergency use of drugs and biological products during the COVID-19 pandemic." EUA Declaration, 85 Fed. Reg. 18,250, 18,250–51 (Apr. 1, 2020). Based on that determination, FDA issued EUAs in December 2020 for the Pfizer-BioNTech and Moderna vaccines, and a third EUA in February 2021 for the Janssen vaccine. *See* Oct. 29, 2021 Letter of Authorization from FDA to Pfizer Inc., https://perma.cc/YY3Q-JGW4 ("Pfizer EUA Letter") (revising and reissuing the December 2020 EUA); Oct. 20, 2021 Letter of Authorization from FDA to ModernaTX, Inc., https://perma.cc/LN7L-AE6D ("Moderna EUA Letter") (same); Oct. 20, 2021 Letter of Authorization from FDA to Janssen Biotech, Inc., https://perma.cc/R7HA-Z6BD ("Janssen EUA Letter") (revising and reissuing the February 2021 EUA). These EUAs are based on FDA's review of extensive safety and efficacy data, including from a Pfizer clinical trial with approximately 46,000 participants, a Moderna clinical trial with approximately 30,000 participants, and a Janssen clinical trial with approximately 43,000 participants. *See* Pfizer EUA Letter at 4; Moderna EUA Letter at 2; Janssen EUA Letter at 2.

On August 23, 2021, the Pfizer-BioNTech COVID-19 vaccine obtained FDA approval, under the name Comirnaty, for people aged 16 years and older. *See* Ex. 1 ¶ 6, Decl. of Peter Marks, M.D., Ph.D.[3] This means that the vaccine has completed "the agency's

[3] The Marks Declaration was submitted in connection with separate litigation in the Northern District of Florida in which FDA action was challenged. Here, it provides useful background on the authorization and subsequent approval of the Pfizer-BioNTech vaccine.

standard process for reviewing the quality, safety and effectiveness of medical products." FDA, News Release – FDA Approves First COVID-19 Vaccine (Aug. 23, 2021), https://perma.cc/J9NV-92VH. In approving Comirnaty, FDA determined that the vaccine was 91.1% effective in preventing COVID-19 disease and between 95% and 100% effective in preventing severe COVID-19, based on an analysis of effectiveness data from approximately 20,000 vaccine and 20,000 placebo recipients. FDA, Comirnaty Approved Prescribing Information at 7, 15–18, https://perma.cc/53H8-UG3C. FDA concluded that the product is safe based on data from approximately 12,000 vaccine recipients who were followed for safety outcomes for at least six months after their second dose, as well as safety information from the millions of vaccine doses administered under the EUA. *Id.* at 12.

Comirnaty is the same formulation as the originally authorized Pfizer-BioNTech vaccine, and the two vaccine products "can be used interchangeably without presenting any safety or effectiveness concerns." Vaccine Information Fact Sheet for Recipients and Caregivers About Comirnaty and the Pfizer-BioNTech COVID-19 Vaccine at 1 n.1 (revised Oct. 29, 2021), https://perma.cc/3PQH-7D8Z ("Comirnaty/Pfizer-BioNTech COVID-19 Vaccine Fact Sheet"). The Pfizer-BioNTech vaccine remains authorized for emergency use as a two-dose primary series for individuals 12 years of age and older and—whether or not it bears the "Comirnaty" label—the formulation is available for other emergency uses, including as a single booster dose for elderly and high-risk individuals. *See id.* at 1–2.

III. Vaccination Requirements for Federal Civilian Employees and Contractors

On September 9, 2021, President Biden issued two executive orders announcing COVID-19 vaccination requirements for federal employees and contractors. *See* Exec. Order No. 14043, 86 Fed. Reg. 50,989 (Sept. 14, 2021) (federal civilian employees); Exec. Order No. 14042, 86 Fed. Reg. 50,985 (Sept. 14, 2021 (federal contractors).

Executive Order 14043 instructs each federal agency to "implement, to the extent consistent with applicable law, a program to require COVID-19 vaccination for all of its federal employees, with exceptions only as required by law." 86 Fed. Reg. at 50,990. The directive is based on "public health guidance" providing that "the best way to slow the spread

of COVID-19 and to prevent infection by the Delta variant or other variants is to be vaccinated." *Id.* at 50,989. The EO directs the Safer Federal Workforce Task Force ("Task Force") to issue guidance on implementation of the vaccination requirement. *Id.* at 50,990.

The Task Force guidance, like the EO, recognizes that federal employees are eligible for exceptions to the vaccination requirement as legally required due to a medical condition or religious objection, *see* Task Force, Frequently Asked Questions ("FAQs"), Vaccinations, Limited Exceptions to Vaccination Requirement, https://perma.cc/4CUS-TVNC ("Exception FAQs"), and provides that each agency should "follow its ordinary process to review and consider what, if any, accommodation it must offer" under applicable federal law, *see* Task Force, FAQs, Vaccinations, Enforcement of Vaccination Requirement for Federal Employees, https://perma.cc/4CUS-TVNC ("Enforcement FAQs"); *see also* Template: Request for a Medical Exception to the COVID-19 Vaccination Requirement, https://perma.cc/9D8C-ETHR; Template: Request for a Religious Exception to the COVID-19 Vaccination Requirement, https://perma.cc/V33X-2Q64 ("Religious Exception Template").

Per Task Force guidance, federal employees who have not requested or received an exception should be fully vaccinated "no later than November 22, 2021." Task Force, COVID-19 Workplace Safety: Agency Model Safety Principles at 1 (updated Sept. 13, 2021), https://perma.cc/F2MW-HYQE. An employee who requests an exception should not be subject to discipline while the request is under consideration. Enforcement FAQs. If an exception request is denied, the employee should be given two weeks from the denial to receive the first (or only) dose of a COVID-19 vaccine before any enforcement proceedings are initiated. *See* Exception FAQs.

Executive Order 14042 was issued to "promote[] economy and efficiency in Federal procurement by ensuring that the parties that contract with the Federal Government provide adequate COVID-19 safeguards to their workers performing on or in connection with a Federal Government contract or contract-like instrument." 86 Fed. Reg. at 50,985. The President determined that new safeguards would "decrease worker absence, reduce labor

costs, and improve the efficiency of contractors and subcontractors at sites where they are performing work for the Federal Government." *Id.* EO 14042 directs federal executive departments and agencies, "to the extent permitted by law," to include in qualifying contracts a clause requiring compliance with workplace safety guidance issued by the Task Force. *Id.*; *see also id.* at 50,986–50,987 (listing the categories of contracts to which the EO applies). The EO delegates to the Director of the Office of Management and Budget ("OMB") the President's statutory authority to determine whether the Task Force's guidance "will promote economy and efficiency in Federal contracting if adhered to by Government contractors and subcontractors." *Id.* at 50,985-50,986 (citing 3 U.S.C. § 301). The EO further directs the Federal Acquisition Regulatory Council to make corresponding amendments to the Federal Acquisition Regulation ("FAR") and, in the interim, to issue guidance to federal agencies on how to use existing authority to include the new provision in covered contracts. *Id.* at 50,986.

The Task Force issued guidance regarding EO 14042 on September 24, 2021. Task Force, COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors, https://perma.cc/H2MY-K8RT ("Contractor Guidance"). Exercising the authority delegated to her by the President, the OMB Director determined that this Guidance will promote economy and efficiency in federal contracting. *See* 86 Fed. Reg. 53,691–53,692. Covered contractor and subcontractor employees should be vaccinated against COVID-19, except insofar as any such employee is legally entitled to an accommodation. *See* Contractor Guidance at 5–6. Consistent with the EO, the Guidance sets forth a phase-in period for the new requirements to be added to federal contracts, generally keyed to new contracts awarded on or after November 14 and any changes to existing contracts made on or after October 15. *See id.* at 12. As of January 4, 2021, covered contractor employees must be vaccinated on the first day of a new contract or when there is a renewal, extension, or exercised option on an existing one. *Compare id.* at 5 (setting compliance date of December 8, 2021), *with* White House, Fact Sheet: Biden Administration Announces Details of Two Major Vaccination Policies (Nov. 4, 2021), https://perma.cc/7FPV-PA2N (modifying this date to January 4, 2022).

The Contractor Guidance recognizes that covered contractors "may be required to

provide an accommodation to covered contractor employees . . . because of a disability (which would include medical conditions) or because of a sincerely held religious belief, practice, or observance." *Id.* In assessing these requests, covered contractors are directed to "review and consider what, if any, accommodation it must offer." *Id.* "The contractor is responsible for considering, and dispositioning, such requests for accommodation." Task Force, FAQs, Federal Contractor, Vaccination and Safety Protocols, https://perma.cc/JZA4-KG8H, at 10 ("Contractor FAQs").

IV. This Lawsuit

On September 14, 2021, Plaintiffs filed the present lawsuit. *See* Compl., ECF No. 1. On October 22, 2021, Plaintiffs filed their Amended Complaint, which contains six counts challenging federal vaccination requirements and an additional five counts challenging alleged immigration policies. *See* Am. Compl., ¶¶ 114–64. The same day, Plaintiffs filed a motion for preliminary injunction that pertains to only Counts One through Six of the Amended Complaint. *See generally* Mot. On October 29, 2021, the State Plaintiffs supplemented this motion with additional argumentation and exhibits. *See* State Pls.' Notice of Additional Legal and Factual Developments, ECF No. 48 ("Pls.' Suppl. Br."). Defendants oppose Plaintiffs' motion for the reasons set forth below.

ARGUMENT

I. The Court Lacks Jurisdiction.

This Court has no jurisdiction over Counts One through Six because each of them has been brought at the wrong time or in the wrong forum. *First*, Plaintiff Doe's claims are not ripe because his request for a medical exception may well be granted—and even if it were denied, he could not bring his claims in District Court because they are almost certainly governed by the comprehensive remedial scheme established by the Civil Service Reform Act. *Second*, the State of Arizona lacks *parens patriae* standing to assert claims against the federal government. If Arizona seeks to establish standing based on a state agency or subdivision's status as a federal contractor, that claim is speculative because the State has not shown that any such entity will be required to vaccinate its employees, or lose a federal contract, under

EO 14042. And in any event, contractual disputes with the federal government must be brought before an agency board of contract appeals or the Court of Federal Claims, not this Court.

A. The Court Lacks Jurisdiction over Plaintiff Doe's Claims.

Plaintiff Doe alleges that he "has been an employee of the Federal government for 30 years," "opposes Defendants' vaccine mandate," and "has requested a medical exemption." Am. Compl. ¶ 27. Plaintiff Doe further alleges that if his exception request were denied, he would "either be subject to dismissal from his employment, or [would] suffer violations of his constitutional rights to bodily integrity and to refuse medical treatment." *Id.* ¶ 107. As explained more fully below, Plaintiff Doe's claims are unripe—and even if they were not, they would almost certainly be precluded by the CSRA's comprehensive remedial scheme.

1. Plaintiff Doe's Claims Are Unripe Because He Has Neither Been Denied an Exception Nor Been Subjected to Discipline.

At the outset, Plaintiff Doe's claims are unripe. "Ripeness has two components: constitutional ripeness and prudential ripeness." *In re Coleman*, 560 F.3d 1000, 1004 (9th Cir. 2009 (footnote omitted). "The constitutional component of ripeness is a jurisdictional prerequisite." *United States v. Antelope,* 395 F.3d 1128, 1132 (9th Cir. 2005). As the Ninth Circuit has explained, "a case is not ripe where the existence of the dispute itself hangs on future contingencies that may or may not occur." *Clinton v. Acequia, Inc.*, 94 F.3d 568, 572 (9th Cir. 1996); *see also, e.g.*, *Mont. Envt'l Info Ctr. v. Stone-Manning*, 766 F.3d 1184, 1190 (9th Cir. 2014) (case unripe where "the supposed injury has not materialized and may never materialize"). With respect to prudential ripeness, courts consider "the fitness of the issues for judicial decision" and the "hardship to the parties of withholding court consideration." *Coleman*, 560 F.3d at 1006 (quoting *Abbott Labs v. Gardner*, 387 U.S. 136, 149 (1967)). Hardship "does not mean just anything that makes life harder; it means hardship of a legal kind, or something that imposes a significant practical harm upon the plaintiff." *Nat. Res. Def. Council v. Abraham,* 388 F.3d 701, 706 (9th Cir. 2004); *see also, e.g.*, *Mun. of Anchorage v. United States*, 980 F.2d 1320, 1326 (9th Cir. 1992) (hardship must be "immediate, direct, and significant" (internal quotations

marks and emphasis omitted)).

Plaintiff Doe fails to demonstrate that his claims are either constitutionally or prudentially ripe. *See Colwell v. Dep't of Health & Hum. Servs.*, 558 F.3d 1112, 1121 (9th Cir. 2009) (burden of establishing ripeness falls on Plaintiff). As described above, Plaintiff has submitted a request to be excepted from the mandate on medical grounds. *See* Am. Compl. ¶¶ 27, 107; *see also* EO 14043 § 1 (executive order is "subject to such exceptions as required by law): Exception FAQs. If Plaintiff's request is granted, he would not need to be vaccinated against COVID-19 and there would be no need for this Court to address the constitutional and other issues presented here. And if his request is denied, he would have an additional two weeks from the denial within which to receive the first (or only) dose of a COVID-19 vaccine before being subject to discipline. *See supra* Background Part III. Under Task Force guidance, Plaintiff is not subject to discipline while his request is pending. In all events, therefore, this potential dispute is constitutionally unripe.

Plaintiff Doe's only contrary argument is to speculate that his request for a medical exemption will be denied. But Plaintiff provides no evidence to support that assertion and, as in *Clinton*, there is "no way of knowing whether" his claim for a medical exemption will be granted. *See* 94 F.3d at 572. Nor is there any reason to assume that, if Plaintiff's medical exemption is denied, his employing agency will impose any particular form of discipline. This is thus a textbook case in which there is a significant possibility that the complained-of injury may never occur.

Prudential ripeness concerns point in the same direction. With respect to the fitness of the issues for judicial consideration, "[c]ourts customarily deal in specific facts or circumstances drawn with some precision and legal questions trimmed to fit those facts or circumstances; they are not in the business of deciding the general without reference to the specific." *Am. Fed'n of Gov't Emps. v. O'Connor*, 747 F.2d 748, 755–56 (D.C. Cir. 1984). And with respect to hardship, because Plaintiff Doe would have two weeks to become vaccinated if his exemption request were denied, there is no hardship to deferring resolution of his claims until such time as it is truly necessary.

2. Plaintiff Doe's Claims Are Likely Precluded by the Civil Service Reform Act.

Even setting aside these ripeness concerns, Plaintiff Doe fails to make anything approaching the requisite "clear showing" that he is entitled to the "extraordinary remedy" of a preliminary injunction, *Winter v. Nat. Res. Def. Council, Inc.,* 555 U.S. 7, 20 (2008), because his claims are almost certainly precluded by the CSRA, and he has not pleaded—much less provided evidence of—facts suggesting otherwise.[4]

The CSRA constitutes "an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *United States v. Fausto,* 484 U.S. 439, 445 (1988). It "prescribes in great detail the protections and remedies applicable to such action, including the availability of administrative and judicial review." *Id.* at 443. As the Ninth Circuit has explained, "[t]he CSRA's remedial scheme is both exclusive and preemptive." *Mangano v. United States*, 529 F.3d 1243, 1246 (9th Cir. 2008). Where claims are precluded under the CSRA, district courts lack jurisdiction to hear them. *See, e.g.*, *Munoz v. Locke*, 634 F. App'x 166 (9th Cir. 2015).

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[4] The vast majority of federal civilian employees are covered by the CSRA and may thus appeal adverse actions, including removal decisions, to the Merit Systems Protection Board ("MSPB"). Some federal civilian employees are covered by different administrative schemes, including foreign service officers, *see* 22 U.S.C. §§ 4131-4140, and certain employees of the Department of Veterans Affairs, *see generally* 38 U.S.C. § 714. Certain other federal employees have no administrative appeal rights, *see, e.g.,* 5 U.S.C. § 7511(b)(1)-(3) (political appointees), but the Ninth Circuit has repeatedly recognized that where certain categories of employees fall outside the CSRA scheme, the "lack of more complete remedies was not inadvertent." *Blankenship v. McDonald*, 176 F.3d 1192, 1195 (9th Cir. 1999); *see also, e.g.*, *Farkas v. Williams*, 823 F.3d 1212, 1215 (9th Cir. 2016) ("The fact that Congress excluded NAFI employees from the CSRA's remedial scheme does not prevent the Act from precluding Farkas's employment-related *Bivens* claims."(footnote omitted)). The only possible exception is for colorable constitutional claims seeking equitable relief, *see infra* note 6. At this stage of the litigation, it suffices to observe that Plaintiff has pleaded no facts suggesting that he is not subject to the CSRA scheme or lacks any potential remedy under it, having chosen to proceed pseudonymously without waiting for permission to do so. That choice means that Plaintiff is not likely to succeed on the merits at this stage of litigation.

Under the CSRA, different administrative and judicial review procedures apply depending on the nature of the challenged employment action and the types of claims asserted. More serious "adverse actions"—removal, suspension for more than 14 days, reduction in grade, reduction in pay, or furlough of 30 days or less, 5 U.S.C. § 7512—may generally be appealed directly to the Merit Systems Protection Board ("MSPB"), with judicial review of the Board's decision in the Federal Circuit. *Id.* §§ 7513(d), 7703(b)(1). Corrective action for a less severe personnel action—*e.g.*, a suspension of 14 days or less—may generally be sought only from the Office of Special Counsel ("OSC"), *id.* §1214(a)(3), and the applicant or employee must allege a prohibited reason for the action, 5 U.S.C. § 2302.[5] "[F]or all other minor personnel actions," there is "review by neither OSC nor the courts." *Veit v. Heckler*, 746 F.2d 508, 511 (9th Cir. 1984) (quoting *Carducci v. Regan*, 714 F.2d 171, 175 (D.C. Cir. 1983)).[6]

The Ninth Circuit has made clear that if "challenged conduct falls within the scope of the CSRA's prohibited personnel practices, then the CSRA's administrative procedures are the

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[5] Under the statute, "personnel actions" are "defined comprehensively" to include, *inter alia,* "any . . . disciplinary or corrective action, detail, transfer, reassignment, . . . performance evaluation, pay or benefits decision, . . . or any other significant change in duties, responsibilities, or working conditions." *Mangano*, 529 F.3d at 1247 (citing 5 U.S.C. § 2302(a)(2)). Congress authorized OSC to investigate whether a challenged "personnel action" constitutes one or more thirteen specified "prohibited personnel practices," including failure to provide "[a]ll employees . . . fair and equitable treatment . . . with proper regard for their . . . constitutional rights." 5 U.S.C. §§ 1212(a)(2), 1214(a)(1)(A), 2302(b)(1)–(13); *id.* U.S.C. § 2301(b)(2). OSC thus has jurisdiction to investigate an employee's claim that a personnel action violated the Constitution. *See Saul v. United States*, 928 F.2d 829, 834 (9th Cir. 1991).

[6] There is one potential exception, insofar as the Ninth Circuit has held that the CSRA should not be understood to preclude colorable constitutional claims sounding in equity where the plaintiff has no other remedy. *See Am. Fed. of Gov't Emps. Local 1 v. Stone*, 502 F.3d 1027, 1035 (9th Cir. 2007). But Plaintiff pleads no facts suggesting that he falls outside the CSRA scheme, and so is apparently governed by the default rule under which constitutional claims must be presented to the MSPB. *See generally Elgin v. Dep't of Treasury*, 567 U.S. 1 (2012). As for the hypothetical possibility that Plaintiff Doe might present constitutional claims to OSC and then be denied an opportunity to present that claim to the Federal Circuit, the Court need not deal with that possibility given the absence of any allegation that he has attempted to exhaust his administrative remedies under the statute. *See Munoz-Munoz v. Locke*, No. 10-1475, 2013 WL 11319006, at *6 (W.D. Wa. Apr. 24, 2013) (collecting cases).

employee's only remedy." *Mangano*, 529 F.3d at 1246 (internal quotation marks and alterations omitted). That is true even if there might ultimately be no remedy for his claims under the CSRA: "the preclusive effect of the CSRA sweeps beyond the contours of its remedies." *Saul v. United States*, 928 F.2d 829, 840 (9th Cir. 1991). In other words, "[e]ven if no remedy were available . . . under the CSRA, he still could not bring his action if the acts complained of fell within the CSRA's confines." *Mahtesian v. Lee*, 406 F.3d 1131, 1134 (9th Cir. 2005); *see also Veit,* 746 F.2d at 511 (holding that APA review of CSRA grievances was improper because "the comprehensive nature of the procedures and remedies provided by the CSRA indicates a clear congressional intent to permit federal court review as provided in the CSRA or not at all").

Here, Plaintiff Doe's complaint could be characterized as a challenge to a current "significant change in duties, responsibilities, or working conditions," 5 U.S.C. § 2302(a)(A)(xii), or as a challenge to a hypothetical future removal or suspension, *see* 5 U.S.C. § 7512. Either way, Plaintiff Doe's remedy for such an action would arise under the CSRA, and there is no jurisdiction in this Court.[7]

B. The Court Lacks Jurisdiction over the State's Claims.

1. The State Lacks Standing to Seek Relief on Behalf of Its Residents.

Arizona purports to bring its claims as *parens patriae*, that is, on behalf of "Arizona citizens" or "businesses" that it asserts will be harmed by the federal vaccine policies. *See* Mot. at 2–3, 29–30; Am. Compl. ¶ 104 (asserting "quasi-sovereign 'interest'" in "assuring that the benefits of the federal system are not denied to its general population" (citation omitted)). Although the "doctrine of *parens patriae* allows a sovereign to bring suit on behalf of its citizens" in certain circumstances, *Washington v. Chimei Innolux Corp.*, 659 F.3d 842, 847 (9th Cir. 2011), it is well established that a state "does not have standing as *parens patriae* to bring an action against the Federal government," *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1178 (9th Cir.

[7] To the extent Plaintiff Doe seeks to bring disability-discrimination claims pursuant to the Rehabilitation Act related to any denial of his request for a medical exception, he would be required to first exhaust administrative remedies before filing a claim in this Court. *See, e.g.*, *Leorna v. U.S. Dep't of State*, 105 F.3d 548, 550 (9th Cir. 1997).

2011) (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 610 n.16 (1982)); *see also Citizens Against Ruining the Env't v. EPA*, 535 F.3d 670, 676 (7th Cir. 2008) ("the United States, and not the state, represents the people's interests" (citations omitted)). Arizona therefore lacks standing to proceed on this basis.

2. The State Does Not Demonstrate that it Is Currently Subject to the Contractor Mandate, and This Court Lacks Jurisdiction over Federal Contractors' Claims.

Arizona further alleges that it has standing to challenge Executive Order 14042 on the ground that "multiple agencies and political subdivisions of the State are contractors with the federal government and thus subject to Defendants' COVID-19 vaccine mandate." Am. Compl. ¶ 26; *see also* Mot. at 6; Pls.' Suppl. Br. at 5. But the Court lacks jurisdiction over Arizona's claims raised as a federal contractor for two reasons: (1) Arizona has not identified any concrete dispute between a state agency (or subdivision) and a federal agency that would provide a vehicle for reviewing the validity of Executive Order 14042; and (2) any such dispute would have to be brought before an agency board of contracting appeals or in the Court of Federal Claims.

First, Arizona fails to establish that any state agency or subdivision will be required to ensure that its employees are vaccinated. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (asserted injuries must be "actual and imminent," not "conjectural or hypothetical"). Arizona has identified only two contracts between a State agency and the federal government—one between the Arizona State Retirement System ("ASRS") and the federal General Services Administration ("GSA"); and the other between the Division of Civil Rights Section ("DCRS") of the State's Office of Attorney General and the federal Equal Opportunity Employment Commission ("EEOC"). Neither of these contracts has been amended to require vaccination of State employees, and Arizona provides no basis to conclude that either will be in the near future.

ASRS leases part of a building it owns to GSA. *See* Ex. 2 ¶¶ 2–3, Decl. of Justin Hawes. Pursuant to EO 14042, GSA is "strongly encouraged, to the extent permitted by law" to

incorporate the Task Force's COVID-19 safety protocols into "existing contracts," such as its lease agreement with ASRS. Exec. Order No. 14042, § 6(c). GSA has therefore *requested* that ASRS agree to a bilateral amendment of the lease that would incorporate the protocols by reference. *See* Hawes Decl. ¶¶ 8, 10. If ASRS refuses, it will not cause the current lease to be terminated. *See id.* ¶¶ 4, 9. To be sure, such a refusal could prevent GSA from renewing the lease, *see id.* ¶¶ 3, 11; *accord* Exec Order No. 14042, § 6(a), but this is hardly an imminent injury because the current lease runs through the end of 2027, *see* Hawes Decl. ¶ 11. The bare possibility of losing a lease contract six years from now is not the sort of actual and imminent injury that entitles a plaintiff to sue in federal court.

Since autumn 2019, DCRS has collaborated with EEOC under a Worksharing Agreement and a related federal contract. Arizona asserts that there is "ambiguity regarding whether" Executive Order 14042 "would apply to DCRS" if it agrees to EEOC's recent request to extend the Worksharing Agreement. Browder Decl. ¶ 5, ECF No. 5. No such ambiguity exists; nothing in the one-page extension document indicates that DCRS would need to require its employees to be vaccinated if it agreed to the extension.[8] *See* Ex. A to Browder Decl., ECF No. 48-3 at 8. While EO 14042 could impact future contractual negotiations between EEOC and DCRS, the federal contract pursuant to which DCRS receives funding from EEOC likely will not be up for renewal for several months.[9] *See* Ex. C to Browder Decl., ECF No. 48-3 at 23 (indicating that the previous federal contract was executed on May 22, 2020—approximately six months after the previous work sharing

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[8] To the contrary, the document states that "there have been no substantive changes in the processes, procedures, statutes, policies or regulations that would . . . substantially alter the work sharing arrangement" and indicates that it would merely "extend the current work sharing agreement that was executed on September 29, 2019." *Id.*

[9] The Worksharing Agreement is not identical to the federal contract pursuant to which DCRS receives significant federal funding. *Compare* Ex. C to Browder Decl., ECF No. 48-3 at 23–42 (federal contract executed May 22, 2020), *with id.* at 43–49 (Worksharing Agreement executed Sept. 30, 2019). By conflating the two, the Browder Declaration inaccurately suggests that DCRS is currently being presented with an offer to extend its prior federal contract. *See* Browder Decl. ¶¶ 3–4 (misstating the title of the proposed Extension to Worksharing Agreement and incorrectly describing it as "a FY2022 Option Year Contract").

agreement was executed). At present there is neither a pending offer to extend the contract nor clarity about the terms of any such extension—much less a concrete dispute regarding those terms. *Accord* Browder Decl. ¶¶ 5, 7 (citing "ambiguity" regarding such terms).

Second, even if a State agency were to lose a federal contract for refusing to agree to a COVID-19 safety clause, the State's challenge to the validity of this contractual clause would not be cognizable in District Court. Congress has provided that "the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States." *See* 28 U.S.C. § 1346(a)(2). To the extent that Arizona seeks to sue the United States in its role as a contractor, *see* Am. Compl. ¶¶ 4, 26, 79, 105, this statutory provision precludes this Court from exercising jurisdiction over the State's claims. Instead, Arizona would be required to litigate its suit in the Court of Federal Claims pursuant to the Contract Disputes Act ("CDA"), which "applies to any express or implied contract entered into by an executive agency for the procurement of property, services, construction, repair, or the disposal of personal property." *Anselma Crossing, L.P. v. USPS*, 637 F.3d, 238, 240 (3d Cir. 2011); *see* 28 U.S.C. § 1491(a)(2).

Under that statute, contract claims against the government must first be decided by a contracting officer, *see* 41 U.S.C. § 7103(a), and a contractor may contest the decision of the contracting officer either by appealing to a board of contract appeals or filing suit in the Court of Federal Claims, *see id.* § 7104. As the Federal Circuit has explained, "[t]he CDA exclusively governs Government contracts and Government contract disputes," and, "[w]hen the [CDA] applies, it provides the exclusive mechanism for dispute resolution." *Tex. Health Choice, L.C. v. Office of Pers. Mgmt.*, 400 F.3d 895, 898-99 (Fed. Cir. 2005) (citation omitted); *see also, e.g.*, *Janicki Logging Co. v. Mateer*, 42 F.3d 561, 565-65 (9th Cir. 1994); *Mendenhall v. Kusicko*, 857 F.2d 1378 (9th Cir. 1988). Indeed, both ASRS's lease agreement with GSA and DCRS's contract with EEOC specifically provide that all disputes shall be governed by the CDA. *See* Hawes Decl. ¶ 4 (GSA lease incorporates FAR 52.233-1, Disputes (May 2014), which states that "[the] contract is subject to 41 U.S.C. chapter 71"); Ex. C to Browder Decl., ECF No. 48-3 at 41 (EEOC contract also incorporates FAR 52.233-1).

For similar reasons, to the extent that a State agency were to challenge the solicitation requirements for any new contracts requiring acceptance of a COVID-19 safety clause, it could not proceed in this Court. The Government Accountability Office has statutory authority to hear certain bid protests, *see* 31 U.S.C. §§ 3551–57, and the Court of Federal Claims, not the district courts, has "jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement," 28 U.S.C. § 1491(b). This encompasses "all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout." *Distributed Solutions, Inc. v. United States*, 539 F.3d 1340, 1345 (Fed. Cir. 2008) (internal quotation marks omitted).[10] Any claim Arizona might be able to bring on behalf of a State agency such as DCRS or ASRS would relate to a contractual dispute with the government, and therefore would not be cognizable in District Court.

As the Supreme Court has made clear, "standing is not dispensed in gross." *Town of Chester, N.Y. v. Laroe Ests., Inc.,* 137 S. Ct. 1645, 1650 (2017) (quoting *Davis*, 554 U.S. at 734). Instead, "a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Id.* (quoting *Davis*, 554 U.S. at 734). Here, Arizona is not itself subject to EO 14043, which covers only federal employees, and it cannot proceed *parens patriae*

[10] The text of 28 U.S.C. § 1491(b) suggests that district courts and the Court of Federal Claims have concurrent jurisdiction over these matters—which was the state of the law prior to 2001. As the Federal Circuit has explained, however, the Alternative Dispute Resolution Act of 1996 included a "sunset provision, which terminated federal district court jurisdiction over bid protests on January 1, 2001." *Emery Worldwide Airlines, Inc. v. United States*, 264 F.3d 1071, 1079 (Fed. Cir. 2001); *see also* Pub. L. No. 104-320, § 12(d), 110 Stat. 3870, 3874 (*codified at* § 1491). As a result, there is "no longer . . . APA-based jurisdiction for the district courts in government bid protest cases." *Novell, Inc. v. United States*, 109 F. Supp. 2d 22, 24-24 (D.D.C. 2000); *see also, e.g.*, *Fire-Trol Holdings, LLC v. U. S. Forest Serv.*, 209 F. App'x 625, 627 (9th Cir. 2006); *Advanced Sys. Tech., Inc v. Barrito*, No. 05-2080, 2005 WL 3211394, at 5 (D.D.C. Nov. 1, 2005); *Aeolus Sys., LLC v. Small Bus. Admin.*, No. 07-536, 2007 WL 1526700, at *1 (M.D. Fla. May 22, 2007); *Validata Chem. Serv. v. U.S. Dep't of Energy*, 169 F. Supp. 3d 69, 85 (D.D.C. 2016); *Labat-Anderson, Inc. v. United States*, 346 F. Supp. 2d 145, 153 (D.D.C. 2004).

against the federal government to challenge EO 14043. To the extent that a State entity is a federal contractor, it might have standing to raise arguments about the validity of EO 14042 in challenging the inclusion of a COVID-19 safety clause in a contract, but such claims are currently premature and, in any event, would need to be raised in a different forum. This Court should therefore deny Plaintiffs' motion on threshold grounds.

II. Plaintiffs Are Not Entitled to Extraordinary Injunctive Relief.

A preliminary injunction is "an extraordinary and drastic remedy" that should not be granted "unless the movant, by a clear showing, carries the burden of persuasion." *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012) (citation omitted). A plaintiff must show that (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) an injunction is in the public interest. *Winter*, 555 U.S. at 20.

A. Plaintiffs Are Not Likely to Succeed on the Merits.

This Circuit considers "[l]ikelihood of success on the merits [to be] the most important factor"; if a plaintiff fails to meet this "threshold inquiry," the court "need not consider the other factors." *California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018) (citation omitted). Here, the Amended Complaint contains eleven counts, but only the first six—all of which pertain to federal vaccination requirements—are at issue in the pending preliminary injunction motion. As detailed below, Plaintiffs are not likely to succeed on any of these claims, even setting aside the critical jurisdictional defects identified above.

1. Neither Executive Order Violates the Equal Protection Clause.

Count One of the Amended Complaint alleges that Executive Orders 14042 and 14043 violate the Equal Protection Clause because they "impos[e] vaccine mandates on U.S. citizens and lawfully employed aliens, but not on unauthorized aliens at the border or already present in the United States." Am. Compl. ¶ 116; *see* Am. Compl. ¶¶ 114–23. This argument is doubly incorrect.

First, in order to state a claim under the Equal Protection Clause, Plaintiffs must "show[] that a class *that is similarly situated* has been treated disparately." *Ariz. Dream Act Coal.*

v. Brewer, 757 F.3d 1053, 1063–64 (9th Cir. 2014) (emphasis added) (citations omitted). Plaintiffs cannot do so here because the classes that they seek to compare—federal employees or contractors, on the one hand, and unlawfully present noncitizens, on the other—are not similarly situated in any way. In assessing equal protection challenges to employment-related policies, the Ninth Circuit has held that "individuals are similarly situated when they have similar jobs and display similar conduct." *Vasquez v. Cnty. of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2003), *as amended* (Jan. 2, 2004). This standard plainly is not met here, as Plaintiffs' comparison is between policies concerning federal employees and contractors with putative policies that apply to nonemployees, *i.e.*, those crossing United States borders outside official ports of entry. *See* Am. Compl. ¶ 116. These groups are not similarly situated. *See* Tr. of Scheduling Conf. at 7:25–8:7 (Oct. 26, 2021) (expressing doubt that comparing federal contractors to unlawfully present noncitizens is "the right comparison").

Second, the Executive Orders do not contain any suspect classification, which is necessary to trigger heightened equal protection scrutiny. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 631 (1996). "Most laws classify, and many affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 238–242 (1979). Only certain classifications, however—*e.g.*, race, sex, national origin, and alienage—are considered inherently suggestive of invidious discrimination and therefore trigger heightened judicial scrutiny. *See, e.g.*, *id.* at 272–73; *Graham v. Richardson*, 403 U.S. 365, 372 (1971). Neither Executive Order at issue here "targets a suspect class," and each must therefore be upheld "so long as it bears a rational relation to some legitimate end." *Romer*, 517 U.S. at 631.

Plaintiffs resist this conclusion by asserting that EO 14042 and EO 14043 "discriminat[e] on the basis of national origin and alienage," *e.g.*, Am. Compl. ¶ 116. But in fact, these vaccination requirements apply solely based on status as a federal employee, federal contractor, or covered contractor employee. *See* Exec. Order 14043 § 2; Exec. Order 14042. U.S. citizens who are not federal employees, federal contractors, or covered contractor employees are not subject to these Executive Orders. And any non-citizens who fall within

those categories are subject to the Orders. There is therefore no basis to conclude that the Orders discriminate on the basis of national origin or alienage.[11]

Because Plaintiffs fail to plausibly allege that the challenged Executive Orders target a suspect class, the Court must apply rational basis review. *See, e.g.*, *Hoffman v. United States*, 767 F.2d 1431, 1435 (9th Cir. 1985). "To survive rational basis review, [a measure] must be rationally related to a legitimate state interest." *Ariz. Dream Act Coal.*, 757 F.3d at 1065 (citations omitted). The measure "is presumed constitutional," and "the burden is on the one attacking [it] to negative every conceivable basis which might support it." *Heller v. Doe*, 509 U.S. 312, 320 (1993) (quotation omitted).

The government unquestionably has a legitimate interest in combatting COVID-19—indeed, the Supreme Court has held that this is a "compelling state interest." *See, e.g.*, *S. Bay United Pentecostal Church v. Newsom*, 985 F.3d 1128, 1142 (9th Cir. 2021) ("[T]he Supreme Court held that '[s]temming the spread of COVID-19 is unquestionably a compelling interest.'") (quoting *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020)). And there can be no serious dispute that requiring individuals to be vaccinated is "rationally related" to that interest, as numerous courts have held. *See, e.g.*, *Williams v. Brown*, --- F. Supp. 3d ---, 2021 WL 4894264, at *9 (D. Or. Oct. 19, 2021) ("[T]he Court has no trouble concluding that [Oregon's] vaccine mandates [requiring all employees and workers employed by the executive branch of the Oregon state government to be fully vaccinated by October 18, 2021] are rationally related to a legitimate state interest."); *Bauer v. Summey*, --- F. Supp. 3d ---, 2021 WL 4900922, at *12 (D.S.C. Oct. 21, 2021) ("[T]he court finds that [municipal] Policies [requiring local government employees to be vaccinated against COVID-19], based on reliable science and medicine, are likely to survive rational basis review such that plaintiffs are unlikely to prevail on an equal

[11] To the extent that Plaintiffs argue that U.S. citizens are more likely to be federal employees or contractors than noncitizens are, it is black-letter law that disparate treatment of a suspect class triggers heightened scrutiny, while a disproportionate impact does not. *See, e.g.*, *Arlington Heights*, 429 U.S. at 264-265 ("[O]fficial action will not be held unconstitutional solely because it results in a . . . disproportionate impact."); *Pers. Adm'r of Mass*, 442 U.S. 256 at 278; *Washington v. Davis*, 426 U.S. 229, 238-42 (1976).

protection claim."); *Mass. Corr. Officers Federated Union v. Baker*, --- F. Supp. 3d ---, 2021 WL 4822154, at *7 (D. Mass. Oct. 15, 2021) (similar).

2. The State's Procurement Act Claim Is Unlikely to Succeed.

Plaintiffs' claim that Executive Order 14042 violates the Federal Property and Administrative Services Act ("Procurement Act") fails for two independent reasons.

(i) The Procurement Act Contains No Waiver of Sovereign Immunity or Private Right of Action for These Plaintiffs.

At the outset, the Procurement Act does not contain any waiver of sovereign immunity or private right of action that would apply here. Plaintiffs have identified no such provision, and their failure to do so is sufficient to conclude that they are not likely to succeed on the merits of this claim.

Nor could Plaintiffs overcome this defect by reframing their Procurement Act claim as an Administrative Procedure Act ("APA") claim. Among the named defendants here are President Biden, who issued Executive Order 14042, and OMB Director Young, to whom the President delegated his authority to determine whether the Contractor Guidance would promote economy and efficiency in federal contracting, *see* Exec. Order 14042, § 2. It is black-letter law that the President may not be sued under the APA. *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992). And in the unique circumstance where the President transfers his own authority to a subordinate, *see* 3 U.S.C. § 301, the APA does not permit review of the action taken pursuant to the delegation. When officers exercise presidential authority transferred to them through § 301, they "stand[] in the President's shoes" and "exercis[e] purely presidential prerogatives"—and so those actions "cannot be subject to judicial review under the APA." *Nat. Res. Def. Council, Inc. v. U.S. Dep't of State*, 658 F. Supp. 2d 105, 109 & n.5, 111 (D.D.C. 2009); *see also Detroit Int'l Bridge Co. v. Canada*, 189 F. Supp. 3d 85, 100 (D.D.C. 2016) ("Several cases have concluded that an agency's action on behalf of the President, involving discretionary authority committed to the President, is "presidential" and unreviewable under the APA."). While Plaintiffs name numerous other federal agencies and officials as defendants, they fail to identify an allegedly unlawful final agency action that any of these

agencies and officials has taken to implement EO 14042—much less to show that any such action has injured any Plaintiff. *See* Am. Compl. ¶¶ 29–41; *cf.* 5 U.S.C. § 704 (an APA suit must challenge a specific final agency action).

(ii) Executive Order 14042 Is Reasonably Related to Ensuring Efficiency and Economy in Government Procurement.

Even if the Court were to reach the merits, Plaintiffs are not likely to succeed. The Procurement Act empowers the President to "prescribe policies and directives that the President considers necessary to carry out" the Act's provisions, so long as the directives are "consistent" with the Act. 40 U.S.C. § 121(a). Presidential directives are consistent with this authority if they are "reasonably related to the Procurement Act's purpose of ensuring efficiency and economy in government procurement." *Liberty Mut. Ins. Co. v. Friedman*, 639 F.2d 164, 170 (4th Cir. 1981). "Efficiency" and "economy" are "not narrow terms," *AFL-CIO v. Kahn*, 618 F.2d 784, 789 (D.C. Cir. 1979), and the statute confers upon the President both "necessary flexibility and 'broad-ranging authority'" to carry out its goals, *UAW-Labor Emp. & Training Corp. v. Chao*, 325 F.3d 360, 366 (D.C. Cir. 2003). Indeed, the President's authority under the Procurement Act to "pursue efficient and economic procurement" has been "interpreted to permit such broad-ranging Executive Orders as those guaranteeing equal employment opportunities and restricting wage increases on the part of government contractors – measures which certainly reach beyond any narrow concept of efficiency and economy in procurement." *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1333 (D.C. Cir. 1996); *see also Kahn*, 618 F.2d at 788 (noting that the Procurement Act "emphasiz[es] the leadership role of the President in setting Government-wide procurement policy on matters common to all agencies" and reflects an intention that "the President play a direct and active part in supervising the Government's management functions").

Executive Order No. 14042 easily satisfies this "lenient" standard. *See Chao*, 325 F.3d at 367. Fundamentally, the order is designed to "decrease the spread of COVID-19," 86 Fed. Reg. at 50,985, a devastating global pandemic that, as noted above, has to date infected more than 45 million Americans, killing more than 740,000. This has caused serious disruptions to

all aspects of American life, and government procurement is no exception. The President, as ultimate manager of procurement operations, determined that workplace safeguards aimed at preventing the spread of COVID-19 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." 86 Fed. Reg. at 50,985. Slowing the spread of COVID-19 inherently promotes efficiency and economy for the simple reason that federal procurement—like any other business endeavor—suffers when the employees of entities that contract with the federal government get sick and miss work as the result of a deadly and contagious virus. *See, e.g.*, *Williams*, 2021 WL 4894264, at *10 (upholding requirement that state employees be vaccinated in light of the state's "legitimate and compelling interest in slowing the spread of COVID-19 and in protecting the lives and health of" state residents).

Plaintiffs' arguments to the contrary are unpersuasive. Fundamentally, they present a cabined view of the President's statutory authority that runs counter to the text and purpose of the Procurement Act and the many cases in which the Act has been invoked (and upheld) in furtherance of a wide variety of policy goals that transcend "the explicit efficiency rationale." Mot. at 13. *See, e.g.*, *Kahn*, 618 F.2d at 790 (collecting cases for the proposition that the Procurement Act has been "most prominent[ly]" used to impose "a series of anti-discrimination requirements for Government contractors"); *City of Albuquerque v. U.S. Dep't of Interior*, 379 F.3d 901 (10th Cir. 2004) (urban renewal); *Chao*, 325 F.3d 360 (promoting rights of union members); *AFGE v. Carmen*, 669 F.2d 815 (D.C. Cir. 1981) (conservation of gasoline during an oil crisis). To be sure, the Procurement Act does not give the President sweeping power to issue arbitrary decrees over the economy, "like a Politburo ordering citizens to obey or starve." Mot. at 13. But neither is it limited to actions that serve no purpose other than to "ensure the efficient purchase of goods and services," so long as those actions bear a sufficiently close "nexus" under the "lenient" applicable standard. *Chao*, 325 F.3d at 366-67; *see also, e.g.*, *Carmen*, 669 F.2d at 817–18 (executive order directing agencies to reduce subsidized parking for federal employees was permissible even where primary goal was "to reduce the waste of energy, particularly gasoline, in commuting to and from work").

Plaintiffs do not advance their case with their many references to *Alabama Association of Realtors v. Department of Health and Human Services*, 141 S. Ct. 2485 (2021). That case is inapposite for many reasons, the most important of which is that it involved a different statute and a different delegation of congressional authority. And the concerns that the Supreme Court raised—*e.g.*, that the statute upon which the CDC relied to impose a nationwide eviction moratorium (a) had been "rarely [ ] invoked," and only for more limited purposes, and (b) that it "intrude[d] into an area that is the particular domain of state law," *id.* at 2487, 2489—are not present here. The Executive Order is an exercise of the President's longstanding and frequently invoked authority to regulate the terms upon which the federal government does business with private contractors. *See Kahn*, 618 F.2d at 788-89 (language of the Procurement Act "recognizes that the Government generally must have some flexibility to seek the greatest advantage in various situations" and "grants the President particularly direct and broad-ranging authority over those larger administrative and management issues that involve the Government as a whole"); *see also supra* p. 24 (discussion of variety of policy goals that past Procurement Act executive orders have advanced).

Plaintiffs similarly miss the mark when they contend that Executive Order No. 14042 bears "no nexus" to the President's authority under the Procurement Act. *See* Mot. at 14. Relying on dicta in an inapposite Supreme Court opinion,[12] Plaintiffs suggest that the federal contractor vaccination requirements are invalid merely because the Procurement Act does not contain "a specific reference to vaccination or even to disease prevention more generally." *Id.* at 15. But of course neither does the Procurement Act contain any "specific reference" to

[12] The case, *Chrysler Corporation v. Brown*, 441 U.S. 281 (1979), dealt with agency disclosure of records pursuant to the Freedom of Information Act, and the Court did not "str[ike] down," Mot. at 15, any Presidential directive issued pursuant to the Procurement Act. Indeed, the Court expressly stated that it was "not necessary to decide" whether an executive order upon which an agency had relied to disclose certain information "is authorized by the [Procurement Act]" or any other statute, *Chrysler Corp.*, 441 U.S. at 304-05, and its holding was limited to the issue of whether a particular agency disclosure of information was "inconsistent with the FOIA and 18 U.S.C. § 1905, a criminal statute with origins in the 19th century that proscribes disclosure of certain classes of businesses and personal information," *id.* at 285.

racial discrimination, collective bargaining rights, or resource conservation—and, as discussed above, courts have repeatedly upheld Presidential directives promoting each of these interests under the Procurement Act. *See, e.g.*, *City of Albuquerque*, 379 F.3d at 914 (upholding Executive Order that required federal government to consider acquiring office space in the "centralized community business area," and finding sufficient nexus to procurement authority, notwithstanding argument that the Procurement Act did not "contain 'any directive addressing location of federal office space within the [central business area']").

Plaintiffs next quibble with the government's purported lack of "administrative 'findings that suggest what percentage of the total price of federal contracts may be attributed' to the effect of COVID-19 vaccination on reduced absenteeism and labor costs." Mot. at 15-16 (quoting *Liberty Mut. Ins. Co.*, 639 F.2d at 171).[13] But the President is not required to publish detailed "administrative findings" in support of an exercise of authority pursuant to the Procurement Act. For example, in *Chao*, the court upheld a one-sentence analysis as sufficient to support a procurement rule that required the posting of certain labor law rights: "When workers are better informed of their rights, including their rights under Federal labor laws, their productivity is enhanced." 325 F.3d at 366 (quoting Exec. Order 13,201, § 1(a), 66 Fed. Reg. 11,221 (Feb. 17, 2001)). The Executive Order upheld in *City of Albuquerque*, 379 F.3d at 914, provided even less of an analytical basis for the link between the Order and the goals of the Procurement Act. *See* Exec. Order 12,072, 43 Fed. Reg. 36,869 (Aug. 16, 1978). Here, the self-evident nexus between reducing sickness and mortality amongst workers who are employed by federal government contractors—via the spread of a deadly disease and amidst an unprecedented global pandemic—and efficiency and economy in government procurement

[13] *Liberty Mutual* has no application here. The key fact there was that the plaintiff was "not itself a federal contractor and there [was], therefore, no direct connection to federal procurement." *Liberty Mut. Ins. Co.*, 639 F.2d at 171. That—and not the subject matter of the directive itself—was the basis for the court's finding that application of the Presidential directive at issue was "too attenuated" from federal procurement. *See Chao*, 325 F.3d at 366-67 (upholding even an "attenuated" link between requirements of executive order and efficiency and economy under the "lenient standards" pursuant to which courts assess Procurement Act challenges).

involving those entities is much clearer than in either of those cases.

Finally, Plaintiffs reach for the so-called "major questions doctrine" to invalidate an otherwise valid exercise of authority under the Procurement Act. But, contrary to Plaintiffs' suggestion, that doctrine does not serve as an automatic veto of any regulation that has "deep economic and political significance on a significant portion of the economy." Mot. at 17. Rather, in certain "extraordinary" cases, where there are "special reasons for doubt, the doctrine asks whether [the challenged executive action] is implausible in light of the statute and subject matter in question that Congress authorized such unusual agency action." *Am. Lung Ass'n v. EPA*, 985 F.3d 914, 959 (D.C. Cir. 2021). Here, the President has exercised well-established authority under the Procurement Act to impose contractual terms designed to prevent the spread of a deadly disease. There is nothing "unusual" about that, nor is there any "special reason[]" to doubt the President's exercise of authority. *See id.* ("Unlike cases that have triggered the major questions doctrine, each critical element of the Agency's regulatory authority on this very subject has long been recognized by Congress and judicial precedent.").

3. The State's Procurement Policy Act Claim Is Unlikely to Succeed.

Arizona also challenges the contractor vaccination requirement under the Office of Federal Procurement Policy Act, 41 U.S.C. §§ 1101–2313. This claim fails at the threshold for the same reasons as the Procurement Act claim: the OFPP Act does not contain any waiver of sovereign immunity or private right of action that would apply here. *See supra* Part II.A.2.i.

In any event, Arizona's OFFP Act claim lacks merit. Arizona seizes on § 1707, which explains how agency heads can issue agency-specific procurement policies, regulations, procedures, and forms. Arizona claims that the contractor vaccine requirement should be struck down because the economy and efficiency determination that cross-referenced the Contractor Guidance did not run § 1707's procedural gauntlet. But § 1707 does not apply to the President; it applies only to "executive agencies." 41 U.S.C. § 133. And the statute provides a specific definition of "executive agency"—a definition that includes neither the President himself nor the White House. See *id.* Because the President is not an agency for purposes of the OFPP Act, and the OMB Director acted pursuant to a delegation from the

President, the OFPP Act's procedural requirements do not apply to EO 14042 or to the OMB Director's determination.[14] Arizona's interpretation of the OFFP Act would eviscerate the President's Procurement Act authority by subjecting him to rulemaking procedures that apply only to agencies.

The Office of Federal Procurement Policy Act establishes the Office of Federal Procurement Policy ("OFPP") within OMB to "provide overall direction of Government-wide procurement policies, regulations, procedures, and forms for executive agencies." *Id.* § 1101(a), (b)(1). OFPP's Acting Administrator works with the GSA Administrator, the Secretary of Defense, and the NASA Administrator (collectively, the "FAR Council") to "prescribe Government-wide procurement policies" and to issue government-wide procurement regulations, procedures, and forms. *Id.* §§ 1102, 1121(b), (c)(2) & (d); 1303(a)(1). Those government-wide directives are "implemented in a single Government-wide procurement regulation called the Federal Acquisition Regulation"—the FAR—contained in Title 48 of the Code of Federal Regulations. *Id.* §§ 1121(b); 1303(a)(1). Executive agencies must follow the FAR when procuring property or services. *See id.* § 1121(c).

When the FAR Council or agencies prescribe procurement regulations, they must comply with § 1707's procedural requirements, specifically that agency heads publish a proposed "procurement policy, regulation, procedure, or form" in the Federal Register if the proposal "relates to the expenditure of appropriated funds" and either "has a significant effect beyond the internal operating procedures of the [issuing] agency" or "has a significant cost or administrative impact on contractors." *Id.* § 1707(a)(1), (b). Although ordinarily the proposal "may not take effect until 60 days after" its publication, the proposal may take effect immediately on a temporary basis (subject to a concurrent comment period) "if urgent and compelling circumstances" require. *Id.* § 1707(a), (d)–(e). But § 1707 plays no role where, as here, the OMB Director stepped into the shoes of the President in exercising his authority. In

[14] Because plaintiffs do not contend that the Task Force's Contractor Guidance is binding of its own force, *i.e.*, without the OMB Director's determination, they cannot argue that the Guidance itself needed to follow the procedures set out in § 1707.

short, Section 1707 is irrelevant here.

4. Neither Executive Order Violates the Emergency Use Authorization Statute.

Plaintiffs also assert a claim under section 564 of the FDCA, 21 U.S.C. § 360bbb-3, which governs the authorization of medical products, including vaccines, for emergency use. *See* Am. Compl. ¶¶ 135–39. Subsection (e)(1)(A) of this provision instructs that, "to the extent practicable given the applicable [emergency] circumstances," and as FDA "finds necessary or appropriate to protect the public health," products distributed under an EUA will include "[a]ppropriate conditions designed to ensure that individuals to whom the product is administered are informed . . . of the option to accept or refuse administration of the product, of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks." 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(III). Plaintiffs contend that both Executive Orders are unlawful under this provision, asserting that "individuals subject to the mandates do not have a meaningful 'option to . . . refuse'" vaccination with a product that has only been authorized for emergency use. Mot. at 23 (quoting 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(III)); *see generally id.* at 18, 20–24. This contention fails for three independent reasons.

First, Plaintiffs purport to challenge both Executive Orders under section 564 of the FDCA, *see* Am. Compl. ¶¶ 135–39 (Count Four), but—like both procurement statutes, *see supra* Parts II.A.2, A.3—the FDCA contains no waiver of sovereign immunity or private right of action that would apply here. In general, "proceedings for the enforcement, or to restrain violations, of [the FDCA] shall be by and in the name of the United States." 21 U.S.C. § 337(a). The sole exception is that "[a] State may bring in its own name and within its jurisdiction proceedings for the civil enforcement, or to restrain violations, of section 341" and parts of section 343, all of which relate to food branding, quality, and safety. *See id.* § 337(b). Accordingly, this Court should not reach the merits of Plaintiffs' claim that the challenged vaccination requirements violate section 564. *See Guilfoyle v. Beutner*, No. 2:21-cv-5009, 2021 WL 4594780, at *27 (C.D. Cal. Sept. 14, 2021) (dismissing an identical claim because section

564 does not contain a private right of action); *accord Doe v. Franklin Square Union Free Sch. Dist.*, --- F. Supp. 3d ----, No. 2:21-cv-5012, 2021 WL 4957893, at *20 (E.D.N.Y. Oct. 26, 2021); *Bridges v. Hous. Methodist Hosp.*, --- F. Supp. 3d ----, No. 21-cv-1774, 2021 WL 2399994, at *2 (S.D. Tex. June 12, 2021), *appeal filed*, No. 21-20311 (5th Cir. June 14, 2021).

Second, Plaintiffs' purported FDCA claim is based on the factually incorrect premise that "the vaccines available to federal contractors and employees to satisfy Defendants' vaccine mandates are only available under EUAs," Am. Compl. ¶ 136; *see* Pls.' Mot. at 18 n. 10, 21–22. In fact, certain lots of the Pfizer vaccine are "manufactured in compliance with the [Biologics License Application, which FDA has approved] and they are not subject to the EUA requirements when used for the approved indication." Marks Decl. ¶ 13. In other words, numerous available lots of Pfizer's vaccine are BLA-compliant. In any event, the widely available Pfizer-BioNTech EUA vaccine and Comirnaty "can be used interchangeably without presenting any safety or effectiveness concerns."[15] Comirnaty/Pfizer-BioNTech COVID-19 Vaccine Fact Sheet at 1 n.1. Accordingly, any dispute over whether section 564 forbids the government from requiring individuals to use non-FDA-approved vaccines only available under an EUA is moot. *See Norris v. Stanley*, No. 1:21-cv-756, 2021 WL 3891615, at *2 (W.D. Mich. Aug. 31, 2021) (no likelihood of success on EUA claim because it "would be moot" if the plaintiff was offered the FDA-approved Pfizer vaccine); *Valdez v. Grisham*, --- F. Supp. 3d ---, 2021 WL 4145746, at *4 (D.N.M. Sept. 13, 2021) (rejecting claim that state vaccine mandate violated the EUA statute because "FDA has now given its full approval – not just

[15] Until very recently, the Pfizer-BioNTech EUA vaccine was always "the same formulation" as Comirnaty. *See* Comirnaty/Pfizer-BioNTech COVID-19 Vaccine Fact Sheet at 1 n.1. On October 29, 2021, however, FDA amended the EUA to include a modified formulation of the Pfizer vaccine for use in children 5 through 11 years old that uses tromethamine (Tris) buffer instead of the phosphate buffered saline (PBS) used in the originally authorized Pfizer-BioNTech COVID-19 vaccine. The agency additionally authorized a version of the Tris formulation for those 12 years of age and older. The two formulations of Pfizer-BioNTech COVID-19 EUA vaccine that are authorized for use in individuals 12 years of age and older differ only with respect to the inactive ingredient buffers and have been shown to be analytically comparable. FDA determined that the "12 and older" version of the Tris formulation may be used interchangeably with Comirnaty and the PBS formulation of the EUA vaccine. Pfizer EUA Letter at 3-4.

emergency use authorization – to the Pfizer vaccine"); Order at 6, ECF No. 12, *Robert v. Austin*, No. 1:21-cv-02228 (D. Colo. Sept. 1, 2021) ("[A]s is now common knowledge, the Food and Drug Administration has now fully approved a COVID-19 vaccine, likely rendering moot Plaintiffs' underdeveloped arguments concerning the emergency use authorization for the vaccines currently available.").

Third, Plaintiffs' interpretation of section 564 is incorrect: the statute does not prohibit the government from requiring vaccination with an EUA product as a condition to continued employment. The relevant subsection directs only that potential vaccine recipients be "informed" of certain information, to the extent FDA finds it "practicable" and "necessary or appropriate to protect the public health," including "the option to accept or refuse administration of the product." 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(III). For each COVID-19 vaccine made available under an EUA, FDA implemented this subsection by requiring that potential vaccine recipients receive a Fact Sheet informing them, for example, that they have a "choice to receive or not receive" the vaccine. *See, e.g.*, FDA, Moderna EUA COVID-19 Vaccine Fact Sheet for Recipients and Caregivers at 4, https://perma.cc/JZ6Y-ZUJF (revised Oct. 20, 2021). As numerous courts have held, this informational requirement does not prevent any entity (including the government) from imposing workplace discipline, up to and including termination, on employees who make the choice not to receive an EUA vaccine. *See Bridges*, 2021 WL 2399994, at *2; *Valdez*, 2021 WL 4145746, at *4; *Norris v. Stanley*, --- F. Supp. 3d ---, No. 1:21-cv-756, 2021 WL 4738827, at *3 (W.D. Mich. Oct. 8, 2021); *Johnson v. Brown*, No. 3:21-cv-1494, 2021 WL 4846060, at *18 (D. Or. Oct. 18, 2021); *Pelekai v. Hawaii*, No. 1:21-cv-343, 2021 WL 4944804, at *6 n.9 (D. Haw. Oct. 22, 2021); *see generally* U.S. Dep't of Justice, Office of Legal Counsel, Whether Section 564 of the Food, Drug, and Cosmetic Act Prohibits Entities from Requiring the Use of a Vaccine Subject to an Emergency Use Authorization, 45 Op. O.L.C. __, 2021 WL 3418599 (July 6, 2021).

5. Executive Order 14043 Does Not Violate Substantive Due Process.

Count Five alleges that requiring federal employees to be vaccinated for COVID-19 is a substantive due process violation. *See* Am. Compl. ¶¶ 54–56, 140–42. Plaintiffs contend

that the federal employee vaccination requirement burdens two fundamental rights—"the right to refuse unwanted medical treatment" and "the right to bodily integrity"—and is therefore subject to strict judicial scrutiny. Mot. at 25; *see id.* at 25–28. This contention fails. As numerous courts have held, vaccination requirements (or, as here, vaccination conditions on employment) are subject to rational basis review, under which the Executive Order easily passes muster.

When presented with a substantive due process claim, a court must "adopt a narrow definition of the interest at stake." *Raich v. Gonzales*, 500 F.3d 850, 863 (9th Cir. 2007) (citing *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997)). Next, the court must determine whether the narrowly-defined right is "fundamental," *i.e.*, "deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty." *Glucksberg*, 521 U.S. at 721 (citation omitted). If the challenged law "abridges a fundamental right," it is "subject to strict scrutiny"; if not, it receives rational basis review. *See, e.g.*, *United States v. Juv. Male*, 670 F.3d 999, 1012 (9th Cir. 2012).

Plaintiffs err in suggesting that Executive Order 14043 implicates any recognized "right to refuse medical treatment" or "right to bodily integrity," Mot. at 25. The Supreme Court has recognized this type of right only in the context of "forced administration of life-sustaining medical treatment," *Cruzan ex rel. Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 279 (1990), and "forced administration of antipsychotic drugs," *Washington v. Harper*, 494 U.S. 210, 236 (1990). Such interventions are far more intrusive than vaccinations, which are a common feature of modern life. Moreover, the policies at issue here do not *force* anyone to receive medical care; federal employees may seek an exception based on a medical condition or religious objection, or may choose to pursue other employment. *See, e.g.*, *Klaassen v. Trs. of Ind. Univ.*, --- F. Supp. 3d ----, 2021 WL 3073926, at *25 (N.D. Ind. July 18, 2021) (public university's COVID-19 vaccination requirement was "a far cry" from forcible provision of medical care), *denying mot. for inj. pending appeal*, 7 F.4th 592 (7th Cir. 2021) (Easterbrook, J.), *emergency application for relief denied*, No. 21A15 (Barrett, J., in chambers) (Aug. 12, 2021); *Bridges*, 2021 WL 2399994, at *2 (similar).

Binding precedent demonstrates that Plaintiffs' proposed definition of the "right" at stake here is far too broad. In *Raich*, for example, the Ninth Circuit held that a criminal ban on marijuana use does not implicate a "right to mak[e] life-shaping medical decisions" or "preserve bodily integrity" but rather "the right to use *marijuana*" for these purposes. 500 F.3d at 864; *see also Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1086–87 (9th Cir. 2015) (holding that a law requiring pharmacies to timely deliver all prescription medications did not implicate "the right to refrain from taking human life" but rather a much narrower "right to own, operate, or work at a licensed professional business free from regulations requiring the business to engage in activities that one sincerely believes lead to the taking of human life" (citation omitted)). Accordingly, the present case does not involve "bodily integrity"—but rather, a purported right to hold federal employment while refusing to be vaccinated against a highly contagious virus.

It is clear that the American legal tradition does not recognize any such right. *See, e.g.*, *Valdez*, 2021 WL 4145746, at *5 ("[F]ederal courts have consistently held that vaccine mandates do not implicate a fundamental right . . . ."); *Johnson*, 2021 WL 4846060, at *13 ("[T]he right to refuse vaccination is not a fundamental right." (citation omitted)); *Dixon v. De Blasio*, ---F. Supp. 3d---, 2021 WL 4750187, at *8 (E.D.N.Y. Oct. 12, 2021) (same). To the contrary, even "vaccination requirements, like other public-health measures, have been common in this nation." *Klaassen*, 7 F.4th at 593; *see also Doe v. Zucker*, 520 F. Supp. 3d 217, 249–53 (N.D.N.Y. 2021). And the Supreme Court held more than a century ago "that a state may require all members of the public to be vaccinated against smallpox," under penalty of criminal sanctions. *Klaassen*, 7 F.4th at 593 (citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)); *see also Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944) (Constitution does not provide "freedom from compulsory vaccination"); *Zucht v. King,* 260 U.S. 174, 177 (1922) (similar).

Plaintiffs' criticism of *Jacobson* misses the mark. *See* Mot. at 27–28. *Jacobson* has not been abrogated; as the Seventh Circuit recently observed, it remains binding on lower courts. *See Klaasen*, 7 F.4th at 593; *accord Phillips v. City of N.Y.*, 775 F.3d 538, 542 (2d Cir. 2015). Notably, Justice Gorsuch's concurrence in *Cuomo*—which Plaintiffs cite with approval—

describes *Jacobson* as having correctly "applied rational basis review" to a government-imposed vaccination requirement. *See* 141 S. Ct. at 70. And regardless of the continuing validity of *Jacobson*'s "doctrinal underpinnings," Mot. at 28, the decision is compelling evidence of "this Nation's history and tradition," *Glucksburg*, 521 U.S. at 721. Tellingly, Plaintiffs fail to reference any history or tradition that might reveal the existence of a fundamental right to avoid vaccination requirements (or conditions). *See Klaassen*, 2021 WL 3073926 at *23-24 (finding a dearth of "historic rules, laws, or traditions" suggesting the existence of such a right, and "declin[ing] the [plaintiffs'] invitation to extend substantive due process to recognize more than what already and historically exists").

In sum, Courts have "consistent[ly] use[d] . . . rational basis review to assess mandatory vaccination measures." *Klaassen*, 2021 WL 3073926, at *24; *accord, e.g.*, *Workman v. Mingo Cnty. Bd. of Educ.*, 419 F. App'x 348, 355–56 (4th Cir. 2011); *Williams*, 2021 WL 4894264, at *8; *Valdez*, 2021 WL 4145746, at *5; *Norris v. Stanley*, 2021 WL 3891615, at *1–*2; *Harris v. Univ. of Mass., Lowell*, No. 21-11244, 2021 WL 3848012, at *6 (D. Mass. Aug. 27, 2021); *Zucker*, 520 F. Supp. 3d at 249–53. The federal employee vaccination requirement is therefore subject to rational basis review, which it easily passes. *See supra* Part II.A.1. Plaintiffs argue that the requirement "is both under- and over-inclusive," Mot. at 26, "[b]ut this argument cannot carry the day under rational basis review," *Allied Concrete & Supply Co. v. Baker*, 904 F.3d 1053, 1064 (9th Cir. 2018); *see Heller*, 509 U.S. at 321 ("[C]ourts are compelled under rational-basis review to accept [policymakers'] generalizations even when there is an imperfect fit between means and ends.").

6. Executive Order 14042 Does Not Violate the Tenth Amendment.

Plaintiffs' claim based on the Tenth Amendment is vague and undefined, and Plaintiffs therefore cannot show a likelihood of success. The motion recites many truisms about the Tenth Amendment. *See* Mot. at 8-9. But Plaintiffs cite no authority for the proposition on which their "federalism challenge" appears to hinge—*i.e.*, that any federal action that addresses

any topic that states also have the power to regulate is unconstitutional.[16] So long as the federal action is authorized by the Constitution, "the Tenth Amendment gives way." *United States v. Hatch*, 722 F.3d 1193, 1202 (10th Cir. 2013); *see also, e.g.*, *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 291 (1981) ("The Court long ago rejected the suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority under the Commerce Clause in a manner that displaces the States' exercise of their police powers."); *NCAA v. Christie*, 926 F. Supp. 2d 551, 571 (D.N.J. 2013) (if challenged action is pursuant to a valid act of Congress, it does not matter that it addresses an issue that "might be considered an area subject to the States' traditional police powers").

Here, as discussed above, Executive Order No. 14042 was issued pursuant to the President's authority under the Procurement Act, which is undisputedly a valid federal statute. Plaintiffs' conclusory claim therefore fails.

B. Plaintiffs Are Not Likely to Suffer Irreparable Harm in the Absence of Preliminary Relief.

A plaintiff seeking a preliminary injunction also bears the burden of demonstrating that irreparable harm is *likely*, not just possible, prior to a final disposition of the case. *All. for the Wild Rockies v. Cottrell,* 632 F.3d 1127, 1131 (9th Cir. 2011). "An injunction will not issue if the person or entity seeking injunctive relief shows a mere possibility of some remote future injury, . . . or a conjectural or hypothetical injury." *Park Vill. Apartment Tenants Ass'n v. Mortimer Howard Tr.*, 636 F.3d 1150, 1160 (9th Cir. 2011) (citations omitted). Here, neither Plaintiff Doe nor the State of Arizona has carried this burden.

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[16] Plaintiffs cite *Printz v. United States*, 521 U.S. 898, 919 (1997) for its generic characterization of the Tenth Amendment, *see* Mot. at 9, but the case stands for the proposition that "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." *United States v. California*, 921 F.3d 865, 888 (9th Cir. 2019) (quoting *Printz*, 521 U.S. at 925). Those circumstances are obviously not present here.

1. Plaintiff Doe's Alleged Injuries Are Conjectural and, if They Materialize, Would Not Be Irreparable.

As explained above, Plaintiff Doe may never face any injury at all because he has a pending request for a medical exception to the vaccination requirement. *See supra* Part I.A.1. Plaintiff Doe asserts that his request "will almost certainly be denied," Am. Compl. ¶ 107; *see also id.* ¶ 27, but he provides no evidence in support of this assertion. In the absence of any information about the federal agency for which Plaintiff Doe allegedly works, the nature of his role, the basis for his requested exception to the vaccination requirement, or the (unidentified) agency's handling of similar requests, there is no justification for concluding that it is "*likely*, not just possible," that Plaintiff Doe's request will be denied and he will actually face the prospect of workplace discipline; he certainly has not met his burden of making that required showing.

Even if Plaintiff Doe's request ends up being denied during the pendency of this litigation, he will not be irreparably harmed. The most severe penalty he could face is job loss. *See* Enforcement FAQs; *accord* Mot. at 30 ("Plaintiff Doe faces the heavy economic harm of losing his job, and thus his income."). Courts have repeatedly held that job loss does not constitute irreparable injury for purposes of a preliminary injunction. *See Sampson v. Murray*, 415 U.S. 61, 88–91 (1974); *Hartikka v. United States*, 754 F.2d 1516, 1518 (9th Cir. 1985); *Addington v. US Airline Pilots Ass'n*, 588 F. Supp. 2d 1051, 1068 (D. Ariz. 2008); *see also, e.g.*, *Garcia v. United States*, 680 F.2d 29, 31–32 (5th Cir. 1982) (observing that "[i]t is practically universal jurisprudence in labor relations in this country that there is an adequate remedy for individual wrongful discharge after the fact of discharge," *i.e.*, "reinstatement and back pay").

Perhaps recognizing this, Plaintiff Doe suggests that he faces irreparable harm from "violations of his constitutional rights to bodily integrity and to refuse medical treatment" and from "retaliation for challenging the mandate." Pl. Doe's Reply ISO Mot. for Expedited Briefing at 2–3, ECF No. 43. Neither suggestion has merit. As previously explained, Plaintiff Doe is at no risk of being forced to receive medical treatment. *See supra* Part II.A.5. Nor has Plaintiff Doe produced any evidence indicating a likelihood of retaliation. Thus, Plaintiff Doe

has failed to demonstrate a likelihood of irreparable harm, which is an independently sufficient basis for denying his pending request for preliminary relief. *See Winter*, 555 U.S. at 21–22; *see also Beckerich v. St. Elizabeth Med. Ctr.*, --- F. Supp. 3d ----, 2021 WL 4398027, at *7 (E.D. Ky. Sept. 24, 2021) (employee was not irreparably harmed by employer's vaccination requirement); *Harsman v. Cincinnati Children's Hosp. Med. Ctr.*, No. 21-597, 2021 WL 4504245, at *4 (S.D. Ohio Sept. 30, 2021) (same); *Bauer v. Summey*, --- F. Supp. 3d ----, 2021 WL 4900922, at *18 (D.S.C. Oct. 21, 2021) (same).

2. The State's Alleged Injuries Are Speculative and, in Any Event, Purely Economic.

As noted above, Arizona lacks standing to sue as *parens patriae* to vindicate its "quasi-sovereign interest" in the health and well-being of its residents. Its preliminary injunction motion instead focuses on the purported harms that the federal vaccine policies will cause to the state's economy. For example, Arizona asserts that its economy will be harmed because the state *predicts* that federal vaccine requirements will cause private businesses to lose employees. Mot. at 29-30 (emphasis added). But this harm is purely conjectural. *See, e.g.*, Am. Compl. ¶ 83 (asserting, on "information and belief," that "the vaccination mandates will cause a significant proportion of unvaccinated federal and contractor employees to resign to avoid the mandates"). As courts in this district have repeatedly recognized, a "motion for preliminary injunction, including the likelihood of irreparable injury, must be supported by '[e]vidence that goes beyond the unverified allegations of the pleadings.'" *Valenzuela v. Corizon Health*, No. 16-4120, 2017 WL 11548793, at *2 (D. Ariz. July 26, 2017) (quoting *Fidelity Nat. Title Ins. Co. v. Castle*, No. 11-896, 2011 WL 5882878, at *3 (N.D. Cal. 2011) (cleaned up); *see also, e.g.*, *Rodrigues v. Ryan*, No. 16-8272, 2017 WL 5068468, at *3 (D. Ariz. Nov. 3, 2017) ("unsworn statements for the facts alleged" inadequate for purposes of preliminary injunction motion). Arizona cherry-picks a few survey results in which certain employers speculate about how their employees will react to the new federal vaccine policies, *see* Am. Compl. ¶ 83, but it provides no concrete facts demonstrating that federal and contractor employees will respond to federal vaccination policies in a way that will irreparably harm Arizona's economy.

At the outset, Arizona fails to submit credible evidence that the challenged vaccine mandates will hurt its economy; given the extraordinary disruptions that COVID-19 has caused to workplaces around the country, it is far more likely that Arizona will benefit from having a vaccinated workforce. In any case, the harm that Arizona asserts—both indirectly and directly in its capacity as a federal contractor—is, in Arizona's own words, "economic loss." Mot. at 30. And it is axiomatic that "economic injury alone does not support a finding of irreparable harm." *Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991). Arizona suggests that economic injury might sometimes be irreparable where a party cannot recover monetary damages; but as described above, federal contractors have a remedy in the Court of Federal Claims for any dispute they have with Executive Order No. 14042. *See supra.* In any event, Arizona's claims of "direct economic loss" as a result of the Executive Orders' application to federal contractor state agencies are nearly as speculative as their generalized claims of harm to the state economy. Notably, Arizona claims not that DCRS faces an imminent loss of federal funds, but that there is "is "ambiguity regarding whether" Executive Order 14042 "would apply to DCRS." *See supra* Part I.B.2. That is no basis for the award of preliminary injunctive relief. *See Goldie's Bookstore, Inc. v. Superior Ct. of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984) ("Speculative injury does not constitute irreparable injury.")

C. The Requested Preliminary Relief Is Contrary to the Public Interest.

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

First, enjoining the Executive Orders would harm the public interest in slowing the spread of COVID-19 among millions of federal employees, federal contractors, and the members of the public with whom they interact. As the Supreme Court has recognized, "[s]temming the spread of COVID-19 is unquestionably a compelling interest." *Cuomo*, 141 S. Ct. at 67. Accordingly, numerous courts reviewing "executive action designed to slow the

spread of COVID-19" have concluded that, "[t]he public interest in protecting human life—particularly in the face of a global and unpredictable pandemic—would not be served by" an injunction. *Tigges v. Northam*, 473 F. Supp. 3d 559, 573–74 (E.D. Va. 2020); *see also, e.g.*, *Am.'s Frontline Drs. v. Wilcox*, No. EDCV 21-1243, 2021 WL 4546923, at *8 (C.D. Cal. July 30, 2021); *Valdez*, 2021 WL 4145746, at *13, *Harris*, 2021 WL 3848012, at *8; *Williams*, 2021 WL 4894264, at *10–11; *Wise v. Inslee*, No. 2:21-cv-0288, 2021 WL 4951571, at *6 (E.D. Wash. Oct. 25, 2021), 2021 WL 4951571, at *6; *Mass. Corr. Officers*, 2021 WL 4822154, at *7–8; *Johnson*, 2021 WL 4846060, at *26–27; *TJM 64, Inc. v. Harris*, 475 F. Supp. 3d 828, 840–41 (W.D. Tenn. 2020); *Talleywhacker, Inc. v. Cooper*, 465 F. Supp. 3d 523, 543 (E.D.N.C. 2020).

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

By comparison, any theoretical harm that Plaintiffs might experience absent a preliminary injunction is relatively minor. Plaintiff Doe does not face an imminent prospect of workplace discipline, much less removal; he may avoid discipline entirely if his pending request for a medical exception is granted (or if he chooses to receive a COVID-19 vaccine that the FDA has determined to be safe and highly effective). *See supra* Part I.A.1. And even if Plaintiff Doe were ultimately removed from federal service for failing to get vaccinated, he

would have an adequate legal remedy if he successfully challenged his removal. *See supra* Part I.A.2. Similarly, if State agencies or subdivisions were to suffer "the loss of federal funds [or] contracts" during the course of this litigation, Mot. at 30, such economic injuries would be redressable in an appropriate forum. *See supra* Part I.B.2.

Granting the requested injunction would not "preserve the relative positions of the parties," as Plaintiffs suggest, Mot. at 30 (quoting *Doe #1 v. Trump*, 957 F.3d 1050, 1068 (9th Cir. 2020)). Plaintiffs rely heavily on *Doe #1*, but that case did not involve a motion for preliminary injunction but rather a motion to stay an injunction pending appeal. *See Doe #1*, 957 F.3d at 1056; *see also Nken*, 556 U.S. at 428–29 (explaining that an injunction "directs the conduct of a party," whereas a stay "simply suspend[s] [prior] judicial alteration of the status quo" (citation omitted)). The panel held, over a dissent, that staying the district court's injunction—and thereby allowing the challenged policy to go into effect for the first time—would alter the status quo. *See Doe # 1*, 957 F.3d at 1056. Here, by contrast, entering the requested injunction would upend the status quo by (1) preventing further implementation of Executive Orders that have been in effect for nearly two months; and (2) interfering with the federal government's ability to regulate its own employees and determine the terms on which it will enter into contracts. *See, e.g.*, *Nken*, 556 U.S. at 428–29 (explaining that enjoining a government policy is an act of "judicial intervention" that "*alter[s]* the legal status quo"). Moreover, accepting Plaintiffs' argument would generate the absurd result of allowing challengers to obtain a preliminary injunction against *any* new government policy, in order to maintain the prior "status quo" until a decision on the merits. *But see Winter*, 555 U.S. at 24 ("A preliminary injunction is an extraordinary remedy never awarded as of right."); *Brown v. Gilmore*, 533 U.S. 1301, 1303 (2001) (Rehnquist, C.J., in chambers) (explaining that "an injunction against the enforcement of a presumptively valid" enactment should only be granted in extraordinary circumstances).

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

III. Any Relief Should Be Narrowly Tailored.

If the Court disagrees with Defendants' arguments, any relief should be no broader than necessary to remedy the injuries of the specific Plaintiffs in this case. "A plaintiff's remedy must be tailored to redress the plaintiff's particular injury," *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018), and "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs," *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (citation omitted). Consistent with those equitable principles, the Ninth Circuit has repeatedly vacated or stayed nationwide injunctions. *See, e.g.*, *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1029 (9th Cir. 2019); *California v. Azar*, 911 F.3d 558, 584 (9th Cir. 2018); *City & Cty. of S.F. v. Trump*, 897 F.3d 1225, 1244–45 (9th Cir. 2018). To the extent that nationwide injunctions are ever appropriate, they must "be *necessary* to give prevailing parties the relief to which they are entitled," *California*, 911 F.3d at 582 (quoting *Bresgal v. Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1987)), a standard that Plaintiffs do not attempt to satisfy.

Nationwide injunctions "take a toll on the federal court system—preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch." *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring); *see also, e.g.*, *Holland v. Nat'l Mining Ass'n*, 309 F.3d 808, 815 (D.C. Cir. 2002) ("Allowing one circuit's statutory interpretation to foreclose . . . review of the question in another circuit" would "squelch the circuit disagreements that can lead to Supreme Court review."). The Executive Orders at issue here have been challenged in numerous other cases, underscoring why this Court should not attempt to decide their legality for all parties and for all time. *See Foley v. Biden*, No. 21-1098 (N.D. Tex.) (challenge to EO 14043); *Jensen v. Biden*, No. 21-5119 (W.D. Wa.) (same); *Employee A v. Biden*, No. 21-2696 (D. Md.) (same); *Altschuld v. Raimondo*, No. 21-2779 (D.D.C.) (same); *Costin v. Biden*, No. 21-2484 (D.D.C.) (same); *Church v. Biden*, No. 21-2815 (D.D.C) (same); *Navy Seal 1 v. Biden*, No. 21-2429 (M.D. Fla.) (challenge to EO 14042); *Florida v. Nelson*, No. 21-2524 (M.D. Fla.) (same).

Respectfully submitted this 4th day of November,

BRIAN M. BOYNTON
Acting Assistant Attorney General

BRIGHAM J. BOWEN
CHRISTOPHER R. HALL
CARLOTTA P. WELLS
Assistant Directors

/s/ Joseph J. DeMott
JOSEPH J. DEMOTT
CHRISTOPHER M. LYNCH
R. CHARLIE MERRITT
STEVEN A. MYERS
KEVIN J. WYNOSKY
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street NW
Washington, DC 20005
Phone: (202) 514-3367
Email: joseph.demott@usdoj.gov