UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
GEORGIA AUGUSTA DIVISION

THE STATE OF GEORGIA, et al., *Plaintiffs*, ASSOCIATED BUILDERS AND CONTRACTORS OF GEORGIA, INC. and ASSOCIATED BUILDERS AND CONTRACTORS, INC., *Plaintiff-Intervenors,* v. JOSEPH R. BIDEN in his official capacity as President of the United States; et al., *Defendants*.	)	Case 1:21-cv-00163-RSB-BKE

NOTICE OF MOTION TO INTERVENE

PLEASE TAKE NOTICE that, pursuant to Federal Rules of Civil Procedure Rule 24, Proposed Intervenors ASSOCIATED BUILDERS AND CONTRACTORS OF GEORGIA, INC. ("ABCGA"), and ASSOCIATED BUILDERS AND CONTRACTORS, INC. ("ABC") by and through their undersigned counsel move this Court for an Order permitting Proposed Intervenors to intervene as Co-Plaintiffs in the above-captioned lawsuit. A copy of the Proposed Plaintiff-Intervenors' Complaint is attached as Exhibit A.

In support of this Motion, Proposed Intervenors respectfully refer the Court to their Memorandum of Law, which accompanies this Motion.

Respectfully Submitted this 18th day of November 2021.

/s/ Kathleen J. Jennings
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CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2021, I caused a true and correct copy of the foregoing to be served on counsel of record for all parties via ECF.

/s/ J. Larry Stine
J. Larry Stine

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MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE BY ASSOCIATED BUILDERS AND CONTRACTORS, INC. AND ASSOCIATED BUILDERS AND CONTRACTORS OF GEORGIA, INC.

COMES NOW ASSOCIATED BUILDERS AND CONTRACTORS, INC. and ASSOCIATED BUILDERS AND CONTRACTORS OF GEORGIA, INC. ("ABCGA" collectively "ABC"), by and through undersigned counsel, and submits this Memorandum of Law in support of their Motion to Intervene as Co-Plaintiffs in the above-captioned lawsuit.

Pursuant to Federal Rule of Civil Procedure 24, the Associated Builders and Contractors of Georgia, Inc. (the "Proposed Intervenors") have moved to intervene as

a matter of right, or in the alternative, with the Court's permission, as plaintiffs in the above-captioned lawsuit.

I. FACTUAL BACKGROUND

A. The Proposed Intervenors.

ABCGA represents the interests of hundreds of member construction contractors and related firms from all over Georgia, who perform work in this state and district and throughout the country.[1] ABCGA is a chartered chapter of Associated Builders and Contractors, Inc. ("ABC"), a nationwide construction industry trade association representing more than 21,000 members, many of whom regularly perform federal contracts covered by the new mandate.[2] ABC's membership represents most specialties within the construction industry and is comprised primarily of firms that perform work in the industrial and commercial sectors.[3] ABC represents many private businesses that regularly bid on and are awarded federal government contracts of the type covered by the unprecedented vaccination mandates imposed by Executive Order 14042, as implemented by the Safer Federal Workforce Task Force Guidance, the Office of Management and Budget, and the Federal Acquisition Regulatory Council, all of which are being challenged in the above-captioned litigation.[4]

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[1] Declaration of Bill Anderson, Par. 2, (attached hereto). We will refer to the two Plaintiffs-Intervenors as ABC for the rest of the brief.

[2] Declaration of Bill Anderson, Par. 3.

[3] Declaration of Bill Anderson, Par. 2.

[4] Declaration of Bill Anderson, Par. 4.

ABC seeks to intervene on behalf of itself and its many hundreds of members who will be directly harmed if the challenges to Executive Order 14042 and the implementing orders, guidance, and regulations, are not successful. The specific interests of the Proposed Intervenors supporting their intervention are explained in detail below.

B. Executive Order 14042 and Its Potential Consequences.

1. On September 9, 2021, President Biden signed Executive Order 14042, titled Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors ("EO 14042"), a true and accurate copy is found at Doc. 1-1, (Exhibit A).

2. At its core, the mandate forces contractors to make an impossible choice: either (1) take enforcement action that may include termination of all unvaccinated employees, or (2) face losing billions of dollars in federal funding. And because the administration has already amended the guidance multiple times, there is no telling what other onerous obligations may put contractors in breach at a moment's notice.

3. EO 14042 purports to "promote economy and efficiency in Federal procurement by ensuring that the parties that contract with the Federal Government provides adequate COVID-19 safeguards to their workers performing on or in connection with a Federal Government contract or contract-like instruments." EO 14042 is found at Doc. 1-1 at 1 Exhibit A. The EO contains no support for this claim, which is contrary to record evidence.

4. EO 14042 directs executive agencies subject to the Federal Property and Administrative Services Act (the "Procurement Act") to include in all federal

contracts and "contract-like instruments" a clause that contractors and subcontractors will comply with all future guidance issued by the Task Force.

5. EO 14042 required the Task Force issue specific COVID safety protocols by September 24, 2021.

6. On September 24, 2021, the Task Force released its COVID-19 Workplace Safety Guidance for Federal Contractors and Subcontractors (the "Task Force Guidance") to federal agencies, imposing a vaccine mandate on federal contractors and subcontractors, a true and accurate copy is found at Doc. 1-2, (Exhibit B).

7. EO 14042 further required the Director of OMB publish a determination in the Federal Register as to "whether such Guidance will promote economy and efficiency in Federal contracting if adhered to by Government contractors and subcontractors." Doc. 1-1 at 2.

8. On September 28, 2021, Director Young published the OMB's Determination of the Promotion of Economy and Efficiency in Federal Contracting Pursuant to Executive Order No. 14042 (the "OMB Determination") stating in conclusory fashion "I have determined that compliance by Federal contractors and subcontractors with the COVID-19-workplace safety protocols detailed in that 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." 86 Fed. Reg. 53,691 (Sept. 28, 2021), a true and correct copy is found at Doc. 1-3, (Exhibit C).

9. The OMB Determination contained no research or data in support of its claims. Moreover, the OMB Determination underwent no notice-and-comment period.

10. Through EO 14042 and without legislative intervention, the President purported to give the Task Force, the OMB Director, and various federal agencies broad authority to impose vaccine mandates on federal contractors.

11. While EO 14042 did not specifically call for a vaccine mandate, it did purport to delegate rulemaking authority to the Task Force, OMB, and the Federal Acquisition and Regulatory Council (the "FAR Council").

12. On September 30, 2021, the FAR Council issued Class Deviation Clause 252.223-7999 (the "FAR Deviation Clause") with accompanying guidance, a true and correct copy is found at Doc. 1-4, (Exhibit D).

13. The FAR Deviation Clause requires federal contractors to follow the Task Force Guidance and any future amendments to the Guidance. Doc. 1-4

14. EO 14042, the Task Force Guidance, the FAR Deviation Clause, and the OMB Determination are hereinafter collectively referred to as the "Contractor Mandate."

15. Ultimately, the Task Force Guidance was never published to the Federal Register for the purpose of receiving public comment.

16. Pursuant to the Task Force Guidance, "[p]eople are considered fully vaccinated for COVID-19 two weeks after they have received the second dose in a

two-dose series, or two weeks after they have received a single-dose vaccine." Doc. 1-2 at 4.

17. The Guidance further establishes that "covered contractor employees" are to be "fully vaccinated" by December 8, 2021—meaning said employees must obtain the final dose of their vaccine of choice no later than November 24, 2021. Defendant have changed the deadline to January 18, 2022 (Doc. 39 at 3) and covered employees have to take the first shot of Pfizer or Moderna no later than December 7, 2021.

18. Accordingly, any covered contractor employee inclined to take the Moderna vaccine would have had to receive their first dose by October 27, 2021, in order to comply with the December 8, 2021, deadline.[5] With the deadline for a Moderna vaccine having passed, covered contractor employees must obtain a Pfizer vaccine by November 3, 2021[6] or a Johnson and Johnson vaccine by November 24, 2021[7]. Even with the deadline change to January 18, 2022, the first vaccine of Pfizer or Moderna needs to be taken no later than December 7, 2021.

19. Pursuant to the Task Force Guidance, "covered contractor employees" refers to "any full-time or part-time employee of a covered contractor working on or in connection with a covered contract or working at a covered contractor workplace.

[5] Center for Disease Control, Different COVID-19 Vaccines, (Oct. 20, 2020), https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines.html.

[6] Id.

[7] Id.

This includes employees of covered contractors who are not themselves working on or in connection with a covered contract." Doc. 1-2 at 3–4 (emphasis added).

20. For the same reason, the Guidance also specifies that subcontractors working in a covered workplace must also be fully vaccinated. Doc 1-2 at 1.

21. Pursuant to the Task Force Guidance, a contractor or subcontractor workplace location "means a location where covered contract employees work, including a covered contractor workplace or Federal workplace." Doc. 1-2. B at 3.

22. Pursuant to the Task Force Guidance, "unless a covered contractor can affirmatively determine that none of its employees on another floor or in separate areas of the building will come into contact with a covered contractor employee during the period of performance," employees in other areas of the building site or facility are also a part of the covered contractor workplace.

23. Accordingly, the Contractor Mandate mandates vaccination for those who work both directly and indirectly with federal contracts.

24. For example, pursuant to the Task Force Guidance, if a covered contractor employee is working on a contract for the Department of Defense in a remote office facility and that person merely shares a parking garage with non-contracted employees once a week, those non-contracted employees are subject to the Contractor Mandate.

25. In another example, pursuant to the Task Force Guidance, if a covered contractor employee is working on a contract for NASA in a remote office facility and

that person merely shares an elevator with non-contracted employees every other Friday, those non-contracted employees are subject to the Contractor Mandate.

26. The Task Force Guidance imposed a deadline of October 15, 2021, for federal agencies to include a vaccination mandate clause in new contracts.

27. EO 14042, in general terms, and the Task Force Guidance, in specific terms, further required that the Federal Acquisition Regulatory Council ("FAR Council") "conduct a rulemaking to amend the [Federal Acquisition Regulation ("FAR")] to include the [Contractor Mandate]." Doc. 1-2 at 12.

28. Pursuant to the Task Force Guidance, by October 8, 2021, and prior to any rulemaking, the FAR Council was required to develop a recommended contract clause to impose the Contractor Mandate for federal agencies to include in their subsequent contracts. Doc. 1-2 at 12.

29. The Task Force Guidance instructed the FAR Council to "recommend that agencies exercise their authority to deviate from the FAR" by using a vaccination mandate clause in contracts prior to the FAR Council actually amending the FAR. Doc. 1-2 at 12.

30. Plaintiffs-Intervenors ABC strongly support and encourage vaccination of construction workers, and many ABC member companies have made significant efforts through outreach and incentives to get as many workers as possible vaccinated.[8] But a sizable percentage of construction workers, as with the population

[8] Declaration of Bill Anderson, Par. 4.

as a whole, resist compulsory vaccination and have indicated they will quit their employment rather than submit to mandatory vaccination.[9]

31. The broad application of the Contractor Mandate is expected to severely and irreparably impact each ABC company seeking to perform work on federal contracts or subcontracts in that any of their unvaccinated employees must be terminated or reallocated to uncovered workplaces lest they risk breaching their federal contracts by failing to fully comply with the Contractor Mandate.

32. The Contractor Mandate, therefore, forces ABC member companies to choose between two equally problematic outcomes: (1) maintain a fully vaccinated (but reduced) workforce of covered employees by removing or suffering the resignations of those who are unvaccinated and risk breaching the contracts by not satisfactorily performing due to lack of qualified workers; or (2) breach the contract by continuing to employ unvaccinated, covered employees so that they can timely perform and complete the contract requirements.[10] Either way, ABC companies face a risk of breach and material noncompliance for reasons totally beyond their control.[11]

The Contractor Mandate fails to distinguish between contractors and subcontractors or between low-risk and higher risk industries, or between small and large contractors or subcontractors in the implementation of the Mandate. Many ABC

[9] Declaration of Bill Anderson, Par. 9.

[10] Declaration of Bill Anderson, Par. 9.

[11] Declaration of Bill Anderson, Par. 9.

member contractors are small businesses who lack the resources to implement the Mandate. They nevertheless perform work that has been deemed essential by OSHA and the CDC at relatively low risk to construction workers. But as a result of the Contractor Mandate, many of ABC's member contractors cannot bid for or perform federal construction contracts or subcontracts.

II. ARGUMENT

A. The Proposed Intervenors Are Entitled to Intervene as a Matter of Right.

Rule 24 provides two avenues for a nonparty to intervene in a lawsuit; intervention as of right and intervention with permission of the court. A nonparty claiming to have a right to intervene may invoke Rule 24(a), which applies "when a statute of the United States confers an unconditional right to intervene," or "when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Fed. R. Civ. P. 24(a); see also *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989); *Bayshore Ford Trucks Sales, Inc. v. Ford Motor Co. (In re Ford Motor Co.)* 471 F.3d 1233 (11th Cir. 2006).

In the Eleventh Circuit, a party seeking to intervene as of a right must: 1) timely move to intervene; 2) show that it has an interest relating to the subject matter of the suit; 3) show that its ability to protect that interest may be impaired or impeded by the disposition of the suit; and 4) show that the existing parties to the suit cannot

adequately represent that interest. See *Georgia v. United States Army Corps of Eng'rs*, 302 F.3d 1242, 1249 (11th Cir. 2002). If a party meets each of these four requirements, the court must allow it to intervene. *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989); *Omni Healthcare, Inc. v. Health First, Inc.*, 2017 U.S. Dist. LEXIS 136992 (M.D. Fla. 2017). Moreover, "[a]ny doubt concerning the propriety of allowing intervention should be resolved in favor of the proposed intervenors because it allows the court to resolve all related disputes in a single action." *Fed. Savings and Loan Ins. Corp. v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 216 (11th Cir. 1993).

1. *The Proposed Intervenors' Motion to Intervene is Timely.*

Intervention as of right requires a motion be "timely" filed, but Rule 24 does not lay out actual time limits. Fed. R. Civ. P. 24. Courts have relatively broad discretion in assessing timeliness and generally consider four factors: 1) the length of time during which the intervenor knew, or reasonably should have known, of his interest in the case before he petitioned for leave to intervene; 2) the extent of prejudice to existing parties as a result of the intervenor's failure to apply as soon as he knew or reasonably should have known of his interest; 3) the extent of prejudice to the intervenor if the petition is denied; and 4) the existence of unusual circumstances militating either for or against a determination that the application is untimely. *United States v. Jefferson Cty.*, 720 F.2d 1511, 1516 (11th Cir. 1983) (citing *Stallworth v. Monsanto Co.*, 558 F.2d 257, 264-66 (5th Cir. 1977)). No one factor is dispositive, and the Eleventh Circuit urges courts to "keep in mind that '[t]imeliness

is not a word of exactitude or of precisely measurable dimensions. The requirement of timeliness must have accommodating flexibility toward both the court and the litigants if it is to be successfully employed to regulate intervention in the interest of justice.'" *Chiles*, 865 F.2d at 1213 (quoting *McDonald v. E.J. Lavino Co.*, 430 F.2d 1065, 1074 (5th Cir. 1970)). Further, "[t]imeliness is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion . . . ." *Nat'l Ass'n for Advancement of Colored People v. N.Y.*, 413 U.S. 345, 366, 93 S. Ct. 2591, 37 L. Ed. 2d 648 (1973).

Here, there is no doubt that the Proposed Intervenors' Motion to Intervene is timely. The Plaintiffs filed their Complaint on October 29, 2021, less than 20 days ago. This is a far shorter time period than the Eleventh Circuit has allowed in other cases. In *Omni Healthcare, Inc. v. Health First, Inc.*, 2017 U.S. Dist. LEXIS 136992 (M.D. Fla. 2017), for example, the District Court ruled that a motion to intervene that was filed "twenty-nine months after [CMST's] withdrawal, seven months after the parties settled, and almost four months after the case was dismissed" to be timely. See also *Chiles v. Thornburgh*, 865 F. 2d 1197, 1213 (motion to intervene filed seven months after original complaint, three months after the government filed its motion to dismiss, and before any discovery had begun, was timely).

Moreover, neither the Defendants nor the Plaintiffs will suffer any prejudice from the Proposed Intervenors' Motion to Intervene at this time. The Proposed Intervenors seek to join the case before the parties have fully briefed the issues to the Court. Thus, there is ample time for the Proposed Intervenors to participate in the

merits of the case, without prejudice to the parties. And of course, the Court has not yet ruled on any of the substantive merits in this lawsuit. *See Clean Water Action v. Pruitt*, 315 F. Supp. 3d 72, No. 1:17-cv-00817-DLF, ECF No. 33 (D.D.C. 2018) (granting an applicant's motion to intervene where the court had not yet ruled on any substantive matters in the lawsuit, noting that "intervention will not unduly delay or prejudice the adjudication of the original parties' rights"). The Motion to Intervene is therefore timely under Rule 24(a).

2. The Proposed Intervenors Have a Direct, Substantial Interest in the Implementation of Executive Order 14042.

"[A] party is entitled to intervention as a matter of right if the party's interest in the subject matter of the litigation is direct, substantial and legally protectable." *Georgia v. U.S. Army Corps of Eng'rs*, 302 F.3d 1242, 1249 (11th Cir. 2002); see also *Loyd v. Alabama Dep't of Corrections*, 176 F.3d 1336 at 1340 (11th Cir. 1999) ("[t]he intervenor must be 'at least a real party in interest in the transaction which is the subject of the proceeding'" (citation omitted)); *Purcell v. BankAtlantic Fin. Corp.*, 85 F.3d 1508 at 1512 (11th Cir. 1996) (same). The proposed intervenor is required "to anchor its request in the dispute giving rise to the pending lawsuit . . . [and] demonstrate 'an interest relating to the property or transaction which is the subject of the action.'" *In re Bayshore Ford Trucks Sales, Inc.*, 471 F.3d 1233, 1246 (11th Cir. 2006) (citation [*36] and emphasis omitted). To determine whether a proposed intervenor possesses the requisite interest for intervention purposes, the Court looks at the subject matter of the litigation. *Georgia*, 302 F.3d at 1251. The inquiry, however, "is 'a flexible one, which focuses on the particular facts and circumstances

surrounding each [motion for intervention].'" *Chiles*, 865 F.2d at 1214 (citation omitted).

The type of "interest" necessary to sustain intervention as of right must be one that is "direct, substantial and legally protectable." *Mt. Hawley Ins. Co. v. Sandy Lake Properties, Inc.*, 425 F.3d 1308, 1311 (11th Cir. 2005) (citation omitted). For example, an applicant has a direct and substantial interest under Rule 24(a) in the validity of an agency rule when the rule would affect the applicants' economic status or the way the applicants conduct their business. *See N.Y. Pub. Interest Research Grp. v. Regents of Univ. of N.Y.*, 516 F.2d 350, 351-52 (2d Cir. 1975). Moreover, intervening organizations may properly assert the interests of their members. *See id.* at 352.

Here, the Proposed Intervenors individually and collectively have a strong interest in joining the Plaintiffs' complaint and opposing Executive Order 14042. ABC represents many private construction businesses that regularly bid on and are awarded federal government contracts of the type covered by the unprecedented vaccination mandates imposed by Executive Order 14042, as implemented by the Safer Federal Workforce Task Force Guidance, the Office of Management and Budget, and the Federal Acquisition Regulatory Council, all of which are being challenged in the above-captioned litigation. The Proposed Intervenors will suffer direct adverse impact if the Contractor Mandate is applied to their federal contractor and subcontractor members and their employees. The broad application of the Contractor Mandate is expected to substantially impact each ABC company in that any of their unvaccinated employees must be removed or reallocated to uncovered

workplaces and/or resign their employment, causing ABC's federal contractors to breach their federal contracts by failing to fully comply with the Contractor Mandate. The Contractor Mandate, therefore, forces ABC companies to choose between two equally problematic outcomes: (1) maintain a fully vaccinated (but reduced) workforce of covered employees by firing or suffering resignations of those who are unvaccinated and risk breaching the contracts by not satisfactorily performing due to lack of qualified workers; or (2) breach the contract by continuing to employ unvaccinated, covered employees so that they can timely perform and complete the contract requirements. Either way, ABC companies face a risk of breach and material noncompliance for reasons totally beyond their control.

3. *The Proposed Intervenors' Ability to Protect Their Interests Will Be Impaired Without Intervention.*

"All that is required under Rule 24(a)(2) is that the would-be intervenor be practically disadvantaged by his exclusion from the proceedings." *Huff v. Comm'r of IRS*, 743 F.3d 790, 800 (11th Cir. 2014) (citing *Chiles,* 865 F.2d at 1214). Where an applicant demonstrates a legally protectable interest in the outcome of litigation, courts have frequently found that the applicant also demonstrates that its interests will be impaired without intervention due to the effect of an adverse decision. *See, e.g.*, *Brennan v. N.Y. City Bd. of Educ.*, 260 F.3d 123, 132 (2d Cir. 2001) ("Appellants have thus satisfied the second requirement for intervention under Rule 24(a)(2). For the same reasons, appellants have also adequately 'demonstrated that the interest may be impaired by the disposition of the action'").

Here, in the event that the Proposed Intervenors cannot intervene and this Court issues an adverse decision, the Proposed Intervenors will have no further recourse. A negative decision would adversely affect the Proposed Intervenors' economic interests. That the Court could decide to uphold Executive Order 14042 without intervention of the Proposed Intervenors does not preclude the Proposed Intervenors from meeting the requirements of Rule 24(a)'s third prong. Indeed, an applicant need not show that "practical harm" "will result": the applicant need only show only that an adverse judgment in the lawsuit at issue would cause the applicant "practical[l] harm." *Home Ins. Co.*,1990 U.S. Dist. LEXIS 15762, at *13 (quoting J. Friedenthal, M. Kane & A. Miller, *Civil Procedure* § 6.10, at 370). As such, the Proposed Intervenors have demonstrated a sufficient impairment to their interests in the absence of intervention.

4. *The States and Their Governmental Agencies May Not Adequately Represent the Interests of the Proposed Intervenors.*

The fourth requirement for intervention as of right "is satisfied if the proposed intervenor shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Chiles*, 865 F.2d at 1214 (citing *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10, 92 S. Ct. 630, 30 L. Ed. 2d 686 (1972)).

This case was filed by the State of Georgia, state agencies, as well as other States. While the interests of the States and their agencies and those of the Proposed Intervenors are aligned, the interests of privately owned businesses such as those that make up ABC's federal contractor members may not be adequately represented

by governmental entities. Courts in other circuits similarly have determined that a government defendant may not adequately represent the economic interests of a private party. *See, e.g.*, *Kleissler v. United States Forest Serv.*, 157 F.3d 964, 973-74 (3d Cir. 1988) ("[T]he government represents numerous complex and conflicting interests in matters of this nature. The straightforward business interests asserted by intervenors here may become lost in the thicket of sometimes inconsistent governmental policies."); *Earth Island Inst. v. Baker*, 1992 U.S. Dist. LEXIS 8604, at *4 (N.D. Cal. May 6, 1992) ("Moreover, NFI has a strong economic stake in the validity of the challenged governmental action, an interest which the government defendant cannot adequately represent."). Such holdings apply equally to this case. Government entities must consider the interests of multiple stakeholders. Private businesses, in contrast, represent a smaller and more focused group of interested parties. Thus, even where a government plaintiff and a private entity seek the same outcome, it is not surprising that courts often find government entities do not adequately represent the interests of the private parties.

For example, in *Pennsylvania v. President of the United States*, the proposed intervenor, a religious organization, argued that its interests differed from the government's in upholding an executive order. *See* 888 F.3d 52, 61 (3d Cir. 2018). Although the government represented the interests of "nonprofit and for-profit religious objectors, moral objectors, and women seeking access to contraceptive services," the applicant argued that its singular focus on the executive order's moral and religious exemptions entitled it to intervene. *See id.* at 61. The Third Circuit

agreed. *Id.* at 62; *see also Kane City v. United States*, 928 F.3d 877, 894-95 (10th Cir. 2019) (finding that a federal government defendant did not adequately represent the applicant, an environmental organization, because the federal government defendant represented "broad- ranging and competing interests"); *W. Energy Alliance v. Zinke*, 877 F.3d 1157, 1168 (10th Cir. 2017) ("Also, we have held that the government cannot adequately represent the interests of a private intervenor *and* the interests of the public."); *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 899 (9th Cir. 2011) ("Applicants seek to secure the broadest possible restrictions on recreational uses in the Study Area to protect its interest in the wilderness character, while the Forest Service has made clear its position that, while the Interim Order does not violate the MWSA, much narrower restrictions would suffice to comply with its statutory mandate.").

For the reasons stated above, the Proposed Intervenors here are unlikely to receive adequate representation from the States and their agencies. The Proposed Intervenors' interests are narrower and more focused than the interests of the state governments and their agencies.

B. Alternatively, this Court Should Permit the Proposed Intervenors to Intervene under Rule 24(b)(1).

If the Court determines that the Proposed Intervenors are not entitled to intervene as of right under Rule 24(a), the Court should alternatively grant permissive intervention under Rule 24(b). If a nonparty lacks the right to intervene, Rule 24(b) allows the court to grant it permission to do so "when a statute of the United States confers a conditional right to intervene," or "when [the] applicant's

claim or defense and the main action have a question of law or fact in common." Fed. R. Civ. P. 24(b); see also *Chiles*, 865 F.2d at 1213.

In evaluating whether to permit intervention under Rule 24(b), courts look to whether (1) the motion is timely; (2) the claims or defenses share a common question of law or fact with the main action. *See New York v. Azar*, 2019 U.S. Dist. LEXIS 129498, at *26 (S.D.N.Y. Aug. 2, 2019). A proposed intervenor must have a defense that shares a common question of law or fact with the main action. Fed. R. Civ. P. 24(b)(1)(B). This common question requirement is generally given a liberal construction. *Stallworth v. Monsanto Co.*, 558 F.2d 257, 269 (5th Cir. 1977) (citations omitted). When the proposed intervenor will assert the same claims as those of an existing party, the common question requirement is met. *Davis. v. Southern Bell Tel. & Tel. Co.*, 149 F.R.D. 666, 670 (S.D. Fla. May 27, 1993).

The Proposed Intervenors satisfy the test for permissive intervention. First, as discussed above, the Proposed Intervenors' Motion to Intervene is timely. Second, the arguments that the Proposed Intervenors wish to present, basically, that the Contractor Mandate is not a lawful exercise of the federal government's powers—share common questions of law and fact with the current plaintiffs. Moreover, the expertise being brought to bear on this issue by the broad-based business groups representing the many diverse business interests of their members will benefit the Court and assist it in addressing the primary questions in this lawsuit.

Therefore, this Court should exercise its discretion to permit the Proposed Intervenors to intervene, even if it determines that they are not entitled to intervene as of right.

III. CONCLUSION

For all of the reasons set forth above, the Proposed Intervenors respectfully request that the Court grant this Motion and permit the Proposed Intervenors to intervene in the underlying lawsuit.

Respectfully Submitted this 18th day of November 2021.

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/s/ J. Larry Stine
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ASSOCIATED BUILDERS AND CONTRACTORS, INC. AND ASSOCIATED BUILDERS AND CONTRACTORS OF GEORGIA, INC.'S MOTION FOR PRELIMINARY INJUNCTION AND BRIEF IN SUPPORT THEREOF

I. INTRODUCTION

Plaintiff-Intervenors the Associated Builders and Contractors, Inc. and Associated Builders and Contractors of Georgia, Inc. ("ABCGA") (collectively "ABC") represent the interests of hundreds of member construction contractors and related firms from all over Georgia who perform work in this state and throughout the country.[1] ABCGA is a chartered chapter of ABC's national construction industry

[1] Bill Anderson Declaration, Par. 3 (attached hereto).

trade association, representing more than 21,000 member contractors and related firms. ABC's membership represents most specialties within the construction industry and is comprised primarily of firms that perform work in the industrial and commercial sectors.

Many of ABC's members regularly perform federal construction contracts covered by Executive Order 14042 and its implementing regulations mandating vaccination of federal contractors' and subcontractors' employees. (hereafter the "Contractor Mandate"). ABC's federal contractor and subcontractor members will be irreparably harmed by the Contractor Mandate, and ABC has moved to intervene in this proceeding on behalf of its members to seek redress of such harm in the form of injunctive relief. ABC is submitting this brief in support of the State Plaintiffs' pending motion for summary judgment and to highlight the adverse impact of the Contractor Mandate on private businesses who contract with the federal government.

"After the President voiced his displeasure with the country's vaccination rate in September [2021], the Administration pored over the U.S. Code in search of authority, or a "work-around," for imposing a national vaccine mandate." *BST Holdings, L.L.C. v. OSHA*, 2021 U.S. App. LEXIS 33698 at *12-13 (5th Cir. Nov. 12, 2021)[2]

[2] The Fifth Circuit's order stayed as an improper "work-around" OSHA's Emergency Temporary Standard issued on November 4, 2021, mandating a vaccination/testing regimen for all employers of 100 or more employees. The Court further noted that in June 2020 "[t]he Occupational Safety and Health Administration (OSHA) "reasonably determined" . . . that an emergency temporary standard (ETS) was "**not** necessary" to "protect working people from occupational exposure to infectious disease, including COVID-19." *In re AFL-CIO*, 2020 U.S. App. LEXIS 18562, 2020 WL 3125324, at *1 (D.C. Cir. June 11, 2020)." (emphasis added). Yet on June 21,

Another of the Administration's "work-arounds" was an Executive Order, E.O. 14042, that required Federal departments and agencies to compel all Federal contractors to vaccinate their entire workforce. Lacking any direct legislative authority from Congress to impose a mandatory COVID-19 vaccine, the President turned to the Federal Property and Administrative Services Act (the "Procurement Act") as a basis to impose a vaccine mandate on as many individuals as possible. To effectuate the President's directive, OSHA and Defendants issued regulations without the notice and comment provisions normally required by the Procurement Act and without any explanation for this seismic policy change.

Plaintiff-Intervenors, along with the State Plaintiffs, seek 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. The foregoing agencies have imposed a sweeping and unprecedented mandate on all government contractors, including but certainly not limited to construction contractors and subcontractors performing work on Federal contracts. This sweeping federal mandate requires every Federal contractor and subcontractor, regardless of size or resources, to require their covered employees to submit to COVID-19 vaccination in order to perform such contracts, without regard to the nature of the services provided and at a time when workers in every occupation seem hard to find. This

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2021, OSHA issued an ETS related to COVID-19 limited to healthcare and healthcare support service employees. 86 Fed. Reg. No. 116 (June 21, 2021). The health care ETS did not mandate vaccinations or weekly testing. 29 C.F.R. 1910.502.

will cause severe and irreparable harm to many Federal contractors in the construction industry, particularly small businesses in violation of the Small Business Regulatory Enforcement Fairness Act, and will injure competition, in violation of the Competition in Contracting Act. The Contractor Mandate will also trammel the economy and efficiency of government procurement in violation of the Procurement Act. The government's action violates constitutional separation of powers doctrine as well as the procedural requirements of the APA and the Procurement Act. Further, the government has failed to provide any explanation for its dramatic policy reversal.

The Contractor Mandate is unlawful and unconstitutional for a host of reasons. The Procurement Act, under whose authority President Biden purported to issue the Mandate, does not grant him the vast authority necessary to mandate vaccinations for all employees of Federal contractors and subcontractors, nor has the Federal government shown a nexus between economy and efficiency and mandatory vaccines. Nor has the Administration put the Contractor Mandate through the rigors of notice-and-comment, contrary to the requirements of the Office of Federal Procurement Policy Act, as well as the similar requirements applicable to the actions of the FAR Council and OMB. In addition to its statutory and regulatory failings, the Contractor Mandate also unconstitutionally violates separation of powers by imposing a nationwide vaccination mandate on Federal contractors without any authority grounded in the CONSTITUTION or any intelligible guiding principle from Congress.

The Mandate will require ABC's members' employees to be vaccinated or terminated – to choose between "jobs or jabs." Many are threatening to resign rather than be vaccinated, which will seriously impair members' ability to fulfill their Federal contracts. The Contractor Mandate's reach is almost limitless: it compels vaccination of employees regardless of whether they work directly on Federal contracts, reaching other workers if there is a chance they may come in contact with an employee who is working on a Federal contract. There are no exceptions for employees who work alone, work outdoors, or work remotely, and there is no allowance for even minimal contact without falling within the coercive requirements of the Mandate, even if the employees simply walk past other employees in a parking lot. The Contractor Mandate does not give Federal contractor employees the option to undergo tests for COVID-19 as an alternative to being vaccinated or permit other safety precautions such as social distancing. The Contractor Mandate imposes the same, arbitrary requirements without any allowances for the size or resources of contractors and subcontractors, and regardless of the level of risk or essential nature of tasks performed in the construction industry (or other private industries).

The Administration also has given Federal contractors, including ABC's members, an impossible timeline to comply. To meet the new January 18, 2022, deadline, the Mandate requires all Federal contractors to comply fully by January 4 -- meaning that every unvaccinated Federal contractor employee must obtain their final vaccine dose by that date. To reach this nearly impossible goal an employee

must have the first of the two-dose vaccines (Pfizer or Moderna) no later than December 7, 2021, so they will qualify for the second dose by January 4, 2022. That timeline is unworkable, especially given the large number of covered employees to be vaccinated, the data collection and reporting requirements imposed on federal contractors, and the ambiguities in, and ever-changing nature of, the guidance.

The harm this Mandate will inflict on ABC's members, absent this Court's immediate action, is irreparable. First, if the contractors do not acquiesce to the challenged mandate, they will be disqualified from bidding on or being awarded contracts, or even working on covered Federal contracts beginning January 18, 2022. According to recent data posted on the government website www.usaspending.gov ABC members won 57% of the $118 billion in direct Federal U.S. construction contracts awarded between 2009 and 2020.[3] This is a large segment of the construction industry's Federal contracting base. If contractors are forced to comply with the challenged mandate to be awarded covered Federal contracts, many of them will be unable to perform the awarded contracts because a significant percentage of their vaccine-resistant workers will quit or choose to be placed on extended leaves of absence rather than be vaccinated.[4] The negative impact on Federal government operations will be profound as work grinds to a halt.

Many ABC member contractors are small businesses employing fewer than 100 employees and work as subcontractors under Federal contracts. While OSHA's November 5, 2021, ETS acknowledged that smaller businesses lack the resources to

[3] Bill Anderson Declaration, Par. 8.

[4] Bill Anderson Declaration, Par. 8.

comply with vaccination mandates and the related burdens associated with them, the Contractor Mandate makes no such allowance. Consequently, many smaller construction firms will no longer be able to bid, perform, or work as contractors or subcontractors on Federal contracts under the Mandate, thereby reducing competition and reducing the number of small businesses performing such work. All of the foregoing will cause irreparable harm to ABC's federal contractor members.

For these reasons, and for all the reasons stated by the State Plaintiffs in their motion for preliminary injunction, ABC joins in the State Plaintiffs' request for a preliminary injunction from this Court.

II. BACKGROUND AND STATEMENT OF FACTS[5]

A. ABC's Members' roles as Federal contractors or subcontractors.

According to data posted on the government website www.usaspending.gov ABC member general contractors compose a crucial segment of the construction industry's Federal contracting base.[6] ABC members won 57% of the $118 billion in direct federal U.S. construction contracts exceeding $25 million awarded during fiscal years 2009-2020.[7]

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[5] In the interest of avoiding repetition, ABC hereby incorporates by reference the State Plaintiffs' background and statement of facts as set forth in their Motion for Preliminary Injunction. (Docket No. 19).

[6] According to the U.S. Census Bureau (accessed Sept. 15, 2021), there was roughly $30 billion in federal construction put in place in 2020 https://www.census.gov/construction/c30/historical_data.html

[7] USASpending.gov data (accessed Dec. 22, 2020) cross-referenced with ABC membership. This data does not account for ABC members who performed subcontracting work on federal construction jobsites as that subcontractor information is not available on USASpending.gov or other government resources. However, the percentage of government work performed by ABC subcontractors is

If construction contractors are forced to comply with the challenged mandate to be awarded covered Federal contracts, many will be unable to perform the work. A significant percentage of their vaccine-resistant workers will quit or be placed on extended leaves of absence rather than be vaccinated. This will immediately make a bad labor shortage worse. According to published reports, there is a shortage of 430,000 construction workers needed to fulfill existing demands for construction in the U.S.[8] This shortage is expected to grow as a result of the recently passed Infrastructure Bill. If even a small percentage of the existing construction workforce ceases employment due to the vaccine mandate, exacerbating the existing shortage, then the much-needed construction projects of the Federal government will not be fulfilled.[9] It is also well known that construction industry workforce is uniquely transitory and temporary, compared to other industries.[10] Any vaccine-resistant worker who wants to avoid vaccination as a condition of employment by a Federal contractor can readily obtain employment with a contractor who does not perform Federal contracts, and/or is not covered by the OSHA ETS mandate or test policy, particularly during the current period of high labor demand.

The challenged Federal contractor mandate thus is almost certain to increase costs and undermine efficiency in Federal contracting. An August 2021 ABC survey

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as high as or higher than the percentage of general contractor work, particularly when amounts below $25 million are included, as they would be under the new mandate.

[8] The Construction Industry Needs to Hire an Additional 430,000 Craft Professionals in 2021, March 23, 2021, ABC News Release.

[9] Bill Anderson Declaration, Par. 9

[10] Bill Anderson Declaration, Par. 9

found that 77% of responding members believed a vaccine mandate would increase costs on Federal construction projects.[11] Just 1.2% of respondents thought vaccine mandates will decrease costs.[12] The survey results also suggested that a vaccine mandate on Federal contractor employees would decrease competition for government contracts, with 49% of survey participants saying they would be less likely to bid on Federal contracts subjected to vaccine requirements.[13]

III. LEGAL STANDARD

ABC joins the State Plaintiffs in seeking a preliminary injunction under Fed. R. Civ. P. 65(a) to "preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). While ABC fully supports and agrees with Plaintiffs' motion, ABC's focus here is on the unlawful impact of the Contractor Mandate on private contractors, and construction contractors and subcontractors in particular.

[11] Bill Anderson Declaration, Par. 10

[12] Bill Anderson Declaration, Par. 10

[13] Bill Anderson Declaration, Par. 10

IV. ARGUMENT

A. ABC and the State Plaintiffs are likely to succeed on the merits.

The Contractor Mandate is illegal for multiple, independent reasons, any one of which makes the Plaintiffs "likely to succeed on the merits." *Winter*, 555 U.S. at 20. "Executive Orders and the rules and agency guidance that implement them are subject to judicial review. *Gomez v. Trump*, 485 F. Supp. 3d 145, 177 (D.D.C. 2020); *see also Coliseum Square Ass'n, Inc. v. Jackson*, 465 F.3d 215, 232 (5th Cir. 2006); *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1324 (D.C. Cir. 1996); *Associated Builders & Contractors of Se. Tex. v. Rung*, Civ. A. No. 1:16-cv-425, 2016 WL 8188655, at *5 (E.D. Tex. Oct. 24, 2016) (copy attached).

1. The Contractor Mandate exceeds the President's authority under the Procurement Act.

When the Executive Branch lays claim to powers of "vast economic and political significance," the Supreme Court requires that "Congress [] speak clearly" before it may exercise such powers. *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)). Further, when the Executive Branch invokes powers that would "significantly alter the balance between federal and state power," Congress must define those powers with even greater clarity. *Id.* In that context, the Supreme Court's "precedents require Congress to enact *exceedingly clear language*" granting the Executive Branch such authority. *Id.* (emphasis added) (citing *U.S. Forest Serv. v. Cowpasture River Preservation Ass'n.*, 140 S. Ct. 1837, 1850 (2020)); *see Bond v. United States*, 572 U.S. 844, 858 (2014) (same). Without a doubt, forcing millions of citizens

to choose between jobs and jabs significantly alters the balance between Federal and state power. The purported basis for mandatory vaccines is the economy and efficiency of government contracts. Nothing in the Procurement Act meets these demanding standards, and thus any action that the President would purport to take under the Act that has vast economic significance or alters the federal/state balance is unlawful. As noted in *Associated Builders & Contractors of Se. Tex. v. Rung*, Civ. A. No. 1:16-cv-425, 2016 WL 8188655, at *5 (E.D. Tex. Oct. 24, 2016) "requirements being imposed on federal contractors and subcontractors are nowhere found in or authorized by the statute on which the Executive Order, FAR Rule, and DOL Guidance relies, the Federal Property and Administrative Services Act ("FPASA"), 40 U.S.C. §§ 101 and 121, known as the Procurement Act. During the course of many decades, neither Congress, nor the FAR Council, nor the DOL has deemed it necessary, practicable, or appropriate…." *Id.* at **18-19.

Even if the Act permitted the issuance of procurement regulations that did not need to comply with the major questions doctrine and clear statement rule, the Act does not give the President unlimited authority. *See Chamber of Com. of the U.S. v. Reich*, 74 F.3d 1322, 1330 (D.C. Cir. 1996). That means that the exercise of purported "procurement authority" must have a "nexus" with "some delegation of the requisite legislative authority by Congress . . . reasonably within the contemplation of that grant of authority." *Chrysler Corp. v. Brown*, 441 U.S. 281, 304, 306 (1979). If there is not a "reasonably close nexus between the efficiency and economy criteria of the Procurement Act and any exactions imposed upon federal contractors," the order

issued under the Act is unlawful. *Liberty Mut. Ins. v. Friedman*, 639 F.2d 164, 170 (4th Cir. 1981); *see Reich*, 74 F.3d at 1331. Additionally, the Administration has failed to "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983) (cleaned up); see also *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125. The Administration failed to do so for the Contractor Mandate and the OSHA ETS. As the Fifth Circuit recently found, "It is thus critical to note that the Mandate makes no serious attempt to explain why OSHA and the President himself were against vaccine mandates before they were for one here. *See, e.g.*, Occupational Exposure to Bloodborne Pathogens, 54 Fed. Reg. 23,042, 23,045 (May 30, 1989) ("Health in general is an intensely personal matter. . . . OSHA prefers to encourage rather than try to force by governmental coercion, employee cooperation in [a] vaccination program.")" *BST Holdings, L.L.C. v. OSHA,* 2021 U.S. App. LEXIS 33698, *14-15. The same reasoning applies here with equal force.

The Mandate's application to employees who neither work directly on Federal contracts nor pose a real risk of transmitting COVID-19 on a Federal contract worksite (for example, Federal contractor employees who work solely from home) makes it plain that the President is making *public health policy*, not a policy with any "reasonably close nexus" to "the efficiency and economy criteria of the Procurement Act." *Friedman*, 639 F.2d at 170. As the Fifth Circuit noted, "health

agencies do not make housing policy, and occupational safety administrations do not make health policy. *Cf. Ala. Ass'n of Realtors*, 141 S. Ct. at 2488-90." *BST Holdings*, 2021 U.S. App. LEXIS 33698 at *26. Nor do federal procurement agencies make public health policy.

The Task Force mandates that a "covered contractor employee" must include all full-time or part-time employees that work on a Federal contract, in connection with a Federal contract, or at a contractor workplace. Peeler Dec. at Ex. A, 3–4. Thus, the Mandate requires that employees who do not even work on Federal contracts be vaccinated if they simply walk past another employee in the building lobby. There is no end in sight for this sort of coverage by proximity: the delivery driver bringing a package or delivering lunch will be caught in the same broad net. Furthermore, the Contractor Mandate requires construction workers who work outdoors be vaccinated, while the new OSHA ETS exempts them from coverage. Why would employees who work outdoors be exempt under the OSHA ETS but covered if they do the very same work for a Federal contractor?

All of this means the Mandate is certain to promote *inefficiency* by jeopardizing contractors' ability to timely perform under Federal contracts. Employee terminations and departures, which will be inevitable in order to comply with the Contractor Mandate, will result in contractors losing workers with valuable knowledge and experience who service Federal contracts. Contractors will be compelled to replace journeymen with years of training and experience with new employees who lack the same. The Mandate will force contractors to spend time and resources

training new recruits to replace departing employees. An additional administrative inefficiency as each Federal contractor is required to implement measures to monitor and enforce the Mandate, piling inefficiency on top of inefficiency.

2. The Contractor Mandate is unlawful because it fails to follow notice- and-comment rulemaking requirements.

a) The Procurement Policy Act requires the administration to submit the Task Force Guidance and the FAR Deviation Clause to notice and comment rulemaking.

The Procurement Policy Act requires that before issuing "a procurement policy, regulation, procedure, or form," an agency must subject "that procurement policy, regulation, procedure, or form" to the strictures of notice-and-comment rulemaking, if it "(A) relates to the expenditure of appropriated funds; and (B) (i) has a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure, or form; or (ii) has a significant cost or administrative impact on contractors or offerors." 41 U.S.C. § 1707(a). This applies to "an amendment or modification" to an existing procurement policy, rule, or regulation. *Id*. § 1707(a)(1).

Both the Task Force Guidance and the FAR Deviation Clause are a "procurement policy, regulation, procedure, or form," subject to the Procurement Policy Act, and were issued without following these Congressionally-mandated notice-and-comment rulemaking procedures.

Neither the Task Force Guidance nor the FAR Deviation Clause were published in the Federal Register for public comment. No exception to the notice and comment requirement was invoked. The Defendants did not even attempt to show

"urgent and compelling circumstances [that would have made] compliance with the requirements impracticable," which would have permitted the Mandate to take effect on a temporary basis (but still only after a 30-day public comment period). 41 U.S.C. § 1707(d)–(e). That renders the Task Force Guidance and the FAR Deviation Clause invalid. *See generally Nat. Res. Def. Council, Inc. v. Herrington*, 768 F.2d 1355, 1396 (D.C. Cir. 1985); *see also* 41 U.S.C. § 1707(a)(1). The Administration also attempted to use the ETS issued by OSHA to bypass the Notice and Comment requirements of the APA.

b) The FAR Council failed to provide public notice and comment to implement the Contractor Mandate.

The FAR is the primary regulation governing federal procurement and government contracting. The FAR Council oversees the FAR and "assist[s] in the direction and coordination of Government-wide procurement policy." 41 U.S.C. § 1302(a). The FAR Council consists of two councils that must coordinate to revise the FAR, but primary responsibility to "prepare[], issue[], and maintain[]"and is a creature jointly administered by the Secretary of Defense, the Administrator of General Services, and the NASA Administrator. 41 U.S.C. § 1303(a)(1); 48 C.F.R. § 1.103(b). A "significant revision" to the FAR is any revision that "alter[s] the substantive meaning of any coverage in the FAR [s]ystem," and has "a significant cost or administrative impact on contractors" or a "significant effect beyond the internal operating procedures of the issuing agency." 48 C.F.R. § 1.501-1. Before the FAR Council may make "significant revisions" to the FAR, it must provide an opportunity for public comments and consider those comments when making its

decision. *Id.* §§ 1.501-1; 1.501-2. The FAR explains that the FAR Council will consider the "[v]iews of agencies and nongovernmental parties" when crafting "acquisition policies and procedures." *Id.* § 1.501-2(a). When initiating a public comment period, DOD, NASA, and GSA must jointly publish a notice in the Federal Register. *Id.* §§ 1.501-2(b); 1.201-1; 1.103. The notices must contain the text of the revision and provide at least 30 days, but preferably at least 60 days, for receipt of comments. *Id.* § 1.501-2(b), (c).

The FAR Deviation Clause implementing the Task Force Guidance -- Deviation Clause 52.223-99 -- is a significant revision as defined by the FAR yet was not subject to notice-and-comment rulemaking. Deviation Clause 52.223-99 alters the substantive meaning of contractors' obligations to their workforces and workplace safety duties under FAR Subparts 22 and 23. *See* 48 C.F.R. §§ 22.000–23.1105. Complying with Deviation Clause 52.223-99 will have a crushing administrative impact on federal contractors. Contractors will have to ensure that all their covered employees are vaccinated, implement masking and social-distancing in workplaces, create and implement a contact-tracing program, and monitor the Task Force's website so they can comply with any new guidance that the Task Force may release at a moment's notice. And, very likely, they will have to dismiss employees who resist the mandate, triggering all the administrative burdens associated with termination of employment. Thus, Deviation Clause 52.223-99 is a significant revision and is thereby subject to notice and comment procedures. But the FAR Council did not even attempt to comply. *See Sunoco, Inc. v. United States*, 59 Fed. Cl.

390, 396 (Fed. Cl. 2004). Nor did FAR even attempt to invoke the "urgent and compelling circumstances" exception. 48 C.F.R. § 1.501-3(b); *see supra* I.B.1.

Instead of providing public notice and a comment period for the Contractor Mandate, the FAR Council began enforcing the Mandate as a purported FAR class deviation. That is unlawful, first, because Deviation Clause 52.223-99 does not fit the definition of a deviation, which is meant to be a slight departure from an existing FAR clause or minimal change to the procurement process for a particular contract. *See* 48 C.F.R. § 1.401(a)–(f). The vaccine mandate for Federal contractors is anything but "slight." More importantly, even class deviations must be submitted as a FAR revision and subjected to notice-and-comment when they are implemented on a permanent basis. *Id.* at 1.404(b). Deviation Clause 52.223-99 has no expiration date, yet there was no notice-and-comment.

The President directed the FAR Council to implement the Task Force Guidance to ensure that Federal agencies would incorporate the requirements of the Mandate into those contracts, and the Executive Branch has provided no indication that those requirements are time-limited. As a result, the FAR Council was required to treat the implementation of the Task Force Guidance as a FAR revision subject to notice-and-comment. It has failed to do so. That failure requires invalidation of Deviation Clause 52.223-99. *Sunoco, Inc.*, 59 Fed. Cl. at 396; 48 C.F.R. §§ 1.501-1; 1.501-2.

c) The Administration Acted Arbitrarily and Capriciously When It Failed to Articulate a Reason for This Change In Position.

As noted above, the Administration's initial position on COVID vaccines was that it would not -- and could not – force citizens to take the vaccines. As recently as June 21, 2021, OSHA issued safety standards related to COVID-19 limited to the healthcare industry and did not mandate vaccines or weekly testing. What changed after June 21? President Biden "lost his patience" with the unvaccinated. That is not a sufficient reason for such a dramatic policy shift: if it were, U.S. history would look remarkably different.

Reasons matter. In *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2125-2126 (2016), the Supreme Court held:

> Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change. See, *e.g., National Cable & Telecommunications Assn.* v. *Brand X Internet Services*, 545 U.S. 967, 981-982, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005); *Chevron*, 467 U.S., at 863-864, 104 S. Ct. 2778, 81 L. Ed. 2d 694. When an agency changes its existing position, it "need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate." *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515, 129 S. Ct. 1800, 173 L. Ed. 2d 738 (2009). But the agency must at least "display awareness that it is changing position" and "show that there are good reasons for the new policy." *Ibid.* (emphasis deleted). In explaining its changed position, an agency must also be cognizant that longstanding policies may have "engendered serious reliance interests that must be taken into account." *Ibid.*; see also *Smiley* v. *Citibank (South Dakota), N. A.*, 517 U.S. 735, 742, 116 S. Ct. 1730, 135 L. Ed. 2d 25 (1996). "In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox Television Stations*, *supra*, at 515-516, 129 S. Ct. 1800, 173 L. Ed. 2d 738. It follows that an "[u]nexplained inconsistency" in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice." *Brand X*, *supra*, at 981, 125

> S. Ct. 2688, 162 L. Ed. 2d 820. An arbitrary and capricious regulation of this sort is itself unlawful and receives no *Chevron* deference. See *Mead Corp.*, *supra*, at 227, 121 S. Ct. 2164, 150 L. Ed. 2d 292.

The reason for this about-face from "no vaccine mandate" to "vaccine mandate for Federal contractors" has never been explained beyond the aforementioned loss of patience. Accordingly, the Mandate is an arbitrary and capricious regulation and thus unlawful.

d. The Contractor Mandate Violates the SBREFA Requirements.

Under the Regulatory Flexibility Act contained in SBREFA, 5 U.S.C. § 604, parties may challenge agency action where the agency has not "reasonably addressed" the Rule's impact on small businesses. *Nat'l Tel. Co-Op. Ass'n*,563 F.3d 536. 540 (D.C. Cir. 2009). Such challenges require the Court to evaluate the agency's Final Regulatory Flexibility Analysis under the arbitrary and capricious standard of review. *Id.* at 540; *see also* 5 U.S.C. § 611(a)(2); *Nat'l Coal. For Marine Conservation v. Evans*, 231 F. Supp. 2d 119, 142 (D.D.C. 2002) ("The standard of review is the same as that under the APA, in that a court reviews the FRFA for arbitrary and capricious action."). As OSHA acknowledged in its ETS, smaller employers do not have the resources to comply with a vaccination mandate in the same manner as larger employers. See *COVID-19 Vaccination and Testing; Emergency Temporary Standard*, 86 Fed. Reg. 61402 (Nov. 5, 2021). The Contractor Mandate makes no allowance for this adverse impact on small businesses, including many of ABC's federal subcontractor members, and for this reason alone the Mandate should be enjoined.

3. If the Procurement Act authorizes the Contractor Mandate, then the Procurement Act and the Mandate are unconstitutional.

a) The Procurement Act and the Mandate are unconstitutional under the non-delegation doctrine.

In considering the challenge to OSHA's November 5, 2021, ETS the Fifth Circuit found that in seeking to impose the vaccine mandate on all employers with 100 or more employees "OSHA runs afoul of the statute from which it draws its power and, likely, violates the constitutional structure that safeguards our collective liberty." *BST Holdings, LLC,* supra, at *26.

The principle of nondelegation "is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution." *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892); *Indus. Union Dep't, AFL-CIO v. API*, 448 U.S. 607, 673 (1980) (Rehnquist, J., concurring in judgment). While Congress may delegate a certain amount of its authority, it must "lay down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform" in order to constitutionally delegate authority. *Mistretta v. United States* 488 U.S. 361, 372 (1989) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). When delegating powers in a way that affects the federal/state balance of power, even more clarity than normal is required for a delegation to be effective. *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (citing *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

In the unlikely event that the Procurement Act's open-ended policy aims could be sufficient guidance in certain contexts to support delegation, the "extent and character" of the powers the President seeks to exercise through the Contractor Mandate are so expansive that they are nondelegable. Because the Mandate regulates the public health, something traditionally reserved to the States, even more clarity would be required for Congress to have authorized the Contractor Mandate by delegation.

Here, the President can point to no intelligible principle that would guide his unilateral implementation of a sweeping vaccination requirement, which is so significant in its extent and character that it is not subject to delegation to begin with. As the Fifth Circuit noted, "health agencies do not make housing policy, and occupational safety administrations do not make health policy." *BST Holdings*, 2021 U.S. App. LEXIS 33698 at *26. Accordingly, if the Procurement Act were read to authorize the Contractor Mandate, both would be unconstitutional.

B. Plaintiff-Intervenors Will Suffer Substantial and Irreparable Harm Absent Preliminary Relief.

The second prong in the preliminary injunction analysis is whether injunctive relief is required due to "a substantial likelihood of irreparable injury." *Siegel v. LePore*, 234 F.3d 1163, 1179 (11th Cir. 2000). Absent an injunction, ABC's members face the untenable position of having to choose between (1) reassigning and physically moving or terminating all covered employees who choose not to get vaccinated, which will likely undermine their ability to complete the contracts due to loss of needed personnel; or (2) risk breaching Federal contracts for projects which

are by definition deemed essential to government operations and which collectively are worth millions of dollars that they will later be unable to recover, while losing out on the contracts themselves. Both outcomes would constitute irreparable harm. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220–21 (1994) (Scalia, J., concurring) ("[A] regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs."); *Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013) ("[N]umerous courts have held that the inability to recover monetary damages . . . renders the harm suffered irreparable."); *Georgia v. United States*, 398 F. Supp. 3d 1330, 1344 (S.D. Ga. 2019) (Plaintiffs "experience irreparable harm in the loss of the contract. . ., the loss of employees,. . . [etc.]."); *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 404 (2d Cir. 2004) (classifying the loss of good will as irreparable harm); *Douglas Dynamics, LLC v. Buyers Prods. Co.*, 717 F.3d 1336, 1344 (Fed. Cir. 2013) (recognizing that irreparable injury may include "different types of losses that are often difficult to quantify, including lost sales and erosion in reputation and brand distinction"). These irreparable harms are imminent because the Contractor Mandate requires covered employees to receive a final vaccine dose no later than January 4, 2022.

In the absence of injunctive relief, on January 18, 2022, ABC members will have many covered contractor employees who have not been vaccinated who will resign or else will have to be removed from active employment. In Georgia, for example, nearly 50% of Georgians are fully vaccinated, but a corresponding 50% are not. Georgia Department of Public Health, Press Release, *50% of Georgians Fully Vaccinated*

Against COVID-19 (Oct. 25, 2021), https://bit.ly/3bIQ0GL. While the precise number of covered employees that will remain unvaccinated is unknown, under these odds there is a serious threat that ABC members will be unable to achieve compliance without mass resignations or layoffs.

On the other hand, ABC members may simply be *unable* to comply with the Contractor Mandate. This will cause ABC members to *lose tens and hundreds of millions of dollars* they will never be able to get back.

No dollar amount can address the inevitable (1) loss of personnel, (2) loss of institutional knowledge vested in each employee, (3) loss of specialized workers, (4) damage to reputation, (5) damage to good will, (6) inability to carry out their respective missions, and (7) potential ineligibility for future Federal contracts, all of which constitute irreparable harms. *See Georgia v. United States*, 398 F. Supp. 3d 1330, 1344 (S.D. Ga. 2019) (holding plaintiffs would "experience irreparable harm in the loss of the contract. . ., the loss of employees,. . . [etc.]."); *BellSouth Telecommunications, Inc. v. MCI Metro Access Transmission Servs., LLC*, 425 F.3d 964, 970 (11th Cir. 2005) (finding that "the loss of customers and goodwill is an irreparable injury") (quoting *Ferrero v. Associated Materials Inc.*, 923 F.2d 1441, 1449 (11th Cir.1991)); *Mrs. Fields Franchising, LLC v. MFGPC*, 941 F.3d 1221, 1235 (10th Cir. 2019) (where the court identified "diminishment of competitive positions in marketplace" and "loss of employees' unique services" as factors supporting irreparable harm); *Douglas Dynamics, LLC v. Buyers Prods. Co.*, 717 F.3d 1336, 1344 (Fed. Cir. 2013); *League of Women Voters of the U.S. v. Newby*, 838 F.3d

1, 8 (D.C. Cir. Sept. 26, 2016) (stating "[a]n organization is harmed if the actions taken by the defendant have perceptibly impaired the organization's programs").

C. The Balance of Equities and Public Interest Favors Granting Preliminary Relief.

The balance of the equities and public interest factors also weigh in favor of granting Plaintiff-Intervenors' motion. When the government is the opposing party, these two factors "merge." *Nken v. Holder*, 556 U.S. 418, 435 (2009); *Scott v. Roberts*, 612 F.3d 1279, 1290 (11th Cir. 2010). Defendants have no lawful interest in enforcing an unconstitutional and unlawful policy. *See Odebrecht Const., Inc*, 715 F.3d at 1290. That is especially true because individual freedoms and liberties are at stake. An injunction would serve the interest of the public because, absent an injunction, unvaccinated covered contractor employees across the country face reassignment, relocation, discipline, or termination. The public interest is further served with a preliminary injunction since covered contractor employees are being put to the choice to either keep their job by complying with an unlawful and unconstitutional mandate or lose the ability to put food on the table. Defendants, on the other hand, would simply have to maintain their *status quo* rather than taking any affirmative act. *See United States v. Lambert*, 695 F.2d 536, 540 (11th Cir. 1983) ("Preservation of the status quo enables the court to render a meaningful decision on the merits."). Indeed, Defendants would merely have to maintain the same position they had in July 2021, when the White House admitted it was "not the role of the federal government" to mandate vaccination.

V. CONCLUSION

For the foregoing reasons, Plaintiff-Intervenors respectfully request this Court to preliminarily enjoin Defendants from implementing and enforcing the Contractor Mandate through and including trial of this matter.

Respectfully submitted this 18th day of November 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2021, I caused a true and correct copy of the foregoing to be served on counsel of record for all parties via ECF.

/s/ J. Larry Stine
J. Larry Stine

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EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
GEORGIA AUGUSTA DIVISION

THE STATE OF GEORGIA, et al., *Plaintiffs*, ASSOCIATED BUILDERS AND CONTRACTORS OF GEORGIA, INC. and ASSOCIATED BUILDERS AND CONTRACTORS, INC., *Plaintiff-Intervenors,* v. JOSEPH R. BIDEN in his official capacity as President of the United States; et al., *Defendants*.	Case 1:21-cv-00163-RSB-BKE

PLAINTIFF-INTERVENORS' COMPLAINT FOR DECLARATORY AND PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF

1. "The Occupational Safety and Health Administration (OSHA) "reasonably determined" in June 2020 that an emergency temporary standard (ETS) was "not necessary" to "protect working people from occupational exposure to infectious disease, including COVID-19." In re AFL-CIO, 2020 U.S. App. LEXIS 18562, 2020 WL 3125324, at *1 (D.C. Cir. June 11, 2020)." BST Holdings, L.L.C. v. OSHA, 2021 U.S. App. LEXIS 33698, *4-5.

2. "After the President voiced his displeasure with the country's vaccination rate in September, the Administration pored over the U.S. Code in

search of authority, or a "work-around," for imposing a national vaccine mandate." Id at * 12 -13 (cleaned up).

3. One of the "work-arounds" is an executive order that required federal departments and agencies to mandate all of their federal contractors to fully vaccinate their workforce. Without any direct legislation from Congress to impose a mandatory COVID 19 vaccine, the President turned to the Federal Property and Administrative Services Act (the "Procurement Act") as a basis to impose a mandatory vaccine on as many individuals by issuance of the Executive Order 14042

4. For construction companies that work on federal contracts, this situation is untenable. This mandate puts billions of contracting dollars in peril. At its core, the mandate forces contractors to make an impossible choice: either (1) take enforcement action that may include termination of all unvaccinated employees, or (2) collectively face losing billions of dollars in federal funding. Since the administration has already amended the guidance multiple times, there is no telling what other onerous obligations may put state agencies in breach at a moment's notice.

5. Plaintiff-Intervenors, Associated Builders and Contractors, Inc. (ABC) and Associated Builders and Contractors of Georgia, Inc. ("ABCGA") seek to intervene in this action to stop this unprecedented and unconstitutional use of power by the federal government, and to end the nationwide confusion and disruption that the mandate has caused.

PARTIES

6. Plaintiff State of Georgia is a sovereign state with many agencies that are federal contractors.

7. Plaintiff State of Alabama is a sovereign state with many agencies that are federal contractors.

8. Plaintiff State of Idaho is a sovereign state with many agencies that are federal contractors.

9. Plaintiff State of Kansas is a sovereign state with many agencies that are federal contractors.

10. Plaintiff State of South Carolina is a sovereign state with many agencies that are federal contractors.

11. Plaintiff State of Utah is a sovereign state with many agencies that are federal contractors.

12. Plaintiff State of West Virginia is a sovereign state with many agencies that are federal contractors.

13. Plaintiff Brian P. Kemp is named in his official capacity as Governor of the State of Georgia and appears on behalf of the State of Georgia.

14. Plaintiff Kay Ivey is named in her official capacity as Governor of the State of Alabama and appears on behalf of the State of Alabama.

15. Plaintiff Brad Little, in his official capacity as Governor of the State of Idaho, has an interest in preventing the loss of federal funding that will result as a direct consequence of the Contractor Mandate. Additionally, the Governor has an

interest in ensuring that all State laws, including the Idaho Constitution and Idaho Statutes, are executed, rather than subverted through federal overreach.

16. Plaintiff Henry McMaster is named in his official capacity as Governor of the State of South Carolina and appears on behalf of the State of South Carolina.

17. Plaintiff Board of Regents of the University System of Georgia was established in 1931 as a part of a reorganization of Georgia's state government. The Georgia Constitution grants to the Board of Regents the exclusive right to govern, control, and manage the University System of Georgia, an educational system comprised of twenty-six institutions of higher learning including universities with extensive research institutions such as Augusta University, the Georgia Institute of Technology, Georgia State University, and the University of Georgia.

18. Plaintiff Gary W. Black is named in his official capacity as Commissioner of the Georgia Department of Agriculture.

19. Plaintiff Alabama Department of Agriculture and Industries is a state agency responsible for serving farmers and consumers of agricultural projects.

20. Plaintiff Alabama Department of Rehabilitation Services is the state agency primarily responsible for serving Alabamians with disabilities.

21. Plaintiff Alabama Department of Public Health is the state agency primarily responsible for serving Alabamians' public health needs.

22. Plaintiff Idaho State Board of Education appears in its capacity as Regents of the University of Idaho, Board of Trustees of Boise State University, Board

of Trustees of Idaho State University, and Board of Trustees of Lewis-Clark State College.

23. Based in Atlanta, Plaintiff Intervenor ABCGA represents the interests of hundreds of member construction contractors and related firms from all over Georgia, who perform work in this state and throughout the country. ABCGA is a chartered chapter of Associated Builders and Contractors, Inc. ("ABC"), a nationwide construction industry trade association representing more than 21,000 members, many of whom regularly perform federal contracts covered by the new mandate. ABCGA's membership represents most specialties within the construction industry and is comprised primarily of firms that perform work in the industrial and commercial sectors. Plaintiff-Intervenor ABC represents the interests of more than 21,000 member construction contractors and related firms from all over the country who perform work in this state and ABCGA and ABC as a whole represent many private businesses that regularly bid on and are awarded federal government contracts of the type covered by the unprecedented vaccination mandates imposed by Executive Order 14042, as implemented by the Safer Federal Workforce Task Force Guidance, the Office of Management and Budget, and the Federal Acquisition Regulatory Council, all of which are being challenged in the above-captioned litigation.

24. ABCGA has standing to pursue this action on behalf of its federal contractor members under the three-part test of *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977), because (1) ABCGA's federal

contractor members would otherwise have standing to sue in their own right as they are directly and irreparably injured in their ability to be awarded and perform federal contracts by the challenged mandate; (2) the interests at stake in this case are germane to ABCGA's organizational purposes which include the support of the fair and open competition in the construction industry, which is plainly injured by the challenged mandate; and (3) neither the claims asserted nor the relief requested requires the participation of ABCGA's federal contractor members.

25. Defendant Joseph R. Biden is the 46th President of the United States who, on September 9, 2021, signed Executive Order 14042, titled Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors ("EO 14042").

26. Defendant Safer Federal Workforce Task Force (the "Task Force") was established pursuant to President Biden's Executive Order 13991 (86 Fed. Reg. 7045 (Jan. 25, 2021)).

27. Director of the Office of Personnel Management ("OPM"); (2) the Administrator of the General Services Administration ("GSA"); and (3) the COVID–19 Response Coordinator. The Director of OPM is also a member of the Task Force.

28. Defendant Office of Personnel Management Director, Kiran Ahuja ("Director Ahuja"), is a co-chair and member of the Task Force and represents the federal agency responsible for managing human resources for civil service of the federal government.

29. Defendant Administrator of General Services, Robin Carnahan (the "GSA Administrator"), is a co-chair and member of the Task Force and represents the

federal agency responsible for managing and supporting the basic functioning of federal agencies.

30. Defendant COVID–19 Response Coordinator, Jeffrey Zients (the "COVID-19 Response Coordinator"), is a co-chair and member of the Task Force.

31. Defendant Office of Management and Budget Director, Shalanda Young (the "OMB Director"), is a member of the Task Force and represents the federal agency with delegated authority, by President Biden, to publish determinations relevant to EO 14042 and the Task Force Guidance to the Federal Register.

32. Defendant Director of the Federal Protective Service, L. Eric Patterson (the "FPS Director"), is a member of the Task Force.

33. Defendant Director of the United States Secret Service, James M. Murray (the "Secret Service Director"), is a member of the Task Force.

34. Defendant Director of the Federal Emergency Management Agency, Deanne Criswell (the "FEMA Director"), is a member of the Task Force.

35. Defendant Director of the Center for Disease Control, Rochelle Walensky (the "CDC Director"), is a member of the Task Force.

36. Defendant Office of Management and Budget ("OMB") is an agency of the United States government.

37. Defendant Office of Personnel Management ("OPM") is an agency of the United States government.

38. Defendant United States Department of Health and Human Services ("DHHS") is an agency of the United States government.

39. Defendant General Services Administration ("GSA") is an agency of the United States government, located within DHHS.

40. Defendant United States Department of Defense ("DOD") is an agency of the United States government.

41. Defendant United States Secretary of Defense, Lloyd Austin, is named in his official capacity as the United States Secretary of Defense.

42. Defendant United States Department of Health and Human Services ("DHHS") is an agency of the United States government.

43. Defendant United States Secretary of Health and Human Services, Xavier Becerra, is named in his official capacity as the United States Secretary of Health and Human Services.

44. Defendant National Institutes of Health ("NIH") is an agency of the United States government, located within DHHS.

45. Defendant NIH Director, Francis S. Collins, is named in his official capacity as the Director of the NIH.

46. Defendant United States Department of Veterans Affairs ("DVA") is an agency of the United States government.

47. Defendant United States Secretary of Veterans Affairs, Denis McDonough, is named in his official capacity as the United States Secretary of Veterans Affairs.

48. Defendant National Science Foundation ("NSF") is an agency of the United States government.

49. Defendant Director of the NSF, Sethuraman Panchanathan, is named in his official capacity as the Director of the NSF.

50. Defendant United States Department of Commerce ("DOC") is an agency of the United States government.

51. Defendant United States Secretary of Commerce, Gina Raimondo, is named in her official capacity as the United States Secretary of Commerce.

52. Defendant National Aeronautics and Space Administration ("NASA") is an agency of the United States government.

53. Defendant Administrator of the NASA, Bill Nelson, is named in his official capacity as the Director of the NASA.

54. Defendant United States Department of Transportation ("DOT") is an agency of the United States government.

55. Defendant Director of the DOT, Richard Chávez, is named in his official capacity as the Director of the DOT.

56. Defendant United States Department of Energy ("DOE") is an agency of the United States government.

57. Defendant United States Secretary of Energy, Jennifer Granholm, is named in her official capacity as the United States Secretary of Energy.

STATEMENT OF JURISDICTION AND VENUE

58. This Court has exclusive jurisdiction over this case under 28 U.S.C. §§ 1331 and 1346 because Plaintiff-Intervenors' claims arise under the

Administrative Procedure Act, 5 U.S.C. §§ 702–703, and the UNITED STATES CONSTITUTION, U.S. CONST. Art. III, § 2.

59. This Court is authorized to grant the requested declaratory and injunctive relief under 5 U.S.C. §§ 702 and 706, and 28 U.S.C. §§ 2201–02.

60. Venue is proper within this District pursuant to 28 U.S.C. § 1391(e) because (1) certain Plaintiff-Intervenors reside in Georgia and no real property is involved, and (2) "a substantial part of the events or omissions giving rise to the claim occurred" in this District.

61. Venue further lies in this District pursuant to 28 U.S.C. § 1391(e)(1) because the State of Georgia is a resident of every judicial district in its sovereign territory including this judicial District (and Division). See *California v. Azar*, 911 F.3d 558, 570 (9th Cir. 2018).

FACTUAL ALLEGATIONS

Executive Order 14042 and the Safer Federal Workforce Task Force Guidelines

62. On September 9, 2021, President Biden signed Executive Order 14042, titled Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors ("EO 14042"), a true and accurate copy is found at Doc. 1-1, (Exhibit A).

63. EO 14042 purports to "promote economy and efficiency in Federal procurement by ensuring that the parties that contract with the Federal Government provides adequate COVID-19 safeguards to their workers performing on or in connection with a Federal Government contract or contract-like instrument." Doc. 1-1 at 1.

64. EO 14042 claims that "ensuring that Federal contractors and subcontractors are adequately protected from COVID-19 will bolster economy and efficiency in Federal procurement." Doc. 1-1 at 1.

65. EO 14042 directs executive agencies subject to the Federal Property and Administrative Services Act (the "Procurement Act") to include in all federal contracts and "contract-like instruments" a clause that contractors and subcontractors will comply with all future guidance issued by the Task Force.

66. EO 14042 requires that the Task Force issue specific COVID safety protocols by September 24, 2021.

67. On September 24, 2021, the Task Force released its COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors (the "Task Force Guidance") to federal agencies, imposing a vaccine mandate on federal contractors and subcontractors, a true and accurate copy is found at Doc. 1-2, (Exhibit B).

68. EO 14042 further required that the Director of OMB publish a determination in the Federal Register as to "whether such Guidance will promote economy and efficiency in Federal contracting if adhered to by Government contractors and subcontractors." Doc. 1-1 at 2.

69. On September 28, 2021, Director Young published the OMB's Determination of the Promotion of Economy and Efficiency in Federal Contracting Pursuant to Executive Order No. 14042 (the "OMB Determination") stating in conclusory fashion "I have determined that compliance by Federal contractors and

subcontractors with the COVID-19-workplace safety protocols detailed in that 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." 86 Fed. Reg. 53,691 (Sept. 28, 2021), a true and correct copy is found at Doc. 1-3, (Exhibit C).

70. The OMB Determination contained no research or data in support of its claims. Moreover, the OMB Determination underwent no notice-and-comment period.

71. Through EO 14042 and without legislative intervention, the President purported to give the Task Force, the OMB Director, and various federal agencies broad authority to impose vaccine mandates on federal contractors.

72. While EO 14042 did not specifically call for a vaccine mandate, it did purport to delegate rulemaking authority to the Task Force, OMB, and the Federal Acquisition and Regulatory Council (the "FAR Council").

73. On September 30, 2021, the FAR Council issued Class Deviation Clause 252.223-7999 (the "FAR Deviation Clause") with accompanying guidance, a true and correct copy is found at Doc. 1-4, (Exhibit D).

74. The FAR Deviation Clause requires federal contractors to follow the Task Force Guidance and any future amendments to the Guidance.

75. EO 14042, the Task Force Guidance, the FAR Deviation Clause, and the OMB Determination are hereinafter collectively referred to as the "Contractor Mandate."

76. Ultimately, the Task Force Guidance was never published to the Federal Register for the purpose of receiving public comment.

77. Pursuant to the Task Force Guidance, "[p]eople are considered fully vaccinated for COVID-19 two weeks after they have received the second dose in a two-dose series, or two weeks after they have received a single-dose vaccine." Doc. 1-2 at 4.

78. The Guidance further establishes that "covered contractor employees" are to be "fully vaccinated" by December 8, 2021—meaning said employees must obtain the final dose of their vaccine of choice no later than November 24, 2021.

79. Accordingly, any covered contractor employee inclined to take the Moderna vaccine would have had to receive their first dose by October 27, 2021, in order to comply with the December 8, 2021, deadline.[1] Defendants notified the Court that it was extending the deadline to January 18, 2022. Doc. 39 at 3

80. With the deadline for a Moderna vaccine having passed, covered contractor employees must obtain a Pfizer vaccine by November 3, 2021[2] or a Johnson and Johnson vaccine by November 24, 2021.[3] With the new deadline, the last date that an employee can take Pfizer or Moderna is December 7, 2021.

81. Pursuant to the Task Force Guidance, "covered contractor employees" refers to "any full-time or part-time employee of a covered contractor working on or

[1] Center for Disease Control, Different COVID-19 Vaccines, (Oct. 20, 2020), https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines.html.

[2] Id.

[3] Id.

in connection with a covered contract or working at a covered contractor workplace. This includes employees of covered contractors who are not themselves working on or in connection with a covered contract." Doc. 1-1 at 3–4.

82. For the same reason, the Guidance also specifies that subcontractors working in a covered workplace must also be fully vaccinated. Doc. 1-2 at 1.

83. Pursuant to the Task Force Guidance, a contractor or subcontractor workplace location "means a location where covered contract employees work, including a covered contractor workplace or Federal workplace." Doc. 1-2 at 3.

84. Pursuant to the Task Force Guidance, "unless a covered contractor can affirmatively determine that none of its employees on another floor or in separate areas of the building will come into contact with a covered contractor employee during the period of performance," employees in other areas of the building site or facility are also a part of the covered contractor workplace.

85. Accordingly, the Contractor Mandate mandates vaccination for those who work both directly and indirectly with federal contracts.

86. For example, pursuant to the Task Force Guidance, if a covered contractor employee is working on a contract for the Department of Defense in a remote office facility and that person merely shares a parking garage with non-contracted employees once a week, those non-contracted employees are subject to the Contractor Mandate.

87. In another example, pursuant to the Task Force Guidance, if a covered contractor employee is working on a contract for NASA in a remote office facility and

that person merely shares an elevator with non-contracted employees every other Friday, those non-contracted employees are subject to the Contractor Mandate.

88. The Task Force Guidance imposed a deadline of October 15, 2021, for federal agencies to include a vaccination mandate clause in new contracts.

89. EO 14042, in general terms, and the Task Force Guidance, in specific terms, further required that the Federal Acquisition Regulatory Council ("FAR Council") "conduct a rulemaking to amend the [Federal Acquisition Regulation ("FAR")] to include the [Contractor Mandate]." Doc. 1-2 at 12.

90. Pursuant to the Task Force Guidance, by October 8, 2021, and prior to any rulemaking, the FAR Council was required to develop a recommended contract clause to impose the Contractor Mandate for federal agencies to include in their subsequent contracts. Doc. 1-2 at 12.

91. The Task Force Guidance instructed the FAR Council to "recommend that agencies exercise their authority to deviate from the FAR" by using a vaccination mandate clause in contracts prior to the FAR Council actually amending the FAR. Doc. 1-2 at 12.

Development and Implementation of the FAR Deviation Clause

92. Before the FAR Deviation Clause was even published on September 30, 2021, the Defense Acquisition Regulations System and the Department of Defense published their intent to comply with EO 14042 via a Notice to the Federal Register on September 17, 2021 (the "DOD Notice"). A true and correct copy of the DOD Notice is found at Doc. 1-5, (Exhibit E).

93. In response, there were seventeen letter comments from members of the public, raising hundreds of key concerns that have yet to be addressed by OMB or the Task Force.

94. A few of the DOD Notice comments included concerns such as:

a. "Are contractors or the government [sic] be liable for employee disability or damage claims (side effects, etc.)?"[4]

b. "How will DOD monitor and measure any productivity disruptions?"[5]

c. "Are contractors expected to violate or undermine collective bargaining agreements as they comply with these requirements?"[6]

d. "Implementing a flow down vaccine mandate and/or testing will likely cause our subcontractors to experience significant employee attrition and financial hardship, potentially leaving them unable to fulfill their role in the distribution network."[7]

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[4] Aerospace Industries Association (AIA), Comment Letter on DOD Implementation Planning for Executive Order 14042 (Sept. 23, 2021), https://www.acq.osd.mil/dpap/dars/docs/early_engagement_opportunity/executive_order_14042/ AIA%20Comments%20-%20EO%2040142%20DARS%20EEO.9-23-21.pdf.

[5] Id.

[6] Id.

[7] AmerisourceBergen, Comment Letter on DOD Implementation Planning for Executive Order 14042 (Sept. 23, 2021), https://www.acq.osd.mil/dpap/dars/docs/early_engagement_opportunity/executive_order_14042/Amerisource%20Bergen%20Comments%20to%20DOD%20Early%20Engagement%20Opportu nity%20Ensuring%20Adequate%20COVID%20Safety%20Protocols%20for%20Federal%20Con tractors%20EO%2014042%20final.pdf.

95. The DOD Notice comments were never considered prior to issuing the Task Force Guidance. Indeed, the DOD ultimately published the DOD FAR Deviation Memo just one day after the FAR Deviation Clause, with no alterations.

96. Upon information and belief, even some federal agencies were unable to implement the Task Force Guidance due to the quick turnaround time of just 21 days from the date the Guidance was issued to the October 15, 2021, deadline.

Many Employees Are Likely to Quit Rather Than Submit to Mandatory Vaccination

97. From an employer's perspective, 9 in 10 employers fear significant reductions in their workforce if they had to implement vaccine mandates.[8]

98. In a recent survey, approximately 70% of unvaccinated workers said they would leave their job before complying with an employer-issued vaccine mandate.[9]

99. "Just under one in five U.S. adults, 18%, can be described as vaccine-resistant. These Americans say they would not agree to be vaccinated if a COVID- 19 vaccine were available to them right now at no cost and that they are unlikely to

[8] Karl Evers-Hillstrom, 9 in 10 Employers Say They Fear They'll Lose Unvaccinated Workers Over Mandate: Survey, The Hill (Oct. 18, 2021), https://thehill.com/business-a-lobbying/business-a-lobbying/577201-9-in-10-employers-say-they-will-lose-unvaccinated.

[9] Liz Hamel et al., Kaiser Family Found., KFF COVID-19 Vaccine Monitor: October 2021(Oct. 28, 2021), https://www.kff.org/coronavirus-covid-19/poll-finding/kff-covid-19-vaccine-monitor-october-2021/.

change their mind about it. The percentage holding these views has been stable in recent months."[10]

100. Moreover, "covered contractor employees," specifically include other employees that come into minimal contact directly with contractor employees "unless a covered contractor can affirmatively determine that none of its employees on another floor or in separate areas of the building will come into contact with a covered contractor employee during the period of performance of a covered contract." Doc. 1-2 at 10.

101. The "covered contractor workplace" broadly includes "a location controlled by a covered contractor at which any employee of a covered contractor working on or in connection with a covered contract is likely to be present during the period of performance for a covered contract." Doc. 1-2 at 4.

102. While a "covered contractor workplace" does not include a covered contractor employee's residence, covered contractors working exclusively from their residence are required to be vaccinated. Doc. 1-2 at 11, Q11.

103. Ultimately, the Contractor Mandate extends to all employees that share "common areas such as lobbies, security clearance areas, elevators, stairwells, meeting rooms, kitchens, dining areas, and parking garages." Doc. 1-2 at 10.

[10] Jeffrey M. Jones, About One in Five Americans Remain Vaccine Resistant, Gallup (Aug. 6, 2021), https://news.gallup.com/poll/353081/one-five-americans-remain-vaccine-resistant.aspx (last visited Oct. 26, 2021).

Impact of the Contractor Mandate on ABC and ABCGA and Their Members

104. ABCGA is a chartered chapter of Associated Builders and Contractors, Inc. ("ABC") national construction industry trade association, representing more than 21,000 member contractors and related firms all over the country.

105. ABCGA and ABC as a whole represent many private businesses that regularly bid on and are awarded federal government contracts of the type covered by the unprecedented vaccination mandates imposed by Executive Order 14042, as implemented by the Safer Federal Workforce Task Force Guidance, the Office of Management and Budget, and the Federal Acquisition Regulatory Council.

106. ABCGA and ABC as a whole strongly support and encourage vaccination of construction workers, and many ABC member companies have made significant efforts through outreach and incentives to get as many workers as possible vaccinated.

107. But a sizable percentage of construction workers, as with the population as a whole, resist compulsory vaccination and have indicated they will quit their employment rather than submit to mandatory vaccination.

108. If contractors are forced to comply with the challenged mandate in order to be awarded covered federal contracts, many of them will be unable to perform the awarded contracts because a significant percentage of their vaccine-resistant workers will quit or have to be placed on extended leaves of absence rather than be vaccinated.

109. According to published reports, there is already a shortage of 430,000 construction workers needed to fulfill existing demands for construction in the U.S.

The shortage is expected to grow larger as a result of the recently passed Infrastructure Bill.

110. If even a small percentage of the existing construction workforce ceases employment due to the vaccine mandate, exacerbating the existing shortage, then the much-needed construction projects of the federal government will not be capable of performance.

111. It is also well known that construction industry workforces are uniquely transitory and temporary, compared to other industries. Any vaccine-resistant worker who wants to avoid vaccination as a condition of employment by a government contractor, can readily obtain employment by a contractor who does not perform government contracts, and/or is not covered by the OSHA ETS mandate or test policy, particularly during the current labor shortage.

The Contractor Mandate
Creates Confusion and Uncertainty

112. In response to the Contractor Mandate, ABC and ABCGA member companies have scrambled to comply.

113. In addition to their specific challenges, ABC and ABCGA member companies will have to overcome the following hurdles in order to comply:

a. Track employee vaccination statuses;

b. Develop a robust process to review requests for accommodation;

c. Identify impacted employees and locations;

d. Spend an undetermined amount of money to fund its compliance program; and

e. Track data from subcontractors to ensure they are likewise performing (a), (b), (c), and (d) above.

114. Upon information and belief, some covered contractor employees will not obtain the vaccine and will not seek an exemption, despite the Contractor Mandate and its allowance for narrowly prescribed exemptions for medical reasons or strongly held religious beliefs.

115. For context, nearly 50% of Georgians are fully vaccinated while the remaining 50% have yet to obtain one or oppose the vaccine altogether.[11]

116. With respect to employees who refuse vaccination, ABC and ABCGA member companies will have no choice but to consider enforcement action up to and including potential termination, lest they lose billions in federal funding.

117. With national labor shortages crippling the current labor market, losing employees because of the Contractor Mandate will cause significant harm to ABC and ABCGA member companies.

118. Equally important, the loss of employees will jeopardize ABC and ABCGA member companies' ability to complete the contracted for work in the contracted for time, thereby materially undermining the very efficiency and economy in contracting that purportedly is the core rationale for implementing the Contractor Mandate in the first place.

[11] Georgia Department of Public Health, Press Release, 50% of Georgians Fully Vaccinated Against COVID-19 (Oct. 25, 2021), https://dph.georgia.gov/press-releases/2021-10-25/50-georgians-fully-vaccinated-against-covid-19.

119. The broad application of the Contractor Mandate is expected to substantially impact each Plaintiff-Intervenor's affected member companies in that any of their unvaccinated employees must be terminated or reallocated to uncovered workplaces lest they risk breaching their federal contracts by failing to fully comply with the Contractor Mandate.

120. The Contractor Mandate, therefore, forces ABC and ABCGA affected member companies to choose between two equally problematic outcomes: (1) maintain a fully vaccinated (but reduced) workforce of covered employees by firing those who are unvaccinated and risk breaching the contracts by not satisfactorily performing due to lack of qualified workers; or (2) breach the contract by continuing to employ unvaccinated, covered employees so that they can timely perform and complete the contract requirements. Either way, Plaintiff-Intervenor's affected member companies face a risk of breach and material noncompliance for reasons totally beyond their control.

COUNT I
Violation of the Procurement Act
(Under 40 U.S.C. §§ 101 and 121)

121. ABC and ABCGA incorporate each of the Complaint allegations stated above herein.

122. The purpose of the Procurement Act is to provide the Federal Government with an "economical and efficient system" for, among other things, procuring and supplying property and nonpersonal services. 40 U.S.C. § 101. The Contractor Mandate, however, will actually and materially undermine the efficient

and economical delivery of property and services by disrupting the continuity of the contractor workforce.

123. The purpose of the Procurement Act is not to impose a sweeping vaccination mandate on broad swaths of the American people or to use the federal procurement system as a proxy for implementing a nationwide public health mandate.

124. The Procurement Act empowers the President to "prescribe policies and directives that [he] considers necessary to carry out [the Procurement Act.]" 40 U.S.C. § 121(a). Those policies "must be consistent with" the Procurement Act's purpose, i.e., promoting economy and efficiency in federal contracting. Id. § 121(a).

125. Defendants have failed to demonstrate a "nexus" between the Contractor Mandate (EO 14042, the OMB Determination, the Task Force Guidance, and the FAR Deviation Clause) and the Procurement Act's purpose of promoting an "economical and efficient system" for federal contracting. 40 U.S.C. § 101; see Am. Fed'n of Lab. & Cong. of Indus. *Organizations v. Kahn*, 618 F.2d 784, 793 (D.C. Cir. 1979) (explaining that the Procurement Act is violated when the President does not demonstrate a "nexus" between executive action and the Procurement Act's policy). The Procurement Act's text obligates the President to exercise his statutory authority "consistently with [the Act's] structure and purposes." *Id*.

126. Instead, EO 14042 exceeds the President's Procurement Act authority by directing the Task Force, without a demonstrable nexus to the Procurement Act's purpose, to prescribe a sweeping public health scheme.

127. Here, the text of the Procurement Act clearly demonstrates that Congress has not authorized the Contractor Mandate, and thus, EO 14042 violates the Procurement Act.

128. Further, before the executive branch may regulate a major policy question of "great and economic and political significance"—such as mandating vaccination for every employee of every federal contractor in the country—Congress must "speak clearly" to assign the authority to implement such a policy. *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (citing *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 324 (2014)).

129. When the federal government intrudes on a traditional state function, it must clearly articulate the scope of the intrusion and the rationale behind its unprecedented action, which it has not done here. *Gregory v. Ashcroft*, 501 U.S. 452, 463–64 (1991).

130. The Contractor Mandate implicates critical issues of federalism as public health, and the regulation of inoculation regimes are traditional state functions.

131. Because the statutory language that the President relies on to issue EO 14042 does not contain a clear statement affirmatively sanctioning the broad scope of the Contractor Mandate, EO 14042 violates the Procurement Act.

132. Therefore, under both the plain text of the Procurement Act and the clear statement principle, EO 14042 is unlawful, and thus the Contractor Mandate is unenforceable.

COUNT II
Violation of Federal Procurement Policy
(Under 41 U.S.C. § 1707(a))

133. ABC and ABCGA incorporate each of the Complaint allegations stated above herein.

134. Pursuant to 41 U.S.C. § 1707(a)(1), a procurement policy may not take effect until 60 days after it is published for public comment in the Federal Register if it relates to the expenditure of appropriated funds; and has a significant effect beyond the internal operating procedures of the issuing agency; or has a significant cost or administrative impact on contractors or offerors.

135. The Contractor Mandate will require contractors to develop, implement, and monitor a host of new policies and procedures impacting, for some contractors, their entire workforce. In order to fully comply with the Contractor Mandate, contractors will have to fire any covered employee who refuses to be vaccinated and has not asserted an exemption.

136. Federal agencies will have to budget for and expend appropriated funds to administratively implement the Contractor Mandate and, thereafter, compensate contractors for their increased cost of compliance in violation of § 1707(a).

137. Because the Contractor Mandate requires vaccination of hundreds of thousands of Americans, it certainly has "a significant effect beyond internal operating procedures" in violation of § 1707(a).

138. The Contractor Mandate also has a significant cost or administrative impact on current contractors, future contractors, and offerors in violation of § 1707(a).

139. Despite being required to be published for public comment in the Federal Register, Defendants failed to publish the Task Force Guidance containing the Contractor Mandate in the Federal Register as required by 41 U.S.C. § 1707(a)(1).

140. Moreover, Defendants failed to provide the required 60-day comment period before the Task Force Guidance and Contractor Mandate became effective.

141. Further, the requirements of 41 U.S.C. § 1707(a) were never waived with regard to the Task Force Guidance and Contractor Mandate.

142. Accordingly, Defendants failed to comply with 41 U.S.C. § 1707(a) when issuing the OMB Determination and the Task Force Guidance, making the Contractor Mandate invalid as a matter of law.

COUNT III
Nondelegation Claim
(Article I, Section 1 of The UNITED STATES CONSTITUTION)

143. ABC and ABCGA incorporate each of the Complaint allegations stated above herein.

144. Pursuant to Article I, Section 1 of the UNITED STATES CONSTITUTION, Congress is vested with all legislative powers.

145. "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529–30 (1935).

146. The executive branch can only exercise its own discrete powers reserved by Article II of the UNITED STATES CONSTITUTION and such power that Congress clearly authorizes through statutory command.

147. Congress gives such authorization when it articulates an intelligible principle to guide the Executive that not only sanctions but also defines and cabins the delegated legislative power.

148. Under the nondelegation doctrine, Congress cannot simply offer a general policy that is untethered to a delegation of legislative power. For a delegation to be proper, Congress must articulate a clear principle or directive of its congressional will within the legislative act. See *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). The principle must be binding, and the delegate must be "directed to conform" to it. *Id*.

149. The nondelegation doctrine preserves and protects important tenets of our democracy, including individual liberties and states' rights.

150. The President's direct delegation of authority to the OMB Director and the Task Force gives them unconstitutional and unconstrained rulemaking authority without a statutory directive.

151. Separately, the President's indirect delegation to the federal agencies of broad authority and discretion to enforce the already unconstitutional Contractor Mandate is unsupported by an explicit statutory directive within the Procurement Act or any other federal law.

152. Thus, the President's actions lack the requisite congressional direction in two regards:

a. First, Congress did not articulate clear or sufficient instructions in the Procurement Act directing the President to implement this public health policy scheme by executive order.

b. Second, even if Congress did clearly authorize a national vaccination schedule for federal contractors, it did not give sufficiently clear instructions to permit the President to delegate legislative judgment to the Task Force or the OMB Director.

153. EO 14042's reliance on the precatory statement of purpose in the Procurement Act is not a clear directive, and neither the President nor the federal agencies can rely on it to impose an intrusive and sweeping vaccine mandate.

154. Further, any delegation sanctioning broad and intrusive executive action cannot be sustained without clear and meaningful legislative guidance, especially given the important separation-of-powers and federalism concerns implicated. Under the nondelegation doctrine, the Contractor Mandate is unconstitutional because Congress did not articulate a clear principle by legislative act that directs the Executive to take sweeping action that infringes on state and individual rights.

155. Here, the Executive Order cuts deeply into the state's sphere of power without articulating the underlying reasons or providing a justification beyond a superficial, unsupported, and pretextual reference to efficiency and economy in federal contracts.

156. Without explicit congressional authorization, the President's delegation of power in EO 14042 through the OMB Determination, the Task Force, and the various executive agencies acting to implement the Contractor Mandate cannot survive constitutional scrutiny.

COUNT IV
Violation of Separation of Powers and Federalism
(Article I, Section 8 of Amendment X to The UNITED STATES CONSTITUTION)

157. ABC and ABCGA incorporate each of the Complaint allegations stated above herein.

158. To the extent Defendants argue that the Contractor Mandate is authorized, such authorization would violate the CONSTITUTION'S nondelegation principles.

159. The Contractor Mandate exceeds congressional authority.

160. Pursuant to Article I, Section 1 of the UNITED STATES CONSTITUTION, Congress is vested with all legislative powers, but Congress must act pursuant to the enumerated powers granted to it by Article I.

161. Pursuant to Article I, Section 8 of the UNITED STATES CONSTITUTION, Congress has authority "to make all Laws which shall be necessary and proper for carrying into Execution" its general powers ("the Necessary and Proper Clause"). The Necessary and Proper Clause does not "license the exercise of any 'great substantive and independent power[s]' beyond those specifically enumerated." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 559 (2012) (citation omitted).

162. Pursuant to the Tenth Amendment of the UNITED STATES CONSTITUTION, "the powers not delegated by the CONSTITUTION to the United States,

nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. Amend. X.

163. Nothing in the CONSTITUTION authorizes the federal agencies of the executive branch to impose the Contractor Mandate on states because requiring vaccinations for state employees is an exercise of the police power left to the states under the Tenth Amendment.

164. The CONSTITUTION does not empower Congress to require anyone who deals with the federal government to get vaccinated. It is not a "proper" exercise of Congress's authority to mandate that every employee who touches a federal contract or comes in contact with another employee who touches such a contract, has to be vaccinated because the action here falls outside the scope of an Article I enumerated power.

165. Defendants, through the Contractor Mandate, have exercised power that Congress does not possess under the CONSTITUTION and, therefore, cannot delegate to other branches of the federal government.

166. If Congress intended the Procurement Act to authorize what the President claims, the Act exceeds Congress's authority, and thus Defendants must be enjoined from taking any action under the Act.

COUNT V
Violation of the Tenth Amendment
(Under Amendment X to the UNITED STATES CONSTITUTION)

167. ABC and ABCGA incorporate each of the Complaint allegations stated above herein.

168. Pursuant to the Tenth Amendment of the UNITED STATES CONSTITUTION, "the powers not delegated by the CONSTITUTION to the United States, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. Amend. X.

169. Defendants, through the Contractor Mandate, have exercised power far beyond what was delegated to the federal government by Constitutional mandate or congressional action.

170. Neither Article II of the U.S. CONSTITUTION nor any act of Congress authorizes the federal agencies of the executive branch to implement the Contractor Mandate, which traditionally falls under the police power left to the states under the Tenth Amendment.

171. The Tenth Amendment explicitly preserves the "residuary and inviolable sovereignty," of the states. *Printz v. United States*, 521 U.S. 898, 918–19 (1997) (quoting The Federalist No. 39, at 245 (J. Madison)).

172. By interfering with the traditional balance of power between the states and the federal government and by acting pursuant to ultra vires federal action, Defendants violated this "inviolable sovereignty," and thus, the Tenth Amendment.

173. Therefore, the Contractor Mandate was adopted pursuant to an unconstitutional exercise of authority by Defendants and must be invalidated.

COUNT VI
Unconstitutional Exercise of the Spending Clause
(Under Article I, Section 8, Clause 1 of the UNITED STATES CONSTITUTION)

174. ABC and ABCGA incorporate each of the Complaint allegations stated above herein.

175. The challenged actions are unconstitutional conditions on the states' receipt of federal funds.

176. Article I, Section 8, Clause 1 of the UNITED STATES CONSTITUTION gives Congress the power to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defense and the general Welfare of the United States."

177. While "Congress may attach appropriate conditions to . . . spending programs to preserve its control over the use of federal funds," it cannot wield federal funding to unreasonably constrain state autonomy. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 579 (2012). "[I]n some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *South Dakota v. Dole*, 483 U.S. 203, 211 (1987).

178. Federal contracts are an exercise of the Spending Clause, yet the challenged actions ask Plaintiff-Intervenor's to agree to a coercive contract term.

179. The federal contracts at issue here account for considerable portions of Plaintiff -Intervenors' budgets for essential research, education, and other necessary programs. The pressure on Plaintiff-Intervenors to comply with the Contractor Mandate rises to the level of coercion. The challenged actions are invalid for that reason alone.

COUNT VII
Violation of the APA
(Under 5 U.S.C. § 706)

180. ABC and ABCGA incorporate each of the Complaint allegations stated above herein.

181. Pursuant to 5 U.S.C. § 553, agencies must publish "a notice of proposed rulemaking in the Federal Register before promulgating a rule that has legal force." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S.Ct. 2367, 2384 (2020); 5 U.S.C. § 553(b).

182. Pursuant to 48 C.F.R. 1.501, "significant revisions" to the FAR must be made through notice-and-comment procedures. DOD, NASA, and the General Services Administration must jointly conduct the notice-and-comment process. *Id.*

183. Instead of amending the FAR to implement this significant revision, the FAR Council issued a purported "class deviation" without engaging in the notice-and-comment process. *See* 5 U.S.C. § 553.

184. Proper "class deviations" must fit within one of the discrete definitions set forth in 48 C.F.R 1.401.

185. Here, however, the FAR Deviation Clause fits none of the definitions.

186. Instead, the FAR Deviation Clause is in the nature of a rule within the meaning of the APA because it is "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4).

187. The FAR Council violated the APA by failing to comply with the notice-and-comment requirements for rulemaking.

188. Good cause does not excuse the FAR Council's failure to comply with the notice-and-comment process. See 5 U.S.C. § 553(b)(3)(B).

COUNT VIII
Violation of the APA
(Under 5 U.S.C. § 706)

189. ABC and ABCGA incorporate each of the Complaint allegations stated above herein.

190. Under the APA, a court must "hold unlawful and set aside agency action" that is "not in accordance with law" or "in excess of statutory . . . authority, or limitations, or short of statutory right." See 5 U.S.C. § 706(2)(A), (C).

191. The OMB Determination adopting the Task Force guidance is contrary to law for at least four reasons.

192. First, the OMB Determination violates 41 U.S.C. § 1303(a) because it is a government-wide procurement regulation, which only the FAR Council may issue.

193. EO 14042 apparently seeks to circumvent § 1303 by delegating the President's Procurement Act power to the OMB Director.

194. That attempt is unlawful because the President has no authority to issue regulations under § 1303—only the FAR Council may issue government-wide procurement regulations. See Centralizing Border Control Policy Under the Supervision of the Attorney General, 26 Op. OLC 22, 23 (2002) ("Congress may prescribe that a particular executive function may be performed only by a designated official within the Executive Branch, and not by the President.").

195. Second, and relatedly, the OMB rule is contrary to law because the Procurement Act does not grant the President the power to issue orders with the force

or effect of law. Congress authorized the President to "prescribe policies and directives that the President considers necessary to carry out." 40 U.S.C. § 121(a).

196. "[P]olicies and directives" describe the President's power to direct the exercise of procurement authority throughout the government. It does not authorize the President to issue regulations himself.

197. Congress knows how to confer that power, as it authorized the GSA Administrator, in the same section of the statute, to "prescribe regulations." *Id.* § 121(c); see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.").

198. And Congress has given the President the power to "prescribe regulations" in other contexts, typically in the realm of foreign affairs and national defense. *See, e.g.*, 18 U.S.C. § 3496 ("The President is authorized to prescribe regulations governing the manner of executing and returning commissions by consular officers."); 32 U.S.C. § 110 ("The President shall prescribe regulations, and issue orders, necessary to organize, discipline, and govern the National Guard.").

199. Third, even if the Procurement Act authorized the President to issue orders with the force or effect of law, it would not authorize approval of the Task Force guidance. The President appears to assume that the Procurement Act's prefatory statement of purpose authorizes him to issue any order that he believes promotes "an economical and efficient" procurement system. 40 U.S.C. § 101; *see* Ex. A at 1 ("This order promotes economy and efficiency in [f]ederal procurement."). In

doing so, the President mistakenly construes the prefatory purpose statement for a grant of authority. *D.C. v. Heller*, 554 U.S. 570, 578 (2008) ("[A]part from [a] clarifying function, a prefatory clause does not limit or expand the scope of the operative clause.").

200. And even if the Procurement Act did authorize the President to issue binding procurement orders solely because they may promote economy and efficiency, the OMB Determination does not adequately do so. Providing the federal government with an "economical and efficient system for" procurement is not a broad enough delegation to impose a national-scale vaccine mandate that Congress has not separately authorized.

201. Further, the executive order is divorced from the practical needs of procurement. In order to maintain a steady and predictable flow of goods and services—and the advancement of science and technology through research and development—the federal procurement system requires a stable and reliable workforce to timely perform work required under tens of thousands of federal contracts and funding agreements. The Contractor Mandate disrupts the stability and reliability of the contractor workforce by forcing contractors to potentially fire unvaccinated and non-exempt covered employees, many of whom are highly skilled and essential to the work.

202. Because the OMB Determination violates § 1303(a), seeks to exercise a delegated power the President does not possess, and relies on a misreading of the Procurement Act, it is contrary to law.

COUNT IX
Violation of the APA
(Under 5 U.S.C. § 706)

203. ABC and ABCGA incorporate each of the Complaint allegations stated above herein.

204. Pursuant to the Administrative Procedure Act, agency action that is "arbitrary [or] capricious" is unlawful and must be set as aside by a court of competent jurisdiction. 5 U.S.C. § 706(2)(A).

205. Pursuant to 48 C.F.R. 1.402, "[u]nless precluded by law, executive order, or regulation, deviations from the FAR may be granted [] when necessary to meet the specific needs and requirements of each agency."

206. The Contractor Mandate and the OMB Determination were implemented with no express findings, no explanation, and no consideration of the distinct and diverse universe of federal agencies.

207. The Contractor Mandate and the OMB Determination impose universal and uniform requirements without regard to the particularized needs and circumstances of each federal agency and are therefore arbitrary and capricious in violation of the APA.

COUNT X
Declaratory Judgment
(Under 28 U.S.C. § 2201(a))

208. ABC and ABCGA incorporate each of the Complaint allegations stated above herein.

209. For all the forgoing reasons, Plaintiff-Intervenors request that the Court declare the Contractor Mandate unlawful, unconstitutional, and unenforceable.

COUNT XI
Injunctive Relief

210. ABC and ABCGA incorporate each of the Complaint allegations stated above herein.

211. The Contractor Mandate threatens immediate and irreparable harm to Plaintiff-Intervenors, including a loss of highly trained employees, difficulty in completing existing contracts, and significant expenditure of time and resources in ensuring compliance.

212. Monetary damages or other remedies at law cannot adequately address the injury caused by the Contractor Mandate.

213. The deadlines imposed in the Contractor Mandate will have widespread and permanent effects that no legal remedy can reverse, such that the only available remedy to redress the harms is injunctive relief.

214. Balancing the hardships to Plaintiff-Intervenors relative to the hardships to Defendants, extraordinary equitable relief is warranted.

215. Specifically, absent an injunction, Plaintiff-Intervenors' operations will be jeopardized as a result of Defendants' adoption and implementation of the unconstitutional, illegal, and logistically unworkable Contractor Mandate.

216. On the other hand, the hardship of an injunction to Defendants is minimal; they simply must abide by the CONSTITUTION and the laws of the United States.

217. Permanent injunctive relief would not disserve the public interest, because it would enjoin unconstitutional and illegal executive action.

COUNT XII
VIOLATION OF SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT

218. ABC and ABCGA incorporate each of the Complaint allegations stated above herein.

219. Defendants violated the Small Business Regulatory Enforcement Fairness Act (SBEFA), 29 U.S.C. § 604 in that it failed to describe the steps the agencies took to minimize the significant economic impact on small entities in accordance with the requirements of the statute.

PRAYER FOR RELIEF

Wherefore, Plaintiff-Intervenors respectfully request that this Court:

1. Enter judgment in favor of Plaintiff-Intervenors and against Defendants on all Counts asserted herein.

2. Enter a declaratory judgment that Defendants, individually and collectively, have acted to impose a broad-sweeping, unlawful, and unconstitutional COVID-19 vaccine mandate, and that such COVID-19 vaccine mandate is unlawful and unenforceable.

3. Grant a temporary, preliminary, and permanent injunction prohibiting Defendants and those acting in concert with them from enforcing this broad-sweeping, unlawful, and unconstitutional mandate.

4. Grant any additional and different relief to which Plaintiff-Intervenors may be entitled.

5. Award Plaintiff-Intervenors costs of litigation, including reasonable attorneys' fees, as allowable by law.

Respectfully Submitted this 18th day of November 2021.

Attorneys for Plaintiff-Intervenors

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CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2021, I caused a true and correct copy of the foregoing to be served on counsel of record for all parties via ECF.

/s/ J. Larry Stine
J. Larry Stine

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ATTACHMENT

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

THE STATE OF GEORGIA, et al., *Plaintiffs,* ASSOCIATED BUILDERS AND CONTRACTORS OF GEORGIA, INC. and ASSOCIATED BUILDERS AND CONTRACTORS, INC., *Plaintiffs/Intervenors,* v. JOSEPH R. BIDEN in his official capacity as President of the United States; et al., *Defendants.*	)	Case 1:21-cv-00163-RSB-BKE

DECLARATION OF BILL ANDERSON
IN SUPPORT OF PRELIMINARY INJUNCTION

I, Bill Anderson, being duly sworn, hereby state the following based on personal knowledge;

1. I am the President & CEO of Associated Builders and Contractors of Georgia, Inc. ("ABCGA"), [one of the plaintiffs in the above-captioned case] OR [Intervenor-Movant in the above captioned case].

2. Based in Atlanta, ABCGA represents the interests of hundreds of member construction contractors and related firms from all over Georgia, who perform work in this state and throughout the country. ABCGA's membership

represents most specialties within the construction industry and is comprised primarily of firms that perform work in the industrial and commercial sectors.

3. ABCGA is a chartered chapter of Associated Builders and Contractors, Inc. ("ABC") national construction industry trade association, representing more than 21,000 member contractors and related firms all over the country. ABCGA and ABC as a whole strongly support and encourage vaccination of construction workers, and many ABC member companies have made significant efforts through outreach and incentives to get as many workers as possible vaccinated. But a sizable percentage of construction workers, as with the population as a whole, resist compulsory vaccination and have indicated they will quit their employment rather than submit to mandatory vaccination.

4. ABCGA and ABC as a whole represent many private businesses that regularly bid on and are awarded federal government contracts of the type covered by the unprecedented vaccination mandates imposed by Executive Order 14042, as implemented by the Safer Federal Workforce Task Force Guidance, the Office of Management and Budget, and the Federal Acquisition Regulatory Council, all of which are being challenged in the above-captioned litigation.

5. More specifically, absent preliminary injunctive relief staying the unlawfully promulgated Order and regulations at issue here, many ABCGA and ABC members will be compelled as a condition of award of any contracts after November 14, 2021 to ensure that all "covered contractor employees" are fully vaccinated, including employees "who are not themselves working on or in connection with a

covered contract."[1] The vaccination mandate applies even to persons who have already been infected with COVID-19, or who work exclusively in outdoor workplace locations, or who work full time on a remote basis.

6. The challenged mandate is being imposed on federal contractors in a manner inconsistent with the recently issued OSHA Emergency Temporary Standard (ETS), in ways that adversely affect many members of ABCGA and ABC. Specifically, many members of the association(s) who perform federal contracts and subcontracts employ fewer than 100 employees, a number which according to OSHA renders such employers unlikely to be able to comply with mandatory vaccination requirements.[2] The majority of ABC members are classified as small businesses. Indeed, construction companies employing fewer than 100 workers compose 99% of construction firms in the United States, accounting for 68% of all construction industry employment.[3] In addition, the federal contractor mandate allows no testing option for unvaccinated employees, contrary to the OSHA ETS.

7. The challenged federal contractor mandate allows exemption from its vaccination requirements only for employees who qualify as suffering from vaccine-related disabilities, and those who qualify for a religious exemption. But the Task Force Guidance and FAR Clause are inadequate for the needs of employers

[1]https://www.saferfederalworkforce.gov/downloads/Guidance%20for%20Federal%20Contractors_Safer%20Federal%20Workforce%20Task%20Force_20211110.pdf (last visited Nov. 10, 2021).

[2] 86 Fed. Reg. 61,403 (Nov. 5, 2021) (expressing OSHA's lack of confidence that smaller employers "have the administrative capacity to implement the standard's requirements….")

[3] U.S. Census County Business Patterns by Legal Form of Organization and Employment Size Class for the U.S., States, and Selected Geographies: 2019.

attempting to determine what employees are exempt from the mandate or what accommodations to make for such exempt status.

8. Many ABCGA and ABC members who regularly bid on and are awarded government contracts covered by the challenged contractor mandate will be irreparably harmed in the absence of injunctive relief to prevent its implementation. First, if the contractors do not acquiesce to the challenged mandate, they will be disqualified from bidding on or being awarded work on covered federal contracts beginning November 14, 2021. According to recent data posted on the government website www.usaspending.gov, ABC member general contractors compose a crucial segment of the construction industry's federal contracting base[4] as ABC members won 57% of the $118 billion in direct federal U.S. construction contracts exceeding $25 million awarded during fiscal years 2009-2020.[5] Of this amount, a significant share was awarded to and built by members of ABCGA.

9. If contractors are forced to comply with the challenged mandate in order to be awarded covered federal contracts, many of them will be unable to perform the awarded contracts because a significant percentage of their vaccine-resistant workers will quit or have to be placed on extended leaves of absence rather than be vaccinated. According to published reports, there is already a shortage of 430,000 construction

[4] According to the U.S. Census Bureau (accessed Sept. 15, 2021), there was roughly $30 billion in federal construction put in place in 2020 https://www.census.gov/construction/c30/historical_data.html

[5] USASpending.gov data (accessed Dec. 22, 2020) cross-referenced with ABC membership. This data does not account for ABC members who performed subcontracting work on federal construction jobsites as that subcontractor information is not available on USASpending.gov or other government resources. However, the percentage of government work performed by ABC subcontractors is as high as or higher than the percentage of general contractor work, particularly when amounts below $25 million are included, as they would be under the new mandate.

workers needed to fulfill existing demands for construction in the U.S.[6] The shortage is expected to grow larger as a result of the recently passed Infrastructure Bill. If even a small percentage of the existing construction workforce ceases employment due to the vaccine mandate, exacerbating the existing shortage, then the much-needed construction projects of the federal government will not be capable of performance. It is also well known that construction industry workforces are uniquely transitory and temporary, compared to other industries. Any vaccine-resistant worker who wants to avoid vaccination as a condition of employment by a government contractor, can readily obtain employment by a contractor who does not perform government contracts, and/or is not covered by the OSHA ETS mandate or test policy, particularly during the current labor shortage.

10. For each of these reasons, the challenged federal contractor mandate is likely to increase costs and undermine economy and efficiency in federal contracting. An August 2021 ABC survey of its federal contractor members found that 77 of survey respondents said vaccine mandates will increase costs on federal construction projects. Just 1.2% of respondents said vaccine mandates will decrease costs. In addition, the survey results indicated that a vaccine mandate on federal contractor employees would decrease competition for government contracts, with 49% of survey participants saying they would be less likely to bid on federal contracts subjected to vaccine requirements.

[6] The Construction Industry Needs to Hire an Additional 430,000 Craft Professionals in 2021, March 23, 2021, ABC News Release.

I have reviewed the foregoing and hereby swear under penalties of perjury that it is true and correct.

Dated this 17th day of November 2021.

Bill Anderson