

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
SAN ANGELO DIVISION

TERRY CONNER, et al.,

Plaintiffs,

v.

JOSEPH R. BIDEN, et al.,

Defendants.

No. 6:21-CV-074-H

**ORDER STAYING THE CASE**

Plaintiffs, employees of 3M, seek to enjoin Executive Order 14042, which requires covered federal contractors to ensure that their employees are vaccinated for COVID-19 and to collect proof of vaccination to ensure compliance. The plaintiffs assert that compelling disclosure of their vaccination status would violate their First Amendment rights. Dkt. No. 23 at 6–8. And although the plaintiffs recognize that the EO has already been enjoined nationwide, they assert that the nationwide injunction does not enjoin the EO’s vaccination-status disclosure requirement. Dkt. No. 23 at 5, 13. In response, the defendants confirmed that the nationwide injunction bars the EO’s compelled-disclosure requirement and that they have not—and will not—enforce the EO while the nationwide injunction remains in effect. Dkt. No. 30. Given the nationwide injunction’s broad language and the government’s written concession, the Court agrees that the EO does not currently compel federal contractors to gather their employees’ vaccination status. As a result, the defendants assert that the plaintiffs lack standing because any injury suffered cannot be fairly traceable to a wholly inoperable EO. But because the defendants are currently challenging the nationwide injunction on appeal, the EO’s mandates could be resuscitated. Thus, the Court stays this case pending any intervening court action that reinstates the EO.

## 1. Factual and Procedural Background

### A. Factual Background

On January 20, 2021 President Biden signed Executive Order 13991—Section 4 of which established the Safer Federal Workforce Task Force to “provide ongoing guidance to heads of agencies on the operation of the Federal Government, the safety of its employees, and the continuity of Government functions during the COVID–19 pandemic.”<sup>1</sup> Then, Section 2 of Executive Order 14042, signed on September 9, directed the Task Force to issue guidance providing “explanations of protocols required of [federal] contractors and subcontractors to comply with workplace safety guidance” and directed executive departments and agencies to ensure that federal contracts and subcontracts incorporated a clause that would comply with such guidance.<sup>2</sup>

On September 24, the Task Force published the Original Task Force Guidance<sup>3</sup> outlining three primary COVID-19 workplace safety protocols:

1. COVID-19 vaccination of covered contractor employees, except in limited circumstances where an employee is legally entitled to an accommodation;
2. Compliance by individuals, including covered contractor employees and visitors, with the Guidance related to masking and physical distancing while in covered contractor workplaces; and
3. Designation by covered contractors of a person or persons to coordinate COVID-19 workplace safety efforts at covered contractor workplaces.

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<sup>1</sup> Exec. Order No. 13991, 86 Fed. Reg. 7,045 (Jan. 20, 2021) [hereinafter EO 13991].

<sup>2</sup> Exec. Order No. 14042, 86 Fed. Reg. 50,985 (Sept. 14, 2021) [hereinafter EO 14042].

<sup>3</sup> COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors (Sept. 24, 2021), [https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc\\_20210922.pdf](https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf) [<https://perma.cc/BR6H-NFCC>] [hereinafter Original Task Force Guidance]. Although not cited by the plaintiffs, this guidance was superseded by the COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors (Nov. 10, 2021), [https://www.saferfederalworkforce.gov/downloads/Guidance%20for%20Federal%20Contractors\\_Safer%20Federal%20Workforce%20Task%20Force\\_20211110.pdf](https://www.saferfederalworkforce.gov/downloads/Guidance%20for%20Federal%20Contractors_Safer%20Federal%20Workforce%20Task%20Force_20211110.pdf) [<https://perma.cc/S4LK-LP6L>] [hereinafter Task Force Guidance].

Original Task Force Guidance at 1. This guidance required covered contractor employees to be “fully vaccinated no later than December 8, 2021.” *Id.* at 5. Critically here, as part of the first protocol, a “covered contractor must review its covered employees’ documentation to prove vaccination status” and “require covered contractor employees to show or provide their employer with” a qualifying document demonstrating vaccination. *Id.* at 5–6. On September 28, the Office of Management and Budget (OMB) determined that the Task Force Guidance “will improve economy and efficiency by reducing absenteeism and decreasing labor costs for contractors and subcontractors working on or in connection with a Federal Government contract.”<sup>4</sup> And on September 30, the Federal Acquisition Regulation Council issued the FAR Class Deviation Clause<sup>5</sup>—requiring contractors and subcontractors to comply with the Task Force Guidance—to be inserted pursuant to EO 14042 § 2(a) into federal contracts. FAR Class Deviation Clause & Memo at 2–3, 5.

In response to these executive orders and implementing provisions, 3M, a covered federal contractor, sent a company-wide email on October 29, requiring all 3M employees to log into a website, ShareMy.Health, to upload their vaccination information by December 8. Dkt. No. 23 at 9–11. On the same day, *Georgia v. Biden* was docketed in the

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<sup>4</sup> Determination of the Promotion of Economy and Efficiency in Federal Contracting Pursuant to Executive Order No. 14042, 86 Fed. Reg. 53,691–92 (Sept. 28, 2021) [hereinafter Original OMB Determination]. Although not cited by the plaintiffs, this was superseded by the Determination of the Acting OMB Director Regarding the Revised Safer Federal Workforce Task Force Guidance for Federal Contractors and the Revised Economy & Efficiency Analysis, 86 Fed. Reg. 63,418, 63,421–23 (Nov. 16, 2021) [hereinafter OMB Determination].

<sup>5</sup> Memorandum for Chief Acquisition Officers, Senior Procurement Executives, Defense Acquisition Regulations Council, Civilian Agency Acquisition Council, Federal Acquisition Regulations Class Deviation Clause 52.223-99, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors (Sept. 24, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/09/FAR-Council-Guidance-on-Agency-Issuance-of-Deviations-to-Implement-EO-14042.pdf> [<https://perma.cc/3PXA-T9VY>] [hereinafter FAR Class Deviation Clause & Memo].

Southern District of Georgia. Dkt. No. 1, No. 1:21-CV-163 (S.D. Ga. Oct. 29, 2021). On November 10, the Task Force posted the updated Task Force Guidance, which is nearly identical to the Original Task Force Guidance, and, on November 16, the OMB published the superseding OMB Determination, which determined that this updated Guidance promoted economy and efficiency.

On November 18, a plaintiff-intervenor in *Georgia v. Biden* filed a motion for preliminary injunction “seek[ing] to enjoin the enforcement of Executive Order 14042 and its implementation by the Office of Management and Budget (OMB), the Safer Federal Workforce Task Force (the ‘Task Force’), and the Federal Acquisition Regulatory (FAR) Council.” Dkt. No. 50 at 3, *Georgia v. Biden*, No. 1:21-CV-163 (S.D. Ga. Nov. 18, 2021). And on December 7, the Southern District of Georgia granted that motion and issued a nationwide preliminary injunction, which “**ORDERS** that Defendants are **ENJOINED**, during the pendency of this action or until further order of this Court, from enforcing the vaccine mandate for federal contractors and subcontractors in all covered contracts in any state or territory of the United States of America.” *Georgia v. Biden*, No. 1:21-CV-163, 2021 WL 5779939, \*12 (S.D. Ga. Dec. 7, 2021). The Eleventh Circuit denied the federal government’s motion to stay the nationwide injunction, so it remains in effect. *Georgia v. Biden*, No. 21-14269 (11th Cir. Dec. 17, 2021). The Eleventh Circuit’s current briefing schedule on the nationwide injunction extends to February 22, 2022. *Georgia v. Biden*, No. 21-14269 (11th Cir. Dec. 21, 2021).

After the nationwide injunction issued, the Task Force published a notice on its website that “[t]he Government will take no action to enforce the clause implementing requirements of Executive Order 14042, absent further written notice from the agency,

where the place of performance identified in the contract is in a U.S. state or outlying area subject to a court order prohibiting the application of requirements pursuant to the Executive Order (hereinafter, ‘Excluded State or Outlying Area’).” Safer Federal Workforce Task Force, *For Federal Contractors*, <https://www.saferfederalworkforce.gov/contractors/> [<https://perma.cc/L974-6PAA>] (last visited Dec. 25, 2021) [hereinafter Post-injunction Task Force Notice]. And the Task Force has made clear that currently excluded states and outlying areas include “[a]ll of the United States and its outlying areas.” *Id.*

Despite this notice, on December 10, “Eric Hammes, 3M’s Executive Vice President, Chief Country Governance and Services Officer (‘Hammes’), sent an email to all 3M employees, including the 3M Plaintiffs. Mr. Hammes acknowledged the Georgia Court’s nationwide injunction and that 3M employees were not required to be vaccinated at this time pending the outcome of that litigation. However, Mr. Hammes instructed all 3M employees including the 3M Plaintiffs to ‘continue to upload COVID-19 vaccination documents in the ShareMy.Health platform.’” *See* Dkt. Nos. 23 at 11; 23-1 at 4, 17, 30, 43. The plaintiffs, however, “do not wish to disclose their vaccination status to 3M and the federal government defendants.” Dkt. No. 23-1 at 4, 17, 30, 43. And the plaintiffs assert that 3M is requiring them to disclose their vaccination status by January 4, 2022<sup>6</sup> pursuant to a portion of the EO 14042 and implementing provisions not enjoined by the *Georgia v. Biden* injunction. Dkt. No. 33 at 6, 10–11; *see also* Dkt. Nos. 1 ¶¶ 60, 83; 22 at 2; 23 at 13.

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<sup>6</sup> Fact Sheet: Biden Administration Announces Details of Two Major Vaccination Policies, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/04/fact-sheet-biden-administration-announces-details-of-two-major-vaccination-policies/> [<https://perma.cc/39J2-9QJU>] (Nov. 4, 2021) (“Employees falling under the ETS, CMS, or federal contractor rules will need to have their final vaccination dose – either their second dose of Pfizer or Moderna, or single dose of Johnson & Johnson – by January 4, 2022.”) [hereinafter Fact Sheet]; *see also* Task Force Guidance at 5.

## **B. Procedural Background**

On December 8, the day after the Southern District of Georgia issued its nationwide injunction, the plaintiffs filed their complaint in this case seeking declaratory and injunctive relief from the federal contractor vaccine mandate, which comprises EO 14042, the Task Force Guidance, the OMB Determination, and the FAR Deviation Clause & Memo. *See* Dkt. No. 1 at 20, 26–27. Pursuant to the Court’s order expediting the case in light of the time-sensitive nature of the matter (Dkt. No. 21), on December 14, the plaintiffs filed their motion for an expedited briefing schedule, a temporary restraining order, and a preliminary injunction (Dkt. No. 22). The motion asks the Court to enjoin the contractor vaccine mandate in full, including the requirement that covered employees disclose their vaccination status to their employers.<sup>7</sup> Plaintiffs assert that the current nationwide injunction “does not enjoin the federal government defendants and covered federal contractors from compelling their employees to disclose their vaccination status in accordance with EO 14042, on or before January 4, 2022.” Dkt. No. 22 at 2.

On December 21, the defendants filed their response, arguing, among other things, that: (1) EO 14042 is already subject to a nationwide injunction; (2) plaintiffs lack standing to challenge EO 14042 or the Task Force Guidance; (3) 3M made a voluntary choice, separate from EO 14042 or its implementing provisions, in requiring its employees to provide information about their vaccination status; and (4) a separate federal requirement,

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<sup>7</sup> “The covered contractor must review its covered employees’ documentation to prove vaccination status. Covered contractors must require covered contractor employees to show or provide their employer with one of the following documents: [listing acceptable proof of vaccination]. . . . The covered contractor shall ensure compliance with the requirements in this Guidance related to the showing or provision of proper vaccination documentation.” Task Force Guidance at 5–6; *see also* Original Task Force Guidance at 5–6 (same).

the recently restored OSHA ETS mandate,<sup>8</sup> requires 3M to collect to collection vaccination-status information from its employees. Dkt. No. 28 at 13–17, 21.

“For avoidance of doubt regarding the nationwide injunction’s scope and the defendants’ compliance with it,” the Court ordered the defendants to file a notice detailing their interpretation of and compliance with the *Georgia v. Biden* injunction, including “[w]hether the defendants have taken any post-injunction action to enforce the vaccination-status-disclosure requirements detailed in the Task Force Guidance.” Dkt. No. 29 at 1, 3. In response, defendants’ notice of compliance conceded that the nationwide injunction prevented enforcement of the EO, including its disclosure requirement:

- “Defendants interpret the nationwide injunction as enjoining any enforcement of contract clauses requiring compliance with the November 10, 2021 Safer Federal Workforce Task Force guidance, including the requirement that covered contractors ‘review [their] covered employees’ documentation to prove vaccination status.’” Dkt. No. 30 at 1 (quoting OMB Determination at 63,420 and citing Task Force Guidance).
- Defendants “have moved for clarification from the U.S. District Court for the Southern District of Georgia on whether its nationwide injunction enjoins only enforcing compliance with the November 10 guidance provisions related to vaccination, or whether it also enjoins enforcing compliance with the November 10 guidance provisions related to masking and physical distancing.” *Id.* at 1–2 (citing Defendants’ Emergency Motion to Stay Pending Appeal at 10–12, *Georgia v. Biden*, No. 1:21-CV-163 (S.D. Ga. Dec. 9, 2021) (Dkt. No. 97)).
- “[D]efendants are complying and will continue to comply with the nationwide injunction until further court action by the (1) Southern District of Georgia, (2) United States Court of Appeals for the Eleventh Circuit, or (3) Supreme Court of the United States.” *Id.* at 2.

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<sup>8</sup> *In re MCP No. 165*, --- F.4th ---, 2021 WL 5989357 (6th Cir. Dec. 17, 2021) (dissolving the Fifth Circuit’s stay of the OSHA ETS mandate). On January 7, 2022, the Supreme Court will hear argument on an emergency application for immediate stay of the OSHA ETS mandate. *National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration*, No. 21A244.

- The OMB has “issued detailed guidance to agency chief acquisition officers and senior procurement executives directing them to take no action to enforce contract clauses implementing the requirements of Executive Order 14042 where the place of performance identified in the contract is in a U.S. state or outlying area.” *Id.* (attaching in support Exhibit A, Dkt. No. 30-1 [hereinafter OMB Compliance Email] (OMB instructing agencies to inform existing parties to federal contracts and solicitations, with or without the Clause, that the government will not enforce the Clause absent further notice from the agency and directing agencies to stop including or to remove the Clause in other contracts not yet executed)).
- The defendants, by issuing the OMB Compliance Email, “have directed federal agencies ‘to take no action to enforce’ any of the requirements detailed in the November 10 guidance ‘pursuant to Executive Order 14042,’” and therefore have directed federal agencies to halt enforcement of the vaccination-status disclosure requirement. The defendants note that, if one of the federal government’s contracting officers erroneously sought to enforce this requirement, the defendants would immediately correct the mistake. *Id.* at 2–3 (quoting OMB Compliance Email and citing Task Force Guidance).
- “‘Federal agency workplace safety protocols for Federal buildings and Federally controlled facilities still apply in all locations,’ so ‘[c]ontractor employees working onsite in those facilities must still follow those Federal agency workplace safety protocols.’” *Id.* at 3 (quoting OMB Compliance Email). And because plaintiffs allege that they work “at 3M facilities in Brownwood, Texas and Hutchinson, Minnesota,” “workplace safety protocols for Federal buildings and Federally controlled facilities do not appear to apply to them.” *Id.* at 3 (quoting Dkt. No 1 ¶ 12).

The plaintiffs replied, so their motion for injunctive relief is ripe for review. Dkt. No. 33

## **2. Legal Standards**

### **A. Standing**

Article III, Section 2, of the United States Constitution states that “[t]he judicial Power shall extend to . . . cases . . . [and] to controversies.” The jurisdiction of federal courts is therefore limited to “[c]ases’ and ‘[c]ontroversies.’” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559 (1992). Thus, “in all standing inquiries, the critical question is whether at least one petitioner has ‘alleged such a personal stake in the outcome of the controversy as

to warrant *his* invocation of federal-court jurisdiction.” *Horne v. Flores*, 557 U.S. 433, 445 (2009) (emphasis in original). “[T]he constitutional minimum of standing contains three elements.” *Lujan*, 504 U.S. at 560. “The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016).

An injury in fact is “an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not ‘conjectural’ or ‘hypothetical.’” *Lujan*, 504 U.S. at 560 (internal quotations omitted). To be “fairly traceable to the challenged action of the defendant,” the injury must “not [be] the result of the independent action of some third party not before the court.” *Id.* (internal quotations omitted). Third, the redressability element will not be satisfied if it is “merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’” *Id.* at 561 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 US. 26, 38, 43 (1976)).

The party invoking federal jurisdiction bears the burden of establishing the elements of standing. *Id.* A plaintiff must “support [each element of standing] in the same way as any other matter on which the plaintiff bears the burden of proof.” *Id.* Therefore, a plaintiff must support each element of standing “with the manner and degree of evidence required at the successive stages of litigation.” *Id.* “Because a preliminary injunction ‘may only be awarded upon a clear showing that the plaintiff is entitled to such relief,’ the plaintiffs must make a ‘clear showing’ that they have standing to maintain the preliminary injunction.” *Barber v. Bryant*, 860 F.3d 345, 352 (5th Cir. 2017) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)).

**B. The Court may stay a case sua sponte based on a potential lack of standing pending a ruling by another court.**

Standing is a jurisdictional requirement, and a federal court must consider its jurisdiction at all times. *Lewis v. Casey*, 518 U.S. 343, 349 n.1 (1996); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93 (1998); *Doe v. Tangipahoa Par. Sch. Bd.*, 494 F.3d 494, 496 n.1 (5th Cir. 2007) (en banc). And courts may raise jurisdictional issues like standing sua sponte. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 501 (1975); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) (lack of standing raised by the court when not raised by either party).

A district court has the inherent power to stay proceedings. *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). And rather than dismissing a case outright when a plaintiff lacks standing, a court may pursue the less drastic route of staying a case sua sponte to allow the plaintiff an opportunity to cure the defect. *See, e.g., Kulberg v. Washington Mut. Bank*, No. 10-CV-1214 W, 2011 WL 13356113, at \*3 (S.D. Cal. June 20, 2011); *Sledge v. DaimlerChrysler Corp.*, No. 06-14961, 2007 WL 9752808, at \*4 (E.D. Mich. May 24, 2007). This power extends to circumstances where a standing defect may be resolved by an unrelated appeal. *See Zink v. First Niagara Bank, N.A.*, No. 13-CV-01076-RJA-JJM, 2016 WL 787963, at \*5 (W.D.N.Y. Mar. 1, 2016) (sua sponte staying a case pending a ruling in *Spokeo* by the Supreme Court); *cf. Wainwright v. Bluestem Brands, Inc.*, No. 17-CV-03041-JST, 2018 WL 3399027, at \*1 (N.D. Cal. June 29, 2018) (sua sponte staying a case pending a Ninth Circuit ruling on a contested statutory term).

**3. Analysis**

**A. *Georgia v. Biden's* nationwide injunction enjoins EO 14042's vaccination-status disclosure requirements.**

The Southern District of Georgia's nationwide injunction broadly enjoined EO 14042's application and enforcement, so the government cannot currently require 3M to compel its employees to disclose their vaccination status. The *Georgia* court enjoined the federal government, "during the pendency of this action or until further order of this Court, from enforcing the vaccine mandate for federal contractors and subcontractors in all covered contracts in any state or territory of the United States of America." *Georgia*, 2021 WL 5779939, \*12. More specifically, the operative FAR Deviation Clause, which contractually binds employers like 3M to comply with the Task Force Guidance, is completely enjoined by the nationwide injunction. *See id.*

Moreover, in addressing the irreparable-injury element, the court relied explicitly on the burden of federal contractors having to track employees' vaccination status: "As referenced previously in this Order, the Court heard from three witnesses who described the incredibly time-consuming processes they have undertaken (typically requiring major input and assistance from numerous other departments across their institution) to identify the employees covered by the mandate and to implement software and technology to ensure that those employees have been fully vaccinated (or have requested and been granted an accommodation or exemption) by the deadline in January." *Id.* at \*11. As a result, the court found "that the time and effort spent on these measures in the past—and going forward—constitute compliance costs resulting from EO 14042, which appear to be irreparable." *Id.* Given that part of the justification for the injunction was the burden

resulting from tracking employees' vaccination statuses, the injunction necessarily covers and precludes enforcement of the EO's vaccination-disclosure requirement.

And to the extent there were any doubt regarding the nationwide injunction's scope, the federal government's response to the injunction provides clarity. After the injunction issued, the Task Force published a notice stating that it would not enforce the EO in areas where court orders prohibit its application: "The Government will take no action to enforce the clause implementing requirements of Executive Order 14042, absent further written notice from the agency, where the place of performance identified in the contract is in a U.S. state or outlying area subject to a court order prohibiting the application of requirements pursuant to the Executive Order (hereinafter, 'Excluded State or Outlying Area')." *See* Post-injunction Task Force Notice. Similarly, the OMB Compliance Email instructs agencies to notify existing parties to federal contracts and solicitations, with or without the Clause, that "[t]he Government will take no action to enforce the clause implementing requirements of Executive Order 14042, absent further written notice from the agency" and directs agencies to stop including or to remove the Clause in other contracts not yet executed. Dkt. No. 30-1. Finally, the government's notice in this case states that it "interpret[s] the nationwide injunction as enjoining any enforcement of contract clauses requiring compliance with the November 10, 2021 Safer Federal Workforce Task Force guidance, including the requirement that covered contractors 'review [their] covered employees' documentation to prove vaccination status.'" Dkt. No. 30 at 1 (quoting OMB Determination at 63,420 and citing Task Force Guidance).

In short, *Georgia v. Biden's* nationwide injunction and the government's response to it have already given the plaintiffs what they seek in this suit: an injunction of EO 14042's

vaccination-status disclosure requirement. Nevertheless, the plaintiffs assert that, despite the nationwide injunction, “EO 14042 and related guidance directives provide covered federal contractors like 3M, with express conditions requiring they collect the vaccination status information from their covered employees.” Dkt. No. 33 at 8. In support, the plaintiffs cite various portions of the Task Force FAQs<sup>9</sup> and attach form OMB Control No. 3206-0277 (Dkt. No. 34 at 2–5)—a form apparently used to collect a covered employee’s vaccination status—which the defendants allegedly provided to covered federal contractors. Dkt. No. 33 at 8–12. The plaintiffs make much of the fact that the form indicates that it expires on February 5, 2022. *Id.* at 8 (citing Dkt. No. 34 at 2–5). But this date merely refers to the date the form expires and says nothing about the binding effect of its authorizing executive order. And the form itself indicates that the vaccination-status-collecting party is “authorized to collect the information requested on this form pursuant to Executive Order 13991, Protecting the Federal Workforce and Requiring Mask-Wearing (Jan. 20, 2021), Executive Order 12196, Occupational Safety and Health Program for Federal Employees (Feb. 26, 1980), and 5 U.S.C. chapters 11 and 79.” Dkt. No. 34 at 3. EO 13991 did establish the Task Force,<sup>10</sup> but nowhere in the form does it indicate that it was provided to employers pursuant to EO 14042 or its implementing provisions. And a form cannot, of course, override a federal court’s nationwide injunction of the EO that mandates collection of the information requested.

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<sup>9</sup> Federal Contractors, <https://www.saferfederalworkforce.gov/faq/contractors/> [<https://perma.cc/57Z8-F4TS>] (last visited Dec. 24, 2021).

<sup>10</sup> Exec. Order No. 13991, 86 Fed. Reg. 7,045 (Jan. 25, 2021) (establishing the Task Force, providing its mission, and directing agency cooperation with the Task Force).

**B. The ambiguities in the nationwide injunction noted by the defendants are not related to vaccination-status disclosure requirements.**

The plaintiffs seize on the defendants' concession that the government has sought clarification from the *Georgia v. Biden* court of various aspects of its injunction. Dkt. No. 33 at 5 n.1 (citing Dkt. No. 30 at 1–2). But the government “request[s] clarification of whether the preliminary injunction is limited to enforcement of the Safer Federal Workforce Task Force’s vaccination requirements, [or] whether it also prevents federal agencies from enforcing requirements related to masking and physical distancing and the identification of a person or persons to coordinate COVID-19 workplace safety efforts at covered contractor workplaces.” Motion to Stay at 12, *Georgia*, No. 1:21-CV-163 (Dkt. No. 97); *see also* Dkt. No. 30 at 1–2 (defendants’ notice of compliance, indicating that the pending motion for clarification was only as to whether the injunction enjoins “guidance provisions related to masking and physical distancing”).

The context makes clear that “vaccination requirements” includes vaccination-status disclosure requirements. Again, the broadly worded nationwide injunction order specifically addressed the administrative burdens on covered employers of merging human-resources and medical data in collecting and ascertaining the vaccination statuses of covered employees. *See Georgia*, 2021 WL 5779939, \*4, 11. And, in any case, (1) the defendants have committed to interpreting the nationwide injunction as enjoining the requirement that covered contractors must review covered employees’ vaccination-status documents (Dkt. No. 30 at 1); (2) the OMB Compliance Email instructs federal agencies to provide clear notice to covered contractors that the government will take no action to enforce EO 14042 and implementing provisions (Dkt. No. 30-1); and (3) the Post-injunction Task Force Notice separately notifies employers that the government will not enforce EO 14042 and

implementing provisions. Thus, the plaintiffs have received multiple, detailed assurances that they have already received the relief they sought by filing suit—an injunction of EO 14042 and its vaccination-status disclosure requirement.

**C. A stay is warranted unless and until court action reinstates EO 14042.**

The foregoing makes clear that there is a potential lack of standing in this case. The plaintiffs must demonstrate by a preponderance that their alleged injury is fairly traceable to the defendants' conduct via EO 14042 and its implementing provisions. Despite the plaintiffs' assertions to the contrary, the government has committed itself to an understanding of the nationwide injunction that forecloses it from enforcing the vaccination-status disclosure requirements. *See* Dkt. No. 30 at 1–2. And the government has demonstrated its compliance with the nationwide injunction through the OMB Compliance Email, which directs agencies (1) to inform existing parties to federal contracts and solicitations, with or without the Clause, that the government will not enforce the Clause absent further notice from the agency and (2) to stop including or to remove the Clause in other contracts not yet executed. Dkt. No. 30-1. The operative FAR Deviation Clause and the Task Force Guidelines with respect to vaccination and vaccination-status disclosure requirements are thus completely enjoined by the nationwide injunction. And the ambiguities identified in the government's motion to clarify that injunction are irrelevant to the provisions the plaintiffs complain of here. *See supra* Section 3.B. Moreover, the defendants have committed to remedying any mistaken enforcement of the vaccination-status disclosure requirement, in violation of the nationwide injunction. Dkt. No. 30 at 2–3.

At the same time, the plaintiffs have not provided adequate documentary evidence showing that 3M is requiring vaccination-status disclosure by January 4, 2022 because of

EO 14042 and its implementing provisions. The plaintiffs' declarations make clear that they do not want to disclose their vaccination status (Dkt. No. 23-1 at 4, 17, 30, 43), and the Hammes email, which the court does not have before it, allegedly instructs employees to continue to upload their vaccination documents (Dkt. No. 23 at 11). Neither source sheds light on whether 3M is mandating vaccination-status reporting and, if so, whether the requirement stems from a federal mandate or a voluntary company policy. Further, it is ambiguous as to whether 3M is requiring disclosure by January 4 or merely suggesting its employees to continue uploading their vaccination documents onto the ShareMy.Health platform. The plaintiffs have therefore not shown at this point that the alleged 3M disclosure requirement is the direct result of the defendants' actions pursuant to EO 14042, rather than voluntary actions by their employer.

That said, if the nationwide injunction is lifted on appeal or otherwise, the plaintiffs may be able to demonstrate standing. Thus, a stay—rather than outright dismissal—of this case pending court action reinstating EO 14042 and its implementing provisions is warranted. And because standing is a jurisdictional prerequisite, the Court may do so *sua sponte*. *See supra* Section 2.B.

#### **4. Conclusion**

In sum, the Court finds that the defendants have already been enjoined from enforcing Executive Order 14042 and its implementing provisions, including the vaccination-status disclosure mandate the plaintiffs seek to enjoin in this case. *See Georgia*, 2021 WL 5779939 at \*12. Because it is currently unclear whether the plaintiffs can demonstrate that they face an injury traceable to the defendants, they may lack standing to challenge the Executive Order. But because the plaintiffs may have standing if the

defendants are later permitted to enforce the EO, the Court stays this case pending further court action by the (1) Southern District of Georgia, (2) United States Court of Appeals for the Eleventh Circuit, or (3) Supreme Court of the United States that reinstates EO 14042 along with its implementing Task Force Guidance, OMB Determination, and FAR Deviation Clause.

So ordered on December 28, 2021.

  
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JAMES WESLEY HENDRIX  
UNITED STATES DISTRICT JUDGE