

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

**THE ASSOCIATED GENERAL
CONTRACTORS OF AMERICA, INC.**
2300 Wilson Blvd., Suite 300
Arlington, VA 22201

**THE ASSOCIATED GENERAL
CONTRACTORS OF TEXAS,
HIGHWAY, HEAVY, UTILITIES &
INDUSTRIAL BRANCH**
300 Barton Springs Rd.
Austin, TX 78704

**TEXO, THE CONSTRUCTION
ASSOCIATION**
11101 N Stemmons Freeway
Dallas, TX 75229

Plaintiffs,

v.

JOSEPH R. BIDEN, JR., in his official
capacity as President of the United States; **the
UNITED STATES OF AMERICA;
OFFICE OF MANAGEMENT AND
BUDGET; SHALANDA D. YOUNG**, in her
official capacity as Acting Director of the
Office of Management and Budget;
**FEDERAL ACQUISITION
REGULATORY COUNCIL; GENERAL
SERVICES ADMINISTRATION;
DEPARTMENT OF VETERANS
AFFAIRS; DEPARTMENT OF
DEFENSE;** and, **NATIONAL
AERONAUTICS AND SPACE
ADMINISTRATION,**

Defendants,

Civil Action No. _____

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

NATURE OF THE CASE

1. When it took office in January 2021, the then-new administration announced as one of its highest priorities the goal of beating back COVID-19. But the Administration's springtime optimism, buoyed by the widespread availability of vaccines, by fall faded to frustration with lower-than-hoped vaccination rates and a spike in new infections. The Administration's frustration is one thing, but the way it has acted on its frustration is another, and in important respects has been unlawful.

2. This complaint addresses one such unlawful action: the Administration's attempt to use a law designed to promote economy and efficiency in federal procurement to implement public health policy by mandating that federal contractors require their employees to get vaccinated or find other employment. Using the federal procurement process as a tool to implement public health policy is unlawful as a general matter, but even if there may be occasion to conclude otherwise, this is not one of them. Here, there is no nexus between the federal mandate that employees of federal contractors be vaccinated and economy and efficiency in federal procurement. The Court should not allow it.

3. The Associated General Contractors of America, Inc. ("AGC of America"), the Associated General Contractors of Texas, Highway, Heavy, Utilities & Industrial Branch ("AGC of Texas"), and TEXO, The Construction Association ("TEXO") (collectively, "Plaintiffs") bring this action for declaratory and injunctive relief against the Defendants, the United States, the President of the United States, and certain United States governmental agencies under the Federal Property and Administrative Services Act ("Procurement Act"), 40 U.S.C. § 101 *et seq.*; the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706; the Office of Federal Procurement Policy Act ("OFPPA"), as amended, 41 U.S.C. § 1707 *et seq.*; and fundamental principles embedded in the U.S. Constitution.

4. Plaintiffs' members are construction contractors. For the federal government, they construct courthouses, military housing, road and bridges, levees, ports, water and sewer pipelines, and a great variety of other major improvements to real property. Moreover, they construct such projects in both Texas and many other states, and in fact, around the world. Over the course of the pandemic, the federal government and the vast majority of states and localities have consistently considered their work to be essential, and they have therefore continued to perform with relatively little interruption. To do so, they have also devised and implemented effective measures to protect their employees from COVID-19. Today, they are well aware that COVID-19 vaccinations can also help protect their employees.

5. In both Texas and across the United States, Plaintiffs and their members have therefore funded or sponsored public service announcements and other positive and proactive measures intended to encourage everyone working in the construction industry to take advantage of the protection that COVID-19 vaccinations can provide.

6. In bringing this case, Plaintiffs do not question the safety or efficacy of COVID-19 vaccinations. Plaintiffs bring this case, rather, to challenge the legality of the Government's actions in developing and implementing a government-wide mandate that federal contractors and subcontractors ("Federal Contractors") require their employees to get vaccinated against COVID-19 (the "Vaccine Mandate").

7. As explained in greater detail below, the Vaccine Mandate is not authorized by any law or constitutional right available to the Government. Furthermore, even if the Vaccine Mandate were authorized by law, the process by which the Government developed and implemented it has been so bungled, and has rendered the mandate's application so arbitrary and capricious, that the Vaccine Mandate must be vacated for its many procedural infirmities alone.

8. The Government's creation and implementation of the Vaccine Mandate can be viewed as an administrative law tragedy in five parts. *First*, President Biden issued Executive Order 14042 (the "Executive Order") mandating actions he lacks legal authority to command. *Second*, the *ad hoc* Safer Federal Workplace Task Force ("Task Force") established by the President in January 2-2021 promulgated guidance for Federal Contractors ("Task Force Guidance"). *Third*, the Office of Management and Budget ("OMB") approved the Task Force Guidance and then—both on behalf of the President and in an exercise of authority that Congress has reserved for the Federal Acquisition Regulatory Council ("FAR Council")—ordered all executive departments subject to the Procurement Act ("Procurement Agencies"), to make that guidance mandatory for and binding upon essentially all Federal Contractors (the "OMB Order"). *Fourth*, the FAR Council then issued a government-wide memorandum acquiescing in the Task Force Guidance and the OMB Order, and advising the Procurement Agencies to resort to a uniform set of class deviations from the Federal Acquisition Regulation (FAR) to implement the Task Force Guidance. This action is both patently unlawful under federal procurement law, and implemented through improper procedure. *Fifth*, four of the Procurement Agencies responsible for the procurement of the lion's share of federal construction projects, Defendants the Department of Defense ("DoD"), Department of Veterans Affairs ("VA"), General Services Administration ("GSA"), and National Aeronautics and Space Administration ("NASA"), issued the unlawful class deviations directed unlawfully by the FAR Council.

9. The Procurement Act gives the President broad authority to promote economy and efficiency in federal procurement. But Congress did not intend through the Procurement Act to broadly authorize the President to establish public health policy. To be sure, COVID-19 is a

serious public health issue, but the Procurement Act is not concerned with public health, and does not authorize the President to effectuate public health policy on the backs of federal contractors.

10. Furthermore, statutory authority aside, the President is not authorized to implement procurement policy of any sort by executive edict. Congress created a separate agency—the FAR Council—to serve as the executive branch vessel through which procurement policy is implemented. The statutorily mandated process of executing procurement policy through the FAR Council was not followed here. Indeed, the entire Vaccine Mandate process has been flawed, both legally from its inception and procedurally through its ongoing implementation. The Executive Order set the entire process off in the wrong direction, proceeding from the false premise that the Procurement Act authorizes the President to direct the promulgation and enforcement of any such policy that he simply declares, without support, promotes economy and efficiency in federal procurement. At the President’s direction, OMB then usurped the role of the FAR Council, asserting the latter’s sole and exclusive statutory authority to set and determine the government-wide terms and conditions under which the federal government will procure the goods and services, including the construction, that it requires. The FAR Council then bent to the collective will of the President and OMB. Rather than amend the FAR, 48 C.F.R. § 1.000 *et seq.*, as federal law requires, the FAR Council advised the Procurement Agencies, across the government, to simply deviate from it. Following orders, at least four of those agencies then played their individual roles in a well-coordinated effort to evade the prescribed standards and procedures for amending the FAR.

11. Along the way, the Government has made a mockery of federal procurement law and process. Several of the Defendants have exceeded the legislative authority that Congress has delegated to them, in violation of fundamental principles of the U.S. Constitution. At least four of

the Procurement Agencies have exceeded their limited authority to issue class deviations from the FAR. And several of the participants in this convoluted scheme have also violated the APA.

12. Executive Order 14042 exceeds the President's statutory and constitutional authority. For their part, (i) the OMB Order adopting and directing the implementation of the Task Force Guidance, (ii) the FAR Council's memorandum acquiescing to the Task Force Guidance and OMB Order, and advising the Procurement Agencies to resort to a uniform set of class deviations from the FAR to implement the Task Force Guidance, and (iii) each of the four defendant Procurement Agencies' adoption of the FAR Council's uniform template class deviation from the FAR as its own were each final agency actions for purposes of the APA.

13. The Government's actions pose an imminent threat to Federal Contractors. In order to satisfy the January 18 deadline for full compliance with the Vaccine Mandate, Federal Contractors are required to have their covered employees receive their first dose of the Moderna vaccine on or before December 7, 2021, or their first dose of the Pfizer vaccine on or before December 14, 2021, and their second dose of either of those vaccines, or their single dose of the Johnson & Johnson vaccine, by January 4, 2022. Immediately, covered Federal Contractors also must develop and implement—in most cases, from whole cloth—a broad and complex set of policies and procedures for requiring vaccinations, for accommodating certain employees with medical conditions or sincerely held religious beliefs, and for reassigning, idling or terminating employees who are hesitant to get vaccinated for whatever reason.

14. The various obligations of the Vaccine Mandate will seriously disrupt Federal Contractor operations. The Vaccine Mandate will jeopardize timely completion of federal construction projects and impose substantial additional costs on the taxpayer. This Court should not allow it.

15. The Vaccine Mandate is being challenged in several other cases pending in federal courts across the country. Two federal courts, one in Kentucky and another in Georgia, have issued injunctions against implementation and enforcement of aspects of the Vaccine Mandate. The Government has sought stays and expedited appeals in both of these cases. The uncertainty surrounding the Vaccine Mandate warrants the issue of comprehensive injunctive relief by this Court in order to guard against massive disruption of the federal sector of the construction market, to the detriment of the public.

JURISDICTION AND VENUE

16. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 because this case presents questions arising under federal laws and the U.S. Constitution. Review of the President's action in issuing the Executive Order is appropriate under principles of non-statutory review. Review of the agency Defendants' actions in implementing the Executive Order is appropriate under the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

17. This Court is authorized to grant the requested declaratory and injunctive relief under 5 U.S.C. §§ 702 and 706, 28 U.S.C. §§ 2201-02, and principles of non-statutory review.

18. The Court also has jurisdiction to review and enjoin *ultra vires* or unconstitutional Presidential and agency action through an equitable cause of action.

19. Through the APA, the United States has waived sovereign immunity from this lawsuit.

20. Venue is proper in this judicial district under 28 U.S.C. § 1391(e) because certain of the Plaintiffs (AGC of Texas and TEXO) reside in this district and no real property is involved, and the actions that are the subject of this Complaint were taken, at least in material part, in this judicial district. The facts giving rise to this lawsuit occurred or had impacts, at least in material part, in the Fort Worth Division of this judicial district.

21. The Plaintiffs have standing because the Executive Order directly affects their members' interests. Indeed, many of their members regularly bid for and perform federal construction contracts and subcontracts in this judicial district. Protecting their members from the unquantifiable uncertainties and risks, and the immediate burdens and harms, all flowing from the implementation of Executive Order 14042, is within the heartland of Plaintiffs' mission and purpose, and no facts specific to any individual member need be decided that would otherwise necessitate the participation of that individual member company as a plaintiff in this lawsuit.

PARTIES

Plaintiffs

22. The Associated General Contractors of America, Inc. ("AGC of America") is a nationwide trade association of construction companies and related firms. It has served the construction industry since 1918, and over time, it has become the recognized leader of the industry in the United States. Today, AGC of America has more than 27,000 members in 88 chapters stretching from Puerto Rico to Hawaii. Among these members are more than 6,500 general contractors and over 9,000 specialty contractors. AGC of America has at least one chapter serving each and every state and a total of 11 chapters in the state of Texas. AGC members construct both public and private buildings, including offices and apartment buildings, hospitals, laboratories, schools, shopping centers, factories, and warehouses. They also construct highways, bridges, tunnels, dams, airports, industrial plants, pipelines, power plants, power lines, and both clean water and wastewater facilities. Across the United States, AGC members regularly bid for and perform federal construction contracts, including but not limited to contracts with the DoD entities including the U.S. Army Corps of Engineers and the Naval Facilities Engineering Command, GSA, VA, and the U.S. Department of State. AGC of America is incorporated in the District of Columbia and its mission is to advocate public policies that will expand and enhance the

construction industry, to offer educational programs and materials on topics of interest to its members, and to encourage dialogue not only among construction companies but also between those companies and related firms, including property owners and design professionals. The association also strives to maintain its members' longstanding commitment to skill, integrity and responsibility.

23. Plaintiff AGC of Texas, Highway, Heavy, Utilities & Industrial Branch ("AGC of Texas") is a chartered chapter of AGC of America. It is incorporated in Texas and headquartered in Travis County, Texas. For nearly 100 years, it has represented the interests of the highway and transportation contractors among the members of AGC of America in the state of Texas. For nearly 40 years, it has also represented the industrial, municipal and utility contractors among those members. AGC of Texas has over 650 members. Among them are more than 200 contractors and more than 450 firms in closely allied industries. Collectively, their annual volume of construction exceeds \$4 billion. Many of its members are engaged in public and private construction projects in this judicial district. The mission of the AGC of Texas is to advocate for professional and ethical standards that support cost-effective, quality construction. Its prime objective is to cultivate harmonious relations with supervising public authorities. To advance its mission and prime objective, AGC of Texas offers a broad range of specialized publications. It also hosts education and other events, and provides training, safety and other services. For the federal government, its members regularly construct infrastructure projects for the U.S. Army Corps of Engineers and the Federal Aviation Administration.

24. Plaintiff TEXO is a chartered chapter of AGC of America. It is incorporated in the State of Texas and maintains two physical offices—one in Dallas, Texas and one in Fort Worth, Texas. In 2009, it succeeded two chapters that had collectively represented the interests of the

building contractors among the members of AGC of America in a total of 60 counties in North and East Texas and the City of Fort Worth for many years. Today, TEXO is one of the largest chapters of AGC of America and one of the largest construction industry trade associations in the State of Texas. It has more than 300 members and the annual volume of their work exceeds \$18 billion. Many of its members are engaged in public and private construction projects in this judicial district. TEXO's mission is to build the best construction community through unity and leadership. To that end, TEXO provides its members with the many benefits of innovative programs, quality services and strategic alliances. Its three strategic priorities are: government representation, safety and skilled-craft training, and professional development, including leadership training. For the federal government, TEXO members regularly construct buildings that include hospitals, military housing and courthouses.

Defendants

25. Defendants are the President of the United States, certain United States governmental agencies identified below, and appointed officials of the United States government responsible for the challenged actions.

The President

26. Defendant Joseph R. Biden, Jr. sued in his official capacity, is the President of the United States who, on September 9, 2021, signed Executive Order 14042. 86 Fed. Reg. 50,985 (Sept. 9, 2021). Executive Order 14042 issued the Vaccine Mandate and physical distancing requirements consistent with Centers for Disease Control and Prevention ("CDC") community transmission guidelines for Federal Contractors, and instructed the Task Force to issue supporting compliance guidance for covered employers. Pursuant to Fed. R. Civ. P. 4(i), Defendant President Joseph R. Biden must be served by (A)(i) delivering a copy of the summons and complaint to the

Acting United States Attorney for the Northern District of Texas, Chad E. Meacham, at Burnett Plaza Suite 1700, 801 Cherry Street, Fort Worth, TX 76102-6882; (ii) sending a copy of each by registered or certified mail to Civil Process Clerk, U.S. Attorney for the Northern District of Texas, Fort Worth Division, Burnett Plaza Suite 1700, 801 Cherry Street, Fort Worth, TX 76102-6882; (B) sending a copy of each by registered or certified mail to the Attorney General of the United States at the U.S. Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001; and sending a copy of each by registered or certified mail to Joseph R. Biden, The President of the United States, The White House, 1600 Pennsylvania Avenue, N.W., Washington, D.C. 20500.

The Office of Management and Budget

27. Defendant OMB is an Executive Branch agency within the Executive Office of the President. Pursuant to Fed. R. Civ. P. 4(i), Defendant OMB must be served by (A)(i) delivering a copy of the summons and complaint to the Acting United States Attorney for the Northern District of Texas, Chad E. Meacham, at Burnett Plaza Suite 1700, 801 Cherry Street, Fort Worth, TX 76102-6882; (ii) sending a copy of each by registered or certified mail to Civil Process Clerk, U.S. Attorney for the Northern District of Texas, Fort Worth Division, Burnett Plaza Suite 1700, 801 Cherry Street, Fort Worth, TX 76102-6882; (B) sending a copy of each by registered or certified mail to the Attorney General of the United States at the U.S. Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001; and sending a copy of each by registered or certified mail to The Office of Management and Budget, c/o Shalanda Young, Acting Director, 725 17th Street, NW, Washington, D.C. 20503.

The Director of the Office of Management and Budget

28. Defendant Shalanda Young is the Acting Director of OMB, a member of the Task Force, and also represents the federal agency authorized to publish determinations relevant to

Executive Order 14042 to the Federal Register. She is sued in her official capacity. Pursuant to Fed. R. Civ. P. 4(i), Defendant Shalanda Young must be served by (A)(i) delivering a copy of the summons and complaint to the Acting United States Attorney for the Northern District of Texas, Chad E. Meacham, at Burnett Plaza Suite 1700, 801 Cherry Street, Fort Worth, TX 76102-6882; (ii) sending a copy of each by registered or certified mail to Civil Process Clerk, U.S. Attorney for the Northern District of Texas, Fort Worth Division, Burnett Plaza Suite 1700, 801 Cherry Street, Fort Worth, TX 76102-6882; (B) sending a copy of each by registered or certified mail to the Attorney General of the United States at the U.S. Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001; and sending a copy of each by registered or certified mail to Shalanda Young, Acting Director of the Office of Management and Budget, The Office of Management and Budget, 725 17th Street, NW, Washington, D.C. 20503.

Federal Acquisition Regulatory Council

29. Defendant FAR Council is an Executive Branch agency responsible for “manag[ing], coordinat[ing], control[ing], and monitor[ing] the maintenance of, issuance of, and changes in, the Federal Acquisition Regulation.” 41 U.S.C. § 1303(d). Pursuant to Fed. R. Civ. P. 4(i), Defendant FAR Council must be served by (A)(i) delivering a copy of the summons and complaint to the Acting United States Attorney for the Northern District of Texas, Chad E. Meacham, at Burnett Plaza Suite 1700, 801 Cherry Street, Fort Worth, TX 76102-6882; (ii) sending a copy of each by registered or certified mail to Civil Process Clerk, U.S. Attorney for the Northern District of Texas, Fort Worth Division, Burnett Plaza Suite 1700, 801 Cherry Street, Fort Worth, TX 76102-6882; (B) sending a copy of each by registered or certified mail to the Attorney General of the United States at the U.S. Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001; and sending a copy of each to the FAR Council by registered or certified mail to the attention of the FAR Council Chair, Matthew C. Blum, Acting Administrator,

Office of Federal Procurement Policy, Office of Management and Budget, Washington, D.C. 20503.

Procurement Agencies

30. Defendant GSA is an Executive Branch agency that routinely contracts with Plaintiffs' members. Pursuant to Fed. R. Civ. P. 4(i), Defendant GSA must be served by (A)(i) delivering a copy of the summons and complaint to the Acting United States Attorney for the Northern District of Texas, Chad E. Meacham, at Burnett Plaza Suite 1700, 801 Cherry Street, Fort Worth, TX 76102-6882; (ii) sending a copy of each by registered or certified mail to Civil Process Clerk, U.S. Attorney for the Northern District of Texas, Fort Worth Division, Burnett Plaza Suite 1700, 801 Cherry Street, Fort Worth, TX 76102-6882; (B) sending a copy of each by registered or certified mail to the Attorney General of the United States at the U.S. Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001; and sending a copy of each by registered or certified mail to the GSA at NASA Headquarters, 300 E. Street SW, Suite 5R30, Washington, DC 20546.

31. Defendant VA is an Executive Branch agency that routinely contracts with Plaintiffs' members. Pursuant to Fed. R. Civ. P. 4(i), Defendant VA must be served by (A)(i) delivering a copy of the summons and complaint to the Acting United States Attorney for the Northern District of Texas, Chad E. Meacham, at Burnett Plaza Suite 1700, 801 Cherry Street, Fort Worth, TX 76102-6882; (ii) sending a copy of each by registered or certified mail to Civil Process Clerk, U.S. Attorney for the Northern District of Texas, Fort Worth Division, Burnett Plaza Suite 1700, 801 Cherry Street, Fort Worth, TX 76102-6882; (B) sending a copy of each by registered or certified mail to the Attorney General of the United States at the U.S. Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001; and sending a copy of each

by registered or certified mail to the VA at the U.S. Department of Veterans Affairs, Office of Administration, 810 Vermont Avenue, NW, Washington, D.C. 20420.

32. Defendant DoD is an Executive Branch agency that routinely contracts with Plaintiffs, through a number of entities within DoD, including the U.S. Army Corps of Engineers. Pursuant to Fed. R. Civ. P. 4(i), Defendant DoD must be served by (A)(i) delivering a copy of the summons and complaint to the Acting United States Attorney for the Northern District of Texas, Chad E. Meacham, at Burnett Plaza Suite 1700, 801 Cherry Street, Fort Worth, TX 76102-6882; (ii) sending a copy of each by registered or certified mail to Civil Process Clerk, U.S. Attorney for the Northern District of Texas, Fort Worth Division, Burnett Plaza Suite 1700, 801 Cherry Street, Fort Worth, TX 76102-6882; (B) sending a copy of each by registered or certified mail to the Attorney General of the United States at the U.S. Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001; and sending a copy of each by registered or certified mail to the U.S. Department of Defense, Office of the Secretary of Defense, 1000 Defense Pentagon, Washington, D.C. 20301-1000.

33. Defendant NASA is an Executive Branch agency that routinely contracts with Plaintiffs' members. Pursuant to Fed. R. Civ. P. 4(i), Defendant NASA must be served by (A)(i) delivering a copy of the summons and complaint to the Acting United States Attorney for the Northern District of Texas, Chad E. Meacham, at Burnett Plaza Suite 1700, 801 Cherry Street, Fort Worth, TX 76102-6882; (ii) sending a copy of each by registered or certified mail to Civil Process Clerk, U.S. Attorney for the Northern District of Texas, Fort Worth Division, Burnett Plaza Suite 1700, 801 Cherry Street, Fort Worth, TX 76102-6882; (B) sending a copy of each by registered or certified mail to the Attorney General of the United States at the U.S. Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001; and sending a copy of each

to NASA by registered or certified mail at NASA Headquarters, 300 E. Street SW, Suite 5R30, Washington, DC 20546.

LEGAL BACKGROUND

The Federal Property and Administrative Services Act

34. Following World War II, Congress enacted the Procurement Act “to provide the [f]ederal [g]overnment with an economical and efficient system” for certain enumerated activities, including “[p]rocurring and supplying property and nonpersonal services,” “establish[ing] . . . pools or systems of transportation of [g]overnment personnel,” and “manag[ing] of public utility services.” 40 U.S.C. § 101.

35. To effectuate the Procurement Act, Congress authorized the President to “prescribe policies and directives that the President considers necessary to carry out” that statute. *Id.* at § 121(a). Notably, in the Procurement Act, Congress did not authorize the President to issue regulations with the force or effect of law, as it authorized the General Services Administrator to do. *Compare id.* at § 121(a) (“prescribe policies and directives”), *with id.* at § 121(c) (“prescribe regulations”).

36. Over time, however, the Procurement Act proved inadequate to control the lack of coordination across federal agencies, and the proliferation of procurement regulations by different agencies led to a morass of legal requirements.¹ In 1979, Congress directed the Office of Federal Procurement Policy (“OFPP”)—part of the OMB—to “issue policy directives . . . for the purpose of promoting the development and implementation of [a] uniform procurement system,” with

¹ *See generally* Cong. Rsch. Serv., R42826, *The Federal Acquisition Regulation (FAR): Answers to Frequently Asked Questions 10* (2015), <https://perma.cc/W9ZT-DGT2> (quoting United States Comm’n on Gov’t Procurement, Report of the Commission on Government Procurement, Vol. 1, at 33 (1972)).

concurrence of the OMB's Director. *See* Office of Federal Procurement Policy Amendments Act of 1979, Pub. L. No. 96-83, § 4(e), 93 Stat. 650.

37. In 1983, under the policy directive of the Administrator of the OFPP, DoD, GSA and NASA jointly promulgated the first version of the Federal Acquisition Regulation ("FAR"). 48 Fed. Reg. 42,102 (Sept. 19, 1983).

38. Even after creation of the FAR, however, "[r]edundancies and inconsistencies continue[d] to exist between the [FAR] and agency supplementing regulations implementing the Regulation." S. Rep. No. 100-424, at 13-14 (quoting study prepared by Office of Management and Budget Director Tom Daley (Nov. 1986)).

39. In 1988, Congress established the FAR Council "to assist in the direction and coordination of [g]overnment-wide procurement policy and [g]overnment-wide procurement regulatory activities in the [f]ederal [g]overnment." Office of Federal Procurement Policy Act Amendments of 1988, Pub. L. No. 100-679, § 3, 102 Stat. 4056, *codified at* 41 U.S.C. § 1302(a).⁶ 84.² The FAR Council consists of the OFPP Administrator, the Secretary of Defense, the Administrator of NASA, and the GSA Administrator. 41 U.S.C. § 1302(b).

40. Subject to limited exceptions not relevant here, the FAR Council has exclusive authority to issue "a single [g]overnment-wide procurement regulation, to be known as the Federal Acquisition Regulation." *Id.* at § 1303(a)(1). No other agency is authorized to issue government-wide procurement regulations. *Id.* at § 1303(a)(2).

² *See* S. Rep. No. 100-424, at 4 ("[The Office of Federal Procurement Policy]'s performance as the [f]ederal [g]overnment's procurement policy leader has been uneven. . . . [M]any of the procurement executives, industry officials and other procurement experts . . . rated [the Office]'s overall performance during this as being no more than marginally [e]ffective." (quoting Assessment of the Office of Federal Procurement Policy, GAO/NSIAD-88-35 (No. 1987))).

The Office of Federal Procurement Policy Act

41. The OFPPA requires that any “procurement policy, regulation, procedure, or form”—whether issued governmentwide by the FAR Council or for one agency by that agency—be subject to notice and comment. 41 U.S.C. § 1707(a)-(b). More specifically, this Act requires that:

[A] procurement policy, regulation, procedure, or form (including an amendment or modification thereto) may not take effect until 60 days after it is published for public comment in the Federal Register . . . 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.

Id. at § 1707(a). The relevant official may waive that requirement only if “urgent and compelling circumstances make compliance with the requirements impracticable.” *Id.* at § 1707(d).

The Prescribed Standards and Procedures for Amending the FAR

42. The FAR was promulgated, and may only be amended, through the same rulemaking procedures used by other federal agencies in promulgating regulations: either the FAR Council or the Administrator of OFPP must issue proposed and final rules amending the FAR under the “notice-and-comment” procedures of the APA. 5 U.S.C. § 553. No other agency, entity, or office—including the President—is authorized to amend the FAR.

43. The APA sets out four basic requirements agencies must follow when issuing rules using notice-and-comment, or informal, rulemaking:

- (1) The publication of a proposed rule in the Federal Register, 5 U.S.C. § 553(b);
- (2) The opportunity for interested persons to submit comments on the proposed rule, 5 U.S.C. § 553(c);
- (3) The publication of a final rule that includes a “concise general statement” of the “basis and purpose” of the rule, 5 U.S.C. § 553(d);

and

(4) A 30-day waiting period after the final rule is published in the Federal Register before the rule can take effect, *id.*

44. If necessary, agencies can invoke a “good cause” exception to some of these requirements. 5 U.S.C. § 553(b)(3)(B). Interim final rulemaking is one particular application of the “good cause” exception that, if justified by the particular circumstances, allows an agency to issue a rule without *prior* notice and comment. Instead, if the agency finds that notice and comment would be “impracticable, unnecessary, or contrary to the public interest,” the agency can instead issue an “interim” rule, provided it also takes post-promulgation comments and amends the rule subsequently, as appropriate, based on those comments. *Id.*

The Prescribed Standards and Procedures for Issuing Class Deviations

45. The FAR empowers agencies to authorize certain deviations from the FAR’s contracting clauses and provisions, FAR 1.402; FAR 1.400, for both individual contract actions, FAR 1.403, or a class of more than one contract, FAR 1.404.

46. An agency may use a FAR deviation to issue policies, procedures, solicitation provisions, contract clauses or other practices that are “*inconsistent with the FAR,*” or “that *are not incorporated into [supplemental] agency acquisition regulations[.]*” FAR 1.401(a), (f) (emphasis added).

47. Importantly, class deviations are designed to be temporary. A federal agency is explicitly required to propose a revision to the FAR if it “knows that it will require a class deviation on a permanent basis.” FAR 1.404.

48. Furthermore, class deviations must still follow the 60-day notice procedure set forth in the OFPPA. 41 U.S.C. § 1707(a)(1). Failure to publish a class deviation in accordance with the OFPPA will render the deviation “unenforceable as a matter of law.” *Sunoco, Inc. v. United*

States, 59 Fed. Cl. 390, 396 (2004); *see also La Gloria Oil & Gas Co. v. United States*, 56 Fed. Cl. 211, 221-22 (2003); *Williams Ala. Petrol., Inc. v. United States*, 57 Fed. Cl. 789, 802 (2003); *Tesoro Haw. Corp. v. United States*, 58 Fed. Cl. 65, 72 (2003).

FACTUAL BACKGROUND

49. It is impossible to square the Government’s actions in developing and implementing the Vaccine Mandate with federal procurement law and policy set out above, not to mention the fundamental constitutional questions implicated by the Vaccine Mandate. The reality is that the Vaccine Mandate is just another manifestation of the administration’s public health policy toward COVID-19, dressed up in federal procurement clothing. To reiterate, Plaintiffs do not question the wisdom and efficacy of COVID-19 vaccines. But our legal system does not permit the Executive Branch “to act unlawfully even in pursuit of desirable ends.” *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021). “[E]ven in a pandemic, the Constitution cannot be put away and forgotten.” *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63, 68 (2020).

Actions Taken in Advance of Executive Order 14042

The President Creates the Task Force

50. On January 20, 2021, President Biden issued an Executive Order on Protecting the Federal Workforce and Requiring Mask Wearing. Exec. Order No. 13,991, 86 Fed. Reg. 7,045 (Jan. 20, 2021). This executive order’s expressly stated purpose is “to halt the spread of coronavirus disease 2019 (COVID-19) by relying on the best available data and science-based public health measures” by requiring compliance with CDC policies for mask-wearing and maintaining physical distance for on-site or on-duty federal employees and on-site contractors, and people in federal buildings or on federal land. *Id.* §§ 1, 2(a). The Order makes no reference to anyone working off-site for private companies.

51. Executive Order 13,991 also established the Task Force. The Task Force has three co-chairs: the Director of the Office of Personnel Management, the Administrator of GSA, and the COVID-19 Response Coordinator. Other Task Force members include the Director of OMB; the Director of the Federal Protective Service; the Director of the United States Secret Service; the Administrator of the Federal Emergency Management Agency; the Director of the CDC, and “the heads of such other agencies as the Co-Chairs may individually or jointly invite to participate.” *Id.* § 4(b). Notably absent from the Task Force are representatives from two agencies on the FAR Council: DOD and NASA.

52. The Task Force’s stated mission is to “provide ongoing guidance to heads of agencies on the operation of the Federal Government, the safety of its employees, and the continuity of Government functions during the COVID-19 pandemic.” *Id.* § 4(e). The guidance is required to be based on “public health best practices,” and address, among other things, “vaccine prioritization, distribution, and administration,” and coordination with stakeholders including “business, union, academic, and other community leaders.” *Id.* §4(e)(ix), (x). Notably omitted from the mission statement is any reference to either economy or efficiency in federal procurement. Indeed, Executive Order 13991 makes no reference whatsoever to procurement practices.

The President Announces His Plan to Mitigate the Pandemic’s Impact on Public Health

53. On September 9, 2021, President Biden announced his COVID-19 Action Plan. Its stated objective was to implement “a six-pronged, comprehensive national strategy that employs the same science-based approach that was used to successfully combat previous variants of COVID-19 earlier this year.” *Path Out of the Pandemic: President Biden’s COVID-19 Action Plan*, THE WHITE HOUSE, <https://www.whitehouse.gov/covidplan/> (last visited Nov. 10, 2021).

54. One feature of this strategy bears the title “Vaccinating the Unvaccinated.” *Id.* Its stated objective was to “reduce the number of unvaccinated Americans **by using regulatory powers**

and other actions to substantially increase the number of Americans covered by vaccination requirements—these requirements will become dominant in the workplace.” *Id.* (emphasis added).

55. In addition to employees working for Federal Contractors, the plan called for the vaccination of federal workers (which the Administration had initiated even before unveiling the plan), health care workers (at Medicare and Medicaid-participating hospitals and in other health care settings), and everyone working for private companies with 100 or more employees (with an exception, in that case, for those willing to submit to periodic testing). *Id.* Through separate procedures, the Centers for Medicare and Medicaid Services (“CMS”) and the Occupational Safety and Health Administration (“OSHA”) promulgated rules in the Federal Register on November 5 to implement these latter two vaccine mandates.³

56. As did Executive Order 13991, the President’s September 9 announcement focused on public health and made no reference to either economy or efficiency in federal procurement.

Executive Order 14042 and its Aftermath

57. After the President had established the Task Force and announced his plan, the President and other Defendants implemented an unprecedented and irregular process to develop and implement the government-wide Vaccine Mandate. Implementation involved the five steps described below, each of which is unlawful. *First*, President Biden issued Executive Order 14042. *Second*, the Task Force promulgated the Task Force Guidance for Federal Contractors. *Third*,

³ Both actions are the subject of numerous lawsuits around the country and courts have stayed both rules. *See BST Holdings, L.L.C. v. Occupational Safety & Health Admin.*, 17 F.4th 604, 618 (5th Cir. 2021) (staying OSHA rule); *Louisiana v. Becerra*, No. 3:21-CV-03970, 2021 WL 5609846, at *1 (W.D. La. Nov. 30, 2021) (staying CMS rule). Courts in Georgia and Kentucky have also stayed this Vaccine Mandate. *Georgia v. Biden*, No. 1:21-CV-163, 2021 WL 5779939, at *12 (S.D. Ga. Dec. 7, 2021); *Kentucky v. Biden*, No. 3:21-CV-00055-GFVT, 2021 WL 5587446 (E.D. Ky. Nov. 30, 2021). The Government is appealing those decisions.

OMB approved (and later reapproved) the Task Force Guidance and ordered the Procurement Agencies to implement it. *Fourth*, the FAR Council issued a government-wide memorandum advising the Procuring Agencies to implement the Task Force Guidance via class deviations to the FAR. *Fifth*, at least four of the Procurement Agencies responsible for the procurement of federal construction projects issued such deviations, requiring inclusion of a clause in covered contracts ordering Federal Contractors to comply with the Vaccine Mandate.

Step One: President Biden Issues the Challenged Executive Order

58. On September 9, 2021, President Biden issued an Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors—which lies at the heart of this action. Exec. Order 14,042, 86 Fed. Reg. 50,985 (Sep. 9, 2021). The authority that the President cited for issuing Executive Order 14042 was the Constitution, the Procurement Act, 40 U.S.C. § 101 *et seq*, and the President’s statutory delegation authority, 3 U.S.C. § 301. *See id.* § 1.

59. The stated purpose of the Order is the following:

[to] promote[] economy and efficiency in Federal procurement by ensuring that the parties that contract with the Federal Government provide adequate COVID-19 safeguards to their workers performing on or in connection with a Federal Government contract or contract-like instrument These safeguards will decrease the spread of COVID-19, which will decrease worker absence, reduce labor costs, and improve the efficiency of contractors and subcontractors at sites where they are performing work for the Federal Government. Accordingly, ensuring that Federal contractors and subcontractors are adequately protected from COVID-19 will bolster economy and efficiency in Federal procurement.

Id. § 2.

60. The Executive Order does not provide or refer to any data or other factual support for the proposition that “[t]hese safeguards” would “decrease worker absence, reduce labor costs, [or] improve the efficiency of contractors and subcontractors at sites where they are performing work for the Federal Government.” *See id.* Indeed, the Executive Order neglects to identify, let

alone explain, the specific safeguards that it asserts to have these effects, or otherwise to specify their substance. *See id.*

61. Instead, the Executive Order heads in a different direction, directly addressing all “[e]xecutive departments and agencies, including independent establishments subject to the [Procurement Act]” and purporting to mandate, with the force of law, that they include a prescribed clause in their “contracts and contract-like instruments.” *Id.* § 2(a). By reference, that clause incorporates the Task Force Guidance, and purports, in turn, to require Federal Contractors to comply with that guidance. *Id.*

62. Specifically, the Executive Order also provides that the Safer Federal Workforce Task Force “shall” issue Task Force Guidance “for contractor or subcontractor workplace locations,” *id.* § 2(a), and it requires that guidance to include:

- definitions of relevant terms for contractors and subcontractors;
- explanations of protocols required of contractors and subcontractors to comply with workplace safety guidance; and,
- exceptions, if any, to Task Force Guidance that apply to contractor and subcontractor workplace locations and individuals in those locations working on or in connection with a Federal Government contract or contract-like instrument.

Id. § 2(b).

63. The Executive Order provides that the Task Force Guidance “shall” become binding upon all Procurement Agencies, directly requiring them to insert the prescribed clause into their “contracts and contract-like instruments,” if it meets with the approval of the OMB Director, and the Director determines, in her uncircumscribed discretion, “that the Guidance, if adhered to by contractors or subcontractors, will promote economy and efficiency in federal contracting.” *Id.* §2(c). In addition, the Executive Order requires the OMB Director to publish the Task Force

Guidance, and changes to that guidance which “will promote economy and efficiency,” in the Federal Register. *Id.* § 3(c).

64. The Executive Order also states that the FAR Council “shall” amend the FAR to provide for the incorporation of the prescribed clause into “solicitations and contracts,” and shall take “initial steps” in that direction by October 8, 2021, by “recommending that agencies exercise their authority under subpart 1.4 of the [FAR]” (addressing Class Deviations). *Id.* § 3(a).

65. This Executive Order sets up a framework through which the Task Force Guidance will change over time and, in lockstep, the actions and measures that Federal Contractors and subcontractors will be required to take and implement in order to comply with *existing* contracts will also change, without consideration.

66. The Executive Order also states that the OMB Director has the power to determine that the Task Force Guidance will promote economy and efficiency in federal procurement “as an exercise of the delegation of [the President’s] authority under the [Procurement Act]”. *See* 86 Fed. Reg. 50,985 at § 2(c).

67. The Executive Order extends its requirements to all contracts and contract-like documents, and subcontracts for services, construction, or a leasehold interest in real property; contracts and subcontracts for services covered by the Service Contract Act, 41 U.S.C. 6701 *et seq.*; contracts and subcontracts for concessions; and contracts “entered into with the Federal government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public.” *See id.* § 5(a).

68. The Executive Order’s only exceptions are limited ones for contracts or subcontracts whose value is equal to or less than the Simplified Acquisition Threshold (currently \$250,000); subcontracts that are solely for the provision of products; and work performed work

outside the United States or its outlying areas, as defined in FAR 2.101; and contracts with Indian Tribes under the Indian Self-Determination and Education Assistance Act. *See id.* § 5(b).

69. The Executive Order requires the prescribed contract clause to be incorporated into all new applicable solicitations and contracts after October 15, 2021—subject to a limited 30-day grace period for certain awards of contracts that the federal government solicited before the October 15, 2021 effective date. *Id.* § 6(a), (b). The Executive Order also requires that the prescribed clause be incorporated into applicable existing contracts that have an option exercised or are extended/renewed after November 14, 2021. *Id.* § 6(a).

70. Finally, the Executive Order also “strongly encourages” agencies to incorporate the new clause into contracts entered before the effective date. 86 Fed. Reg. 50,985 at §6(c).

***Step Two: The Task Force Publishes Its Guidance for Federal Contractors,
Including a Vaccine Mandate***

71. On September 24, 2021, the Task Force published 14 pages of initial guidance for Federal Contractors. *See COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors*, SAFER FEDERAL WORKFORCE TASK FORCE (Sept. 24, 2021)⁴. On November 10, 2021, the Task Force published new guidance and rescinded its initial guidance. *COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors*, SAFER FEDERAL WORKFORCE TASK FORCE (Nov. 10, 2021) (“Task Force Guidance”).⁵ This new guidance modified the initial guidance by (1) changing the deadline for Federal Contractors’ covered employees to become fully vaccinated to January 18, 2021; and (2) replacing a list of Frequently

⁴ Available at https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf.

⁵ Available at https://www.saferfederalworkforce.gov/downloads/Guidance%20for%20Federal%20Contractors_Safer%20Federal%20Workforce%20Task%20Force_20211110.pdf.

Asked Questions (“FAQs”) with a link to the webpage where the Task Force had posted the same questions and answers and adding a link to all Task Force Guidance documents.

72. The Task Force Guidance imposes a broad range of requirements on Federal Contractors, including a broadly applicable requirement for vaccinations, protocols for the masking and physical distancing those working in covered workplaces, and responsibilities for monitoring compliance. *See id.* at 1. These requirements must also be flowed down to subcontractors. *Id.*

73. The Vaccine Mandate applies to all contractor and subcontractor employees who work “on or in connection with” a “covered” contract or subcontract. *Id.*

74. A contract or subcontract is “covered” if it includes the clause described in Section 2(a) of Executive Order 14042. *Id.* at 3.

75. The Task Force Guidance provides that the vaccine mandate applies to employees who work “on” a covered contract or subcontract, without regard to whether the employees work “onsite,” in a federal workplace, in a Federal Contractor’s office or other facilities, or as fully-remote employees based in their own homes. *Id.* at 1, 3-4. An employee who works from his or her home in support of a federal contract is subject to the vaccine mandate even if he or she never enters a federal facility or contractor workplace, nor has in-person interactions with any other employees. *Id.* at 4. The vaccine mandate also applies to employees who work outdoors. *Id.* The vaccine mandate also applies across the country, without regard to the vaccination rates, the infection rates, or the transmission rates in any one area.

76. The Task Force Guidance broadly defines employees who work “in connection with” a covered contract or subcontract to include any employee “who performs duties necessary to the performance of the covered contract, but who are not directly engaged in performing the

specific work called for the by the contract.” *Id.* at 3. As examples, the Guidance listed “human resources, billing, and legal review,” without offering any framework for what business activities, if any, would be considered “necessary to the performance” of a covered contract. *FAQs Federal Contractors, Scope of Applicability of Task Force Guidance for Federal Contractors*, SAFER FEDERAL WORKFORCE FAQs, Federal Contractors (last accessed Nov. 24, 2021) <https://www.saferfederalworkforce.gov/faq/contractors/>.

77. The Task Force Guidance also extends its vaccination mandate to all employees who work at a “covered contractor workplace”—regardless of whether the employees work “on or in connection with” a covered contract or subcontract. *COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors* at 1.

78. The Task Force Guidance broadly defines “covered contractor workplace” as “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.” *Id.* at 4 (emphasis added).

79. The Task Force Guidance elaborates that an employee who is likely to come into contact with an employee who works “on or in connection with” a federal contract or subcontract in a workplace will be subject to the vaccine mandate. *FAQs Federal Contractors, Workplaces*, SAFER FEDERAL WORKFORCE FAQs, Federal Contractors (last accessed Nov. 24, 2021) <https://www.saferfederalworkforce.gov/faq/contractors/>. This includes “common areas such as lobbies, security clearance areas, elevators, stairwells, meeting rooms, kitchens, dining areas, and parking garages.” *Id.* In the construction industry, such a workplace could, for example, include any jobsite that a senior safety director—ultimately responsible for the safety of everyone working on all of the company’s projects—has occasion to inspect. Such a workplace could include an

entirely private construction jobsite hundreds of miles from any federal construction jobsite. The Task Force Guidance does not require craft workers employed at such a workplace, or anyone else working for a construction contractor, to have any involvement in any federal construction project, whether direct or indirect, in order to be subject to the Vaccine Mandate.

80. The Task Force Guidance declares that the deadline for full vaccination of covered contracts to be the earlier of January 18, 2022, or the first date of the period of performance for contracts that are not being performed on or before the effective date. *COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors* at 5.

81. A person is considered “fully vaccinated” two weeks after receiving a single-dose vaccine or two weeks after receiving the second dose in a two-dose vaccine series, which requires a 21-day or 28-day period between doses. To be fully vaccinated by January 18, 2022, employees must receive the first dose of the two-dose series on or before December 7, 2021 for the Moderna vaccine or December 14, 2021 for the Pfizer vaccine, and must receive a single-dose vaccine or the second dose in a two-dose series by January 4, 2022.

82. The Task Force Guidance also provides that covered contractors “must check the CDC COVID-19 Data Tracker County View website for community transmission information in all areas where they have a covered contractor workplace at *least weekly* to determine proper workplace safety protocols” above or beyond the Vaccine Mandate. *Id.* at 7 (emphasis added).

Step Three: OMB Approves the Task Force Guidance and Orders its Implementation

83. Executive Order 14042 required the OMB Director to “determine that [the Task Force G]uidance will promote economy and efficiency in Federal contracting if adhered to by Government contractors and subcontractors.” 86 Fed. Reg. 53,691 (Sept. 28, 2021).

84. On September 24, 2021—the same day as the Task Force issued its Guidance—OMB published the OMB Order approving that Guidance. *Id.* The OMB Order explained that the

OMB Acting Director “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.” *Id.*

85. The OMB Order did not explain how the OMB Director reached the conclusion that the workplace safety protocols included in the Task Force Guidance would lead to—or are connected to—“economy and efficiency in Federal procurement.” *See id.* Nor did the OMB Order explain how the protocols will “decreas[e] labor costs for contractors and subcontractors working on or in connection with a Federal Government contract.” *Id.*

86. On November 10, 2021, OMB rescinded and superseded the September OMB Order and reissued it with a “Revised Economy & Efficiency Analysis” for the OMB Order (the “Revised Analysis”), and on November 16, 2021, OMB Published that Revised Analysis in the Federal Register. *See* 86 Fed. Reg. 63,418 (Nov. 16, 2021). This Revised Analysis reiterated OMB’s earlier determination that the Vaccine Mandate “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.” *Id.* at § 1.

87. The Revised Analysis also stated that the Vaccine Mandate is necessary because “COVID-19 is a highly communicable disease that tends to spread between people who are indoors, sharing space, and in close quarters—conditions common in typical workplaces.” *Id.* at § 2.

88. Each of the material conclusory assertions contained in the Revised Analysis is contrary to, and demonstrably refuted by, publicly available facts.

89. Nowhere did the Revised Analysis acknowledge the unique characteristics of the construction industry or its workforce, offer a definition or explanation of what constitute “typical workplaces,” or offer any explanation of why the Vaccine Mandate would promote economy and efficiency even in workplaces where employees do not work in shared spaces or close quarters, or even indoors.

90. To the contrary, the Revised Analysis cited and relied on evidence that vaccination mandates had led only a few employees of three non-construction companies to quit their jobs, and on sheer speculation that replacing such employees would be a relatively small, one-time expense:

While anecdotal reports suggest that vaccine mandates may lead some workers to quit their jobs rather than comply, which could create some cost associated with replacing them, ***we know of no systematic evidence that this has been a widespread phenomenon, or that it would be likely to occur among employees of Federal contractors.*** In fact, the experience of private companies is to the contrary. For example, United Airlines reported in October 2021 that 99.7 percent of the airline’s workforce complied with the vaccination requirements, Tyson Foods reported more than 96 percent of its workforce is now vaccinated, and healthcare providers such as California’s Kaiser Permanente reported placing only two percent of employees on administrative leave for failing to comply with vaccine requirements. And finally, ***even if some non-negligible number of workers were to quit rather than comply with a vaccine mandate, the cost of replacing those workers would be a one-time cost, while the benefits of increased vaccination (including among replacement workers, who would be vaccinated) would be long-lasting.***

Id. (emphasis added).

91. The only authority for this statement by OMB was a *Fortune* magazine article from September 28, 2021, which referred only to non-construction companies’ vaccination mandates.

Id. (citing Jennifer Alsever, *A third of unvaccinated workers would rather get jobs than lose their*

jobs, FORTUNE (Sept. 28, 2021) <https://fortune.com/2021/09/28/a-third-of-unvaccinated-workers-would-rather-get-jobs-than-lose-their-jobs/>).

Step Four: FAR Council Issues Template for Class Deviations from the FAR

92. On September 30, 2021, on the strength of the original OMB Order, the FAR Council issued a memorandum regarding “Issuance of Agency Deviations to Implement Executive Order 14042” (FAR Council Memo”). That memorandum provided “initial direction for the incorporation of a clause into [the Procuring Agencies’] solicitations and contracts” in order “to implement” the Task Force Guidance. *Memorandum for Chief Acquisition Officers: Issuance of Agency Deviations to Implement Executive Order 14042*, FEDERAL ACQUISITION REGULATION COUNCIL (Sept. 30, 2021) (the “FAR Council Memo”).

93. The FAR Council Memo provided a template for a FAR Class Deviation Clause that agencies could incorporate into contracts: FAR 52.223-99, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors (OCT 2021) (DEVIATION) (“FAR Council Template”). *Id.* at 4-5.

94. The FAR Council Template, FAR 52.223-99, derives directly from the OMB Order, and includes the requirement that contractors maintain current awareness of the Task Force Guidance. *Memorandum for Chief Acquisition Officers: Issuance of Agency Deviations to Implement Executive Order 14042*, FEDERAL ACQUISITION REGULATION COUNCIL (Sept. 30, 2021) at 5 (“The Contractor shall comply with all guidance, including guidance conveyed through Frequently Asked Questions, as amended during the performance of this contract, for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force”). This by itself is unprecedented and audacious. No FAR clause requires compliance with a set of requirements that the federal government, as one of the parties to the contract, has the power to change, without providing the contractor with an equitable adjustment of the contract price. *See*,

e.g., FAR 52.236-7 (requiring contractor to obtain necessary building permits at no additional cost to the federal government).

95. The FAR Council Template requires that Federal Contractors incorporate, or “flow down,” the clause into their subcontracts for services, including construction, at any tier, so long as the contract is performed within the U.S. or its outlying areas and valued above the Simplified Acquisition Threshold. *Id.*

96. The FAR Council Memo also reported that it had opened FAR Case 2021-21 “to make appropriate amendments in the FAR to reflect the requirements of the order” and encouraged agencies “to make their deviations effective until the FAR is amended or the deviation is otherwise rescinded by the agency.” *Id.*

97. As of the date of this filing, neither the FAR Council Memo nor the FAR Council Template has been published to the Federal Register. Nor has the FAR Council published any interim final rule, as required by both the Procurement Act and the APA, on which the public would at least have an opportunity to comment.

Step Five: Procurement Agencies Issue Class Deviations

98. In accordance with the FAR Council Memo, and as the OMB Order directs, various procurement agencies issued class deviations. Each of these deviations directs the Procurement Agency to include a clause ordering Federal Contractors comply with the Vaccine Mandate in all covered contracts.

99. On September 30, 2021, GSA issued a memorandum entitled “Class Deviation—Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors,” (the “GSA Memo”)

which provided instructions to GSA contracting officers⁶ for incorporating the FAR Council Template into GSA contracts.

100. The GSA Memo approved Class Deviation CD-2021-13 from the FAR. *Memorandum for All GSA Contracting Activities: FAR Class Deviation - Implementation of Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors*, GSA OFFICE OF ACQUISITION POLICY (MV) (Sept. 30, 2021). The class deviation includes the FAR Council Template, FAR 52.223-99, set forth in the FAR Council Memo. *Id.*

101. The GSA Memo stated that the authority for the class deviation is FAR 1.404 and General Services Administration Acquisition Manual (“GSAM”) 501.404. *Id.* at 4.

102. On October 1, 2021, DoD issued a memorandum entitled “Class Deviation—Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors,” (the “DoD Memo”), which provides instructions to DoD contracting officers for incorporating the FAR Council Template into DoD contracts. *Memorandum for Commanders, United States Cyber: Class Deviation—Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors*, OFFICE OF THE UNDER SECRETARY OF DEFENSE (Oct. 1, 2021). This class deviation applies to all DoD sub-entities, including the U.S. Army Corps of Engineering (“USACE”) and the Naval Facilities Engineering Systems Command (“NAVFAC”), with which the plaintiffs’ members regularly contract.

103. Like the GSA Memo, the DoD Memo included the FAR Council Template set forth in the FAR Council Memo, and entitled, for DoD purposes, Defense FAR Supplement (“DFARS”)

⁶ Contracting Officers are agency officials authorized to enter into, administer, or terminate contracts. *See* FAR 1.602-1.

252.223-7999, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors (Deviation 2021-O0009). *Id.* at 3.

104. The DoD Memo provides that, effective immediately, DFARS 252.223-7999 shall be incorporated into certain solicitations and contracts in accordance with Executive Order 14,042. *Id.* at 1.

105. The DoD Memo does not state the basis for the authority to issue the purported class deviation. *See id.*

106. On October 1, 2021, the VA issued a memorandum entitled “Class Deviation from the Federal Acquisition Regulation Regarding Implementation of Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors (VIEWS 06042621),” (the “VA Memo”), which provides instructions to VA contracting officers for incorporating the FAR Council Template into VA Contracts. *Memorandum for Heads of Contracting Activities—Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors*, Executive Director, OFFICE OF ACQUISITION AND LOGISTICS (003A), AND SENIOR PROCUREMENT EXECUTIVE OF THE DEPARTMENT OF VETERANS AFFAIRS (Oct. 1, 2021). The class deviation includes the FAR Council Template, FAR 52.223-99, set forth in the FAR Council Memo. *Id.*

107. The only authorities that the VA Memo cites for the Class Deviation are Executive Order 14042 and the FAR Council Memo.

108. The VA Memo states that it applies to solicitations and contracts for services, including construction.

109. NASA issued Procurement Class Deviation 21-03 on October 1, 2021, and updated it as Procurement Class Deviation 21-03A (the “NASA Memo”) on November 8, 2021. *Procurement Class Deviation 21-21A: Class Deviation from the Federal Acquisition Regulation*

(FAR) for Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, NATIONAL AERONAUTICS AND SPACE ADMINISTRATION (Nov. 8, 2021).

110. The NASA Memo incorporates FAR Class Deviation 52.223-99, and applies it to *all* new solicitations and resulting contracts, orders, and blanket purchase agreements (“BPAs”) above the micro-purchase threshold (“MPT”), as well as all existing contracts that are bilaterally modified to include it. *Id.* at 2.

111. As of the date of this filing, GSA, DoD, VA, and NASA have not published their class deviations in the Federal Register.

Immediate Irreparable Harm to the Plaintiffs and Other Adverse Consequences for Procurement of Federal Construction Projects

112. On information and belief, the Procurement Agencies have begun to require Federal Contractors to include the contract clause required by the Class Deviations summarized above.⁷

113. Federal contractors have begun taking steps to comply with the Vaccine Mandate, in anticipation of the January 18, 2022 effective date. Plaintiffs’ members have already incurred costs they are unlikely to be able to recover.

114. The Vaccine Mandate will cause irreparable harm to the many Federal Contractors among Plaintiffs’ members. These companies will lose an uncertain but potentially great number of employees who remain resistant to vaccination. In today’s tight market for construction craft workers, field supervisors and experienced executives, those employees will be difficult to replace, and it follows that the secondary effects on the performance of these companies, including the time they require to complete federal construction projects, the quality of their work, and the safety of

⁷ While some Procurement Agencies have paused the incorporation of their Class Deviations into new and modified solicitations and contracts pursuant to injunctions issued by other courts, that pause is wholly dependent on other injunctions remaining in place. The Government is challenging those injunctions.

their jobsites, will be equally great. At best, future changes in productivity, and how much time and money these companies need to budget for rework and warranty work, is already impossible to quantify, turning the competitive bidding for federal construction contracts into little more than a game of chance.

115. The specific obligations of the Vaccine Mandate will cause other types of irreparable harm. For example, Federal Contractors are already facing substantial, unquantifiable, difficulty in processing requests, from employees who are reluctant to be vaccinated, for exemption based either on a medical condition or a sincerely held religious belief.

116. Other irreparable injuries will also include the psychological and reputational impacts of jobsite injuries.

117. The construction industry currently faces a severe labor shortage. According to the U.S. Chamber of Commerce's most recent Commercial Construction Index Report, construction companies nationwide are finding it difficult to hire skilled workers. *See U.S. Chamber Commercial Construction Index – Q3 2021*, (Sept. 22, 2021), https://www.uschamber.com/assets/archived/images/q3_cci_report_final.pdf. Of the contractors surveyed, over 92% reported moderate to high levels of difficulty in finding skilled workers, which is up four points since Q2 of 2021. *See id.* at 5. Moreover, 37% of the surveyed contractors said that their top concern is an increase in worker shortages. *See id.* at 4.

118. The Chamber's findings are validated by numerous other studies. Data derived from the annual State of the Construction Industry analysis published by The Vertex Companies, Inc. ("Vertex), supplemented by other publicly available information, including data obtained from the Bureau of Labor Statistics and the US Census Bureau, demonstrate that the construction industry is currently experiencing one of the tightest labor markets over the past several decades.

Appx:3-5 (Declaration of William J. McConnell, PE, JD, MSCE (“McConnell”) ¶¶ 9).⁸ Several reasons contribute to this labor shortage, including the surge of construction spending in recent years in a time of a smaller and shrinking pool of available labor. Appx:4-6, 8-9, 20-21 (McConnell ¶¶ 9-12, 18, 44). The current unemployment rate in the construction industry is now lower than pre-pandemic levels, Appx:3 (McConnell ¶ 7), and the decline in the hiring rate in recent months further illustrates the labor shortage. Appx:3-4 (McConnell ¶ 8).

119. These findings accord with AGC’s own study of its members’ workforce. Appx:59-60 (Declaration of Jordan Howard (“Howard”) ¶¶ 6-11). In a survey of its members, AGC found that 82% of responding members have said that at least one of their employees will not get the vaccine, even if their choices are between vaccination or resignation, Appx:60 (Howard ¶ 8), and 14% of respondents already had an employee quit over the Vaccine Mandate, Appx:60 (Howard ¶ 11). Further, 65% of respondents reported that vaccination requirements were making it more difficult for them or their subcontractors to find workers, Appx:59-60 (Howard ¶ 6), and 79% of respondents reported that vaccination requirements were making it more difficult for prime contractors to find subcontractors, Appx:60 (Howard ¶ 7).

120. This labor shortage is a major contributor to the fact that the industry is experiencing the highest rate of wage-based inflation since the Bureau of Labor Statistics started keeping such statistics in 2006. Appx:3-5 (McConnell ¶¶ 8, 9). Among other factors causing wage-inflation, publicly available data show that construction workers are working more hours than before. Appx:4-5 (McConnell ¶ 9).

⁸ The McConnell Declaration, and the others cited herein, are provided to the Court as Exhibits to the Memorandum of Law in Support of Plaintiffs’ Motion for Preliminary Injunction and Temporary Restraining Order, filed along with the Complaint.

121. The construction industry's labor shortage is exacerbated by current market conditions that facilitate easy migration by construction workers to other sources of employment. The fragmented nature of the industry, in which approximately 90% of construction industry employers have fewer than 20 employees, gives workers considerable freedom to change jobs, Appx:6 (McConnell ¶ 13).

122. The labor shortage presents another major challenge to construction companies that participate in the federal market; vaccine hesitancy will make it extremely difficult to fully staff federal projects once the Vaccine Mandate becomes effective. In a recent survey on vaccine hesitancy among U.S. adults aged 18 to 64 years conducted by the Delphi Group of Carnegie Mellon University, 46.4% of participants who worked in the construction/extraction/mining industry reported hesitancy to receiving the vaccine. See Wendy King *et al.*, *COVID-19 Vaccine Hesitancy January-May 2021 Among 18-64 Year Old US Adults By Employment And Occupation*, MEDRXIV, (Apr. 24, 2021), <https://www.medrxiv.org/content/10.1101/2021.04.20.21255821.v2.full>.

123. These findings are confirmed by other publicly available data. Recent studies show that vaccination rates have stagnated in the industry in recent months, with only 52% percent of construction workers being vaccinated, compared to 80% in other occupations. Published data also show that 43.9% of workers in the construction industry are vaccine hesitant, compared to 17.3% of workers in other industries. Appx:7-8 (McConnell ¶ 15).

124. Available industry data suggest that the Vaccine Mandate will cause a substantial workforce shift away from the federal construction market. Vaccine hesitancy will exacerbate the already severe labor shortage, and will lead to a an ever-shrinking pool of workers to build federal construction projects, with obvious negative effects on the ability of construction contractors to

meet staffing requirements. That outcome will inexorably intensify wage inflation. The workforce shift away from the federal market is inevitable because federal construction is a small percentage of the overall construction industry. The negative results of this shift will include reduced competition and increased labor shortages in the federal market, which will increase the cost of federal construction projects. Appx:9-10, 14-16 (McConnell ¶¶ 19-20, 32-36).

125. Highly skilled craft workers and specialists are the lifeblood of the construction industry. Employee turnover is one of the biggest challenges facing construction contractors, particularly in a tight labor market. Individuals seeking a career in construction take years to master their particular trade in order to become qualified to work on construction projects. Data issued by the U.S. Department of Labor's Bureau of Apprenticeship and Training indicates that, for most construction trades, successful completion of registered apprenticeship programs, necessary for a person to become a fully-qualified trade worker, takes between two and four years, with up to five years for people to become fully-qualified electricians, plumbers, and sheet metal workers, among other trades. Appx:11 (McConnell ¶ 22). The fact that many workers have chosen not to enter the construction industry only worsens this problem. Appx:11-12 (McConnell ¶¶ 24-25).

126. AGC of America, AGC of Texas, and TEXO members are currently facing a shortage of qualified, vaccinated or vaccine-willing workers for federal contracts. *See, e.g.*, Appx:61-62 (Declaration of Robert Fabbro ("Fabbro") ¶¶ 6-10); Appx:65-66 (Declaration of Bridgette Wiggins ("Wiggins Decl.") ¶¶ 17-19); Appx:69 (Declaration of Robert Barnes III ("Barnes Decl.") ¶ 10); Appx:72 (Declaration of Jeff Harper ("Harper") ¶¶ 9-10); Appx:74 (Declaration of Tasha Gardner ("Gardner") ¶¶ 6-7); Appx:78 (Declaration of Eddie Stewart ("Stewart") ¶¶ 8-10). The labor shortage described above would make it extremely unlikely that

these companies, and other AGC members, will be able to replace workers who leave their companies as a result of the Vaccine Mandate, without serious disruptions to ongoing and future projects.

127. The Vaccine Mandate is likely to result in a substantial increase in labor costs. As with any market reality that creates uncertainty, responsible contractors will have to respond to the labor shortage by hedging their bids to account for potential wage rate increases or labor shortages. Appx:16 (McConnell ¶ 36).

128. Plaintiffs' members have already begun to do just this in submitting revised bids for projects. *See* Appx:72 (Harper ¶¶ 9-10); Appx:78-79 (Stewart ¶¶ 12, 18).

129. Lower productivity caused by the Vaccine Mandate will also increase the cost of federal construction projects. In a tight labor market, where a contractor cannot retain or recruit the requisite number of skilled craft workers, contractors may need to resort to using less skilled or underqualified workers to perform the required work, or require additional overtime work by craft workers. Numerous industry studies demonstrate that these factors decrease labor productivity. In terms of overtime usage in particular, studies have also consistently demonstrated an inverse relationship between the amount of overtime work and labor productivity, with some studies indicating a productivity loss of 10% when craft workers regularly work 10 hours of overtime. Appx:17 (McConnell ¶ 38).

130. In addition to the productivity costs of increased overtime, several other labor-related issues typically have a negative impact on productivity, including: competition for craft labor, turnover, absenteeism, use of under-qualified employees, and worker fatigue. Appx:18-19 (McConnell ¶ 41). The National Safety Council estimates the loss of performance from fatigue can cost employers up to \$3,100 annually per employee. Appx:21 (McConnell ¶ 45). Studies also

show that an environment in which existing workers are compelled to put in longer hours and work irregular schedules to fill in for absent employees increases the risk of injuries and accidents. Appx:20-21 (McConnell ¶ 44).

131. The necessity of employing new and untrained workers to compensate for a labor shortage increases the risk of workplace accidents and injuries, related to worker fatigue. Data published by the Bureau of Labor Statistics demonstrate 34.9% of new and untrained workers in the construction industry are injured during their first year on the job. *Id.*

132. The Vaccine Mandate will also result in project delays. For the reasons explained above, the Vaccine Mandate will likely reduce labor resources and cause a loss of productivity on upcoming federal construction projects. That, in turn, will likely lead to an influx of delay claims from impacted contractors and subcontractors to rebut the assessment of liquidated damages from project owners. Because such delays may not be excusable, impacted contractors and subcontractors may face large and unanticipated liabilities that will be the direct result of the Vaccine Mandate. Appx:23 (McConnell ¶ 52).

133. Plaintiffs' members typically compete for federal construction projects in sealed bidding competitions, awarded on the basis of price. *See* Appx:69-70 (Barnes ¶¶ 14, 16); Appx:78-79 (Stewart ¶¶ 12, 18). This means that bidding is both an art and a science for Plaintiffs' members—they must balance the risk of non-award against the risk of bidding too low to profit for every competition. *See* Appx:69-70 (Barnes ¶¶ 14, 16); Appx:78-79 (Stewart ¶¶ 12, 18); Appx:60 (Howard ¶¶ 9-10). Any disruption in their normal processes, including the resignation of qualified employees, training of new employees, unavailability of qualified subcontractors, or an increased compliance burden, will alter the bidding systems that Plaintiffs' members employ.

134. The Vaccine Mandate is likely to have negative unintended consequences. The negative impact on construction surety bond issuance and administration will likely cause substantial problems in getting construction projects completed on time. Appx:22-23 (McConnell ¶ 51). Surety bond providers may be forced to comply with the Vaccine Mandate under a scenario in which the surety undertakes to perform and complete the project following a default. Sureties have several options in the event of a surety bond default; a common option is for the surety to undertake to perform and complete the project itself, through its agents or independent contractors. This may involve a bid/relet process, or the surety may simply select a known contractor or consultant to complete the work. Either situation often presents risk of either project delay or increased project costs. This uncertainty presents business risks that may have a negative, unforeseeable effect on surety willingness to underwrite bonds or exercise takeover options. *Id.* That, in turn, would adversely affect timely project completion to the detriment of both Federal Contractors and the federal government project owner.

135. All of the uncertainties and business risks described above are impossible to quantify.

136. OMB did not consider the relevant facts in making its conclusory assertions that the Vaccine Mandate will further the goals of economy and efficiency in procurement. The information summarized above demonstrates that the Vaccine Mandate will have the exact opposite effect. Appx:12-14 (McConnell ¶¶ 27-31).

CLAIMS FOR RELIEF

Count I: Declaratory Judgment Action - The President Acted *Ultra Vires*, In Excess of His Statutory and Constitutional Authority. (Brought against the President)

137. Plaintiffs re-allege and incorporate by reference the allegations of the preceding paragraphs.

138. The President’s power to take or direct action affecting private parties must flow from either an act of Congress or from the Constitution. *See Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 585 (1952). In this case, no statutory or constitutional power available to the President authorizes the Executive Order.

139. 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 Procurement Act permits the President to prescribe certain policies and directives within the scope of the Act. 40 U.S.C. § 121. The President’s power under the Procurement Act must be exercised consistently with the structure and purposes of the statute that delegates that power—namely, efficiency and economy in procurement.

140. Any action taken by the President under a claim of Procurement Act authority must necessarily have a nexus to, and advance, the purposes embodied in the Procurement Act in order for that action to be lawful under that act. Where the presidential action fails to demonstrate any such nexus, the President exceeds his authority under the Procurement Act and acts *ultra vires*.

141. Executive Order 14042 exceeds the President’s statutory authority both substantively and procedurally.

142. **First**, Executive Order 14042 is about public health policy, not procurement—the President unleashed Executive Order 14042 as a cudgel to mandate COVID-19 vaccinations for one-fourth of the economy. However well-intentioned the policy may be, it is not within the scope of the Procurement Act. The Procurement Act cannot be interpreted to serve as a tool of convenience for a President to implement sweeping policies that are legislative in nature whenever he (or she) is unable to persuade majorities in Congress or in state houses across the country to enact legislation to the President’s liking. Congress did not intend—and the Procurement Act does

not allow—the President to exercise such sweeping authority under the guise of “procurement” in the absence of congressional authorization. *See Youngstown Sheet & Tube*, 343 U.S. at 635-40 (Jackson, J., concurring).

143. An interpretation of the Procurement Act that would authorize presidential discretion as sweeping as that manifested in Executive Order 14042 would raise serious constitutional questions, both of the federal government’s authority writ large to interfere with matters of police powers (*i.e.*, state power to compel vaccinations) reserved to the states, *see Bond v. United States*, 572 US 844, 854 (2014), and in any event with the authority of Congress to delegate such sweeping legislative power to the President, *see Gundy v United States*, 139 S Ct 2116, 2119 (2019). On matters this consequential, the Supreme Court at the very least requires Congress to delegate any such authority clearly and unambiguously before interpreting a statute as authorizing the Executive Branch to act. *See Ala. Ass’n of Realtors*, 141 S. Ct. at 2489. Here, no such clear statement can be found. Nothing in the Procurement Act provides a clear statement that, in the name of providing an “economical and efficient system” of procurement, the President and his Executive Branch officers can marshal federal procurement to implement public health policy and compel American workers to get vaccinated.

144. **Second**, the Vaccine Mandate comes nowhere close to serving the objectives of the Procurement Act; there is no nexus between Executive Order 14042 and the Procurement Act’s express purpose of providing an “economical and efficient system” of procurement. 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).

145. In reality, the Vaccine Mandate operates at counter purposes to economy and efficiency in procurement. In order to maintain a steady and predictable flow of goods and services through covered contracts, the federal procurement system requires a stable and reliable workforce to timely perform federal construction contracts. Yet the Executive Order is already disrupting the stability and reliability of the contractor workforce by limiting covered contractors' workforces to vaccinated individuals. This is merely exacerbating a severe labor shortage that is already plaguing the construction industry. Procurement policy is not advanced when contractors are forced to separate highly skilled workers without a ready supply of qualified and vaccinated workers to fill the required roles.

146. The Vaccine Mandate extends to all industries, including construction, to many employees uninvolved in the performance of federal contracts, to employees who work outdoors, and to employees who have worn masks, washed their hands, socially distanced and otherwise succeeded in protecting themselves from COVID-19 as they continued to work throughout the course of the pandemic, without resorting to vaccinations. The Procurement Act does not permit public health policy to be factored into federal procurement policy-making, much less a public health edict as blunt and inflexible as the Vaccine Mandate.

147. **Third**, Executive Order 14042 seeks to reallocate *how* federal procurement policy is made by reallocating the authority to promulgate government-wide procurement regulations (*i.e.*, the FAR) from the FAR Council, where Congress placed it, to an *ad hoc* Task Force and OMB, in direct violation of 41 U.S.C. § 1303. The President has no authority to unilaterally rewrite the laws that Congress created and earlier presidents signed into law.

148. Congress makes choices when it acts, and the President is not free to ignore those choices embedded in the statutes enacted into law. The FAR Council is comprised of the OFPP

Administrator, the Secretary of Defense, the Administrator of NASA, and the GSA Administrator (or a delegated representative of each of them). President Biden’s *ad hoc* Task Force, in contrast, is made up of a different group of people—notably absent from the Task Force is anyone from DoD or NASA, two of the federal government’s largest procuring entities. Thus, in directing the creation of new federal procurement regulations, the Executive Order evades not only the agency authorized by Congress to carry out any such policies, but bypasses the constituent members of that authorized agency as selected by Congress.

149. The OMB Order implementing the Task Force Guidance effectively establishes a new government-wide procurement regulatory requirement, something the Procurement Act does not allow. The Procurement Act does not authorize the President to delegate to the OMB Director the power to issue orders on federal procurement with the force or effect of law. While the Procurement Act authorizes the President to issue “policies and directives” to encourage the FAR Council to carry out the objectives of the administration, only the FAR Council can actually establish new procurement requirements (by amending the FAR), and even then, any action it takes must be consistent with the Procurement Act. The Procurement Act does not authorize the President himself to promulgate or dictate government-wide procurement regulations, or to assign the task of doing so to any agency or entity other than the FAR Council.

150. The President’s action in issuing Executive Order 14042 and requiring that federal contractors’ employees be vaccinated is beyond the President’s statutory authority.

151. Executive Order 14042 also is not authorized by any authority vested in the Office of the President under Article II of the Constitution. It is unquestionably the exclusive province of Congress in our tripartite system of federal government to establish the laws, and for the Executive Branch to execute those laws under the leadership of the President. For the reasons

described above, Congress has spoken in the Procurement Act on both the substance and procedure of federal procurement. The President finds no authority in Article II to accomplish policy objectives not authorized by the laws enacted by Congress.

152. The President relies in Executive Order 14042 on the authority delegated to him by Congress in the Procurement Act and on the inherent authority vested in the Office of the President by the Constitution. But, because neither the Procurement Act nor the Constitution in fact give him the right to act as he did in the Executive Order, he acted *ultra vires* in issuing it.

153. Accordingly, Plaintiffs have pleaded facts showing an actual controversy within the Court's jurisdiction that requires declaratory relief, in the absence of which Plaintiffs will suffer irreparable and immeasurable harm. Plaintiffs request that the Court exercise jurisdiction and issue judgment declaring that Executive Order 14042 is unenforceable and void on the basis that it exceeds the President's statutory authority both substantively and procedurally for the reasons stated herein above.

**Count II: Declaratory Judgment Action - OMB's Approval and Implementation of the
Task Force Guidance is Both Contrary to Law and Arbitrary and Capricious.
(Brought against OMB and the OMB Director)**

154. Plaintiffs re-allege and incorporate by reference the allegations of the preceding paragraphs.

155. OMB is an agency within the meaning of the APA. The APA requires that a reviewing court "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right[.]" 5 U.S.C. § 706(2)(A), (C).

156. The OMB Order, which both approves and implements the Task Force Guidance, is contrary to law and arbitrary and capricious for the following reasons:

157. **First**, in adopting and implementing the Task Force Guidance, inclusive of the Vaccine Mandate, in the OMB Order, OMB violated 41 U.S.C. § 1303(a) because the Order functions, in effect, as a government-wide procurement regulation which only the FAR Council has the authority to issue. The OMB Order seeks to circumvent 41 U.S.C. § 1303 by asserting a power under the Procurement Act that Congress did not delegate to OMB. 86 Fed. Reg. at 50,985.

158. As explained in Count I, the President lacks authority under the Procurement Act or the U.S. Constitution to delegate to OMB a function that Congress, by statute, delegated to the FAR Council. OMB therefore cannot claim authority to issue its Order by virtue of having been ordered to do so by the President—agency action that is contrary to law is not made otherwise merely because it was directed by the President. Nor can OMB claim for itself authority to act in an area absent a congressional delegation of that authority, which is also lacking here.

159. **Second**, and related, the OMB Order is contrary to law because it purports to bind the Procurement Agencies, yet Congress only authorized the President to “prescribe policies and directives that the President considers necessary to carry out” the Procurement Act. 40 U.S.C. § 121(a). The Procurement Act does not grant the President the power to issue orders with the force or effect of law, and insofar as OMB is acting on the President’s behalf, neither can it. The Procurement Act merely authorizes the President to issue such “policies and directives” as are necessary to spur the FAR Council to act. When acting on behalf of the President, OMB can do no more.

160. **Third**, OMB’s assertion that the Vaccine Mandate would serve the practical needs of procurement is untenable and contrary to demonstrable fact. In fact, OMB disregarded substantial evidence to the contrary. In order to maintain a steady and predictable flow of goods and services through covered contracts, the federal procurement system requires a stable and

reliable workforce to timely perform federal construction contracts. The OMB Order implementing the Task Force Guidance is already disrupting the stability and reliability of the contractor workforce by limiting covered contractors' workforces to vaccinated individuals. This is merely exacerbating a severe labor shortage that is already plaguing the construction industry. Implementation of the Vaccine Mandate will cause massive disruptions to the federal construction market, and will adversely impact efficiency and economy in procurement.

161. *Fourth*, OMB disregarded obvious distinctions between and among the many industries to which it extended the Vaccine Mandate, and between and among the many employees in those industries. There are huge differences across the affected contractor community, which extends to all industries, from construction to janitorial services; and to employees performing on-site at government facilities, to employees who work outdoors, and to many contractor back-office employees removed from the performance of federal contracts. Across the affected contractor community, employees have worn masks, washed their hands, socially distanced and otherwise succeeded in protecting themselves from COVID-19 as they continued to work throughout the course of the pandemic, without the affected contractors having to resort to vaccine mandates. It was arbitrary and capricious for OMB to approve and implement the blunt and inflexible Vaccine Mandate.

162. Accordingly, Plaintiffs have pleaded facts showing an actual controversy within the Court's jurisdiction that requires declaratory relief, in the absence of which Plaintiffs will suffer irreparable and immeasurable harm. Plaintiffs request that the Court exercise jurisdiction and issue judgment declaring that the OMB Order, which both approves and implements the Task Force Guidance, is unenforceable and void on the basis that it is contrary to law and arbitrary and capricious for the reasons stated herein above.

Count III: Declaratory Judgment Action - By Virtue of OMB's Unlawful Assumption of Authority, It and the FAR Council Failed to Follow Procedures Required by Law (Brought against OMB and the FAR Council)

163. Plaintiffs re-allege and incorporate by reference the allegations of the preceding paragraphs.

164. The OMB Order implementing the Vaccine Mandate is final agency action.

165. The APA requires that a reviewing court “hold unlawful and set aside agency action, findings, and conclusions found to be . . . without observance of procedure required by law[.]” 5 U.S.C. § 706(2)(D).

166. Under the OFPPA, as amended, a “procurement policy, regulation, procedure, or form (including an amendment or modification thereto) 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 appropriate funds” and either “has a significant effect beyond the internal operating procedures of the agency issuing the policy” or “has a significant cost or administrative impact on contractors.” 41 U.S.C. § 1707(a)(1).

167. Even putting the legality of the Vaccine Mandate aside, federal law directs the FAR Council to implement new or amended regulations through notice-and-comment rulemaking, pursuant to the APA. Of course, because the Executive Order charted a new and entirely unlawful path, by executing the Vaccine Mandate outside the usual procurement channels, the FAR Council had no occasion to conduct a rulemaking. But the failure of the Executive Branch to follow the law does not excuse its derivative violation of procedures required by law.

168. This second, procedural violation (*i.e.*, the failure to subject the Vaccine Mandate to notice-and-comment rulemaking) is no less fatal to the OMB Order than the OMB's publication of the illegal OMB Order in the first instance.

169. Even if the OMB were authorized by law to implement the Vaccine Mandate, which

it is not for the reasons explained above and in Count II, the OMB acted “without observance of procedure required by law” when it issued the OMB Order without proper notice and an opportunity for public comment, as would have been required of the FAR Council.

170. The OMB Order implementing the Vaccine Mandate is both a procurement “policy” and “procedure” under 41 U.S.C. § 1707(a).

171. The OMB Order relates directly to the expenditure of appropriated funds; has a significant effect beyond internal operating procedures; and imposes a significant cost and administrative impact on contractors and offerors under 41 U.S.C. § 1707(a)(1).

172. OMB failed to publish the Vaccine Mandate (and the Task Force Guidance more generally) in the Federal Register for public comment, as required by 41 U.S.C. § 1707, and failed again to provide the required 60-day comment period before the Vaccine Mandate became effective with the publication of the OMB Order. *Id.*

173. This is not how federal procurement is supposed to work. This is not how *government* in the United States, under our system of laws, is supposed to work. The Executive Branch cannot ignore legal procedures required by law any more than it can ignore substantive law.

174. Unsurprisingly, given that OMB was not authorized by law in the first place to do what it did in publishing the OMB Order, OMB’s attempt at invoking “compelling circumstances” that allow a policy or procedure to take effect after only 30 days under 41 U.S.C. § 1707(a)(2) is both insufficient and pretextual. No authorized officer ever waived the requirements of the OFPPA as applied to the OMB Order implementing the Vaccine Mandate, as required under 41 U.S.C. § 1707(d).

175. In addition to acting unlawfully in the first instance by creating a *de facto*

government-wide procurement policy despite having no legal authority to do so, OMB failed even to comply with the requirements of the OFPPA when it issued the OMB Order without first subjecting its terms, in particular the Vaccine Mandate, to notice-and-comment rulemaking. Both OMB and the FAR Council are accountable for this violation: OMB as the action agency of record; and the FAR Council as the agency that should have, but did not, assume the responsibility as directed by Congress to implement any new federal procurement policy.

176. The OMB Order is thus unlawful for this reason, too.

177. Accordingly, Plaintiffs have pleaded facts showing an actual controversy within the Court's jurisdiction that requires declaratory relief, in the absence of which Plaintiffs will suffer irreparable and immeasurable harm. Plaintiffs request that the Court exercise jurisdiction and issue judgment declaring that the OMB Order is unenforceable and void on the basis that the OMB acted "without observance of procedure required by law" when it issued the OMB Order without proper notice and an opportunity for public comment as set forth herein above.

Count IV: Declaratory Judgment Action - The FAR Council Template Is Both Contrary to Law and Procedurally Defective (Brought against the FAR Council)

178. Plaintiffs re-allege and incorporate by reference the allegations of the preceding paragraphs.

179. The FAR Council Template is final agency action.

180. The FAR Council is not authorized by any statute or regulation to issue class deviations. *See* 40 U.S.C. § 121(c); FAR 1.404. Class deviations are by nature specific to an agency or type of procurement. *See* FAR 1.404.

181. As explained above, following the FAR Council's publication of its Template with directions to the Procurement Agencies to issue conforming class deviations of their own, the Procurement Agencies did just that. This was unlawful agency action—the FAR Council has no

authority to direct agencies by edict to adopt boilerplate class deviations. The resulting class deviations are neither temporary nor specific to any agency or type of procurement.

182. The FAR Council acted contrary to law in publishing the FAR Council Template.

183. Even if authorized by law (which it was not), the FAR Council Template is unlawful for the distinct reason that the FAR Council failed to follow procedures required by law.

184. 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).

185. Pursuant to FAR 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. 48 C.F.R. § 1.501.

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

187. Proper “class deviations” must fit within one of the discrete definitions set forth in FAR 1.401, including omitting specific solicitation terms or contract clauses, and adding solicitations or contract clauses that are not consistent with the FAR. *See* 48 C.F.R. § 1.401. Class deviations must also be temporary and agency-specific, and approved by the issuing agency’s head of contracting activity or in a manner consistent with the agency’s FAR supplement. *See* 48 C.F.R. § 1.404.

188. Here, however, the FAR Council Template fits none of the definitions.

189. In substance, therefore, the FAR Council Template is 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).

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

191. 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).

192. The FAR Council Template also violates the APA because it encouraged agencies to adopt the FAR Council Template as-is, or with slight amendment. This constitutes a government-wide acquisition regulation, which is unlawful to issue except in accordance with notice-and-comment rulemaking under the APA.

193. Accordingly, Plaintiffs have pleaded facts showing an actual controversy within the Court’s jurisdiction that requires declaratory relief, in the absence of which Plaintiffs will suffer irreparable and immeasurable harm. Plaintiffs request that the Court exercise jurisdiction and issue judgment declaring that the FAR Council Template is unenforceable and void on the basis that the FAR Council violated the APA by failing to comply with the notice-and-comment requirements regarding the issuance of the FAR Council Template as set forth herein above.

Count V: Declaratory Judgment Action - The Procurement Agencies’ Class Deviations are Both Contrary to Law and Procedurally Defective for Failure to Follow Procedures Required by Law (Brought against the Procurement Agency Defendants)

194. Plaintiffs re-allege and incorporate by reference the allegations of the preceding paragraphs.

195. The adoption and implementation of the FAR Council Template by each of the Procurement Agencies constituted final agency action of each of them.

196. Proper “class deviations” must fit within one of the discrete definitions set forth in FAR 1.401. *See* 48 C.F.R. § 1.401.

197. Here, however, the Procurement Agencies’ class deviation clauses fit none of the definitions. Instead, they are mere recitations of the FAR Council Template, which in substance is a rule and not a proper class deviation.

198. The Procurement Agencies lack the legal authority to adopt as a “class deviation” what is, in effect, a government-wide procurement regulation.

199. Even where authorized, class deviations must follow the 60-day notice procedure set forth in the OFPPA. 41 U.S.C. § 1707(a)(1). Failure to publish a class deviation in accordance with the OFPPA will render the deviation “unenforceable as a matter of law.” *Sunoco, Inc. v. United States*, 59 Fed. Cl. 390, 396 (2004); *La Gloria Oil & Gas Co. v. United States*, 56 Fed. Cl. 211, 221-22 (2003); *Williams Ala. Petrol., Inc. v. United States*, 57 Fed. Cl. 789, 802 (2003); *Tesoro Haw. Corp. v. United States*, 58 Fed. Cl. 65, 72 (2003).

200. Each of the Procurement Agencies was required to publish its decision to adopt and implement the template clause as their own class deviations in the Federal Register and take public comment. None have done so.

201. The Procurement Agencies thus also violated the APA by failing to comply with the notice-and-comment requirements for rulemaking.

202. Good cause does not excuse the Procurement Agencies’ failure to comply with the notice-and-comment process. *See* 5 U.S.C. § 553(b)(3)(B).

203. Accordingly, Plaintiffs have pleaded facts showing an actual controversy within the Court’s jurisdiction that requires declaratory relief, in the absence of which Plaintiffs will suffer irreparable and immeasurable harm. Plaintiffs request that the Court exercise jurisdiction and issue

judgment declaring that the Procurement Agencies' adoption and implementation of the FAR Council Template is unenforceable and void on the basis that the Procurement Agencies violated the APA by failing to comply with the notice-and-comment requirements for rulemaking as set forth herein above.

**Count VI: Injunctive Relief
(Brought against all Defendants)**

204. Plaintiffs re-allege and incorporate by reference the allegations of the preceding paragraphs.

205. The Vaccine Mandate threatens immediate and irreparable harm to Plaintiff associations' and their members, including a loss of highly trained employees, difficulty in completing existing contracts, and significant expenditure of time and resources in ensuring compliance.

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

207. The deadlines imposed in the Vaccine 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.

208. Balancing the hardships to Plaintiffs and their members relative to the hardships to Defendants, extraordinary equitable relief is warranted.

209. Specifically, absent an injunction, members of Plaintiff associations will be jeopardized as a result of Defendants' adoption and implementation of the unconstitutional, illegal, and logistically unworkable Vaccine Mandate.

210. 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.

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

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

- a. Declare that Executive Order 14042 is unlawful process and in excess of statutory authority;
- b. Declare that the Task Force Guidance, the OMB Order, the FAR Council Template and the Class Deviations are contrary to law;
- c. Declare that Executive Order 14042 violates the Constitution;
- d. Declare that Defendants' use of the Vaccine Mandate to take contractual action against a member of a Plaintiff association denies that Plaintiff association member due process;
- e. Permanently enjoin Defendants from implementing or enforcing the Vaccine Mandate; and
- f. Award Plaintiffs such other relief as this Court deems appropriate.

December 14, 2021

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