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

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. THE ASSOCIATED GENERAL CONTRACTORS OF TEXAS, HIGHWAY, HEAVY, UTILITIES & INDUSTRIAL BRANCH TEXO, THE CONSTRUCTION ASSOCIATION 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. [INSERT]

BRIEF IN SUPPORT OF PLAINTIFFS'
APPLICATION FOR TEMPORARY RESTRAINING ORDER
AND MOTION FOR PRELIMINARY INJUNCTION AND

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The members of the Associated General Contractors of America, Inc. ("AGC of America"), the Associated General Contractors of Texas ("AGC of Texas"), and TEXO, the Construction Association ("TEXO") (collectively, "AGC" or "Plaintiffs") are in the business of constructing buildings, roads and other improvements to real property, including civilian and military facilities for the federal government in Texas and across the country. Plaintiffs now move to enjoin an unlawful effort by Defendants broadly to mandate that private-sector employers to require their employees be fully vaccinated against COVID-19. Plaintiffs satisfy all four elements for a preliminary injunction and request the immediate issuance of a temporary restraining order ("TRO"). And, as explained below, the imminent compliance deadlines and unsettled state of other litigation challenging the government action confirms the need for injunctive relief here.

I. INTRODUCTION

Seeking to impose public health policy across the private sector by any means necessary, Defendants (collectively, the "Government") rolled out a government-wide mandate that federal contractors and subcontractors ("Federal Contractors") compel their employees to be fully vaccinated against COVID-19 (the "Vaccine Mandate") by January 18, 2022. To do so, the Government crafted and then implemented in a highly irregular five-step process that exceeded the President's authority under the Federal Property and Administrative Services Act ("Procurement Act"), 40 U.S.C. § 101 *et seq.*; and violated 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. As explained below, the process began with President Biden's promulgation of Executive Order 14042 (the "Executive Order"), and culminated with directives issued by federal procurement agencies imposing mandatory contractual terms containing the Vaccine Mandate on all covered contracts held by Federal Contractors.

The entire process was flawed, from beginning to end. To be sure, COVID-19 is a serious public health problem. But COVID-19 is not a problem for the procurement of federal construction projects, or otherwise informative of the President's authority under the Procurement Act. The Government proceeds from the false premise that the Procurement Act grants the President the authority to promulgate and enforce public health policies that he simply declares—without support, and ***contrary to fact***—to have the side-effect of promoting economy and efficiency in the procurement of federal construction projects. As explained in the Complaint, the Procurement Act's original purpose was standardization of federal procurement, not an open-ended grant of authority for the President to issue public health proclamations. Complaint, ECF 1 ¶¶ 34, 3. The Executive Order is contrary to law: neither the Constitution nor the Procurement Act authorizes it.

In addition, the implementation of the Executive Order bypassed the well-established process for promulgating government-wide procurement regulations. At the President's direction, the *ad hoc* Safer Federal Workplace Task Force ("Task Force") and the Office of Management and Budget ("OMB") bypassed the Federal Acquisition Regulatory Council ("FAR Council"), arrogating to themselves the FAR Council's exclusive statutory authority to set and determine the government-wide terms and conditions under which the federal government will procure goods and services, including construction projects. In a sin of omission, the FAR Council simply watched as first the Task Force and then OMB carried out the work of setting a new federal procurement policy. Rather than undertaking its statutory obligation under the OFPPA to amend the Federal Acquisition Regulation ("FAR"), 48 C.F.R. § 1.000 *et seq.*, through notice-and-comment rulemaking, the FAR Council acquiesced in OMB's improper decision to adopt by fiat the Task Force Guidance. The FAR Council then strong-armed federal procurement agencies (including Defendants Department of Defense ("DoD"), Department of Veterans Affairs ("VA"),

General Services Administration ("GSA"), National Aeronautics and Space Administration ("NASA") (collectively, the "Procurement Agencies")) to abide by that guidance by issuing "class deviation" clauses across the federal government, also in violation of the OFPPA and the FAR.

These illegal acts will irreparably harm Plaintiffs' members, and have already begun doing so. Plaintiffs' members face at least three distinct harms. Plaintiffs' members are already faced with the tightest labor market in generations, and many of their unvaccinated employees have already begun to resign rather than be vaccinated. The loss of these highly skilled employees, either through resignation or forced termination—who will take years of training to replace—is irreparable harm on its own. Furthermore, employee turnover will harm Plaintiffs' members' ability to complete their construction for government projects on time and within budget, risking consequences as dire as liquidated damages and default termination. The compliance burden that the Vaccine Mandate places on Federal Contractors also constitutes irreparable harm to the Plaintiffs' members. Further, Plaintiffs' members will have to change the way they develop bids and proposals for federal construction contracts. Plaintiffs' members regularly engage in sealed bid competitions for such contracts, where razor-thin price differences often determine awards.

While Plaintiffs' members will be harmed by the implementation of the Vaccine Mandate, neither the Government nor the public will be harmed by a TRO or preliminary injunction. Indeed, such injunctive relief would actually be to the Government's and public's benefit. The costs of excluding unvaccinated craftworkers and other professionals from the construction of federal projects is already costing the taxpayer, and damaging the public trust in the federal procurement process.

For these reasons, Plaintiffs respectfully request that this Court grant their application for TRO and motion for preliminary injunction.

II. FACTUAL BACKGROUND

A. Executive Order 14042 and its Aftermath

1. Step One: President Biden Issues the Executive Order.

On September 9, 2021, President Biden issued Executive Order 14042 on Ensuring Adequate COVID Safety Protocols for Federal Contractors, citing as authority for issuance the Constitution, the Procurement Act, and the President's statutory delegation authority. Exec. Order 14,042, 86 Fed. Reg. 50,985 (Sep. 9, 2021). The purpose of the Executive Order is to "promote[] economy and efficiency in Federal procurement" by ensuring that Federal Contractors provide adequate COVID-19 safeguards to "decrease worker absence, reduce labor costs, and improve the efficiency of contractors and subcontractors[.]" *Id.* § 2.[1]

2. Step Two: The Task Force Publishes Guidance for Federal Contractors.

On September 24, 2021, the Task Force published its initial Guidance. *See COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors*, SAFER FEDERAL WORKFORCE TASK FORCE (Sept. 24, 2021).[2] The Task Force later rescinded that guidance and issued updated guidance on November 10. *COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors*, SAFER FEDERAL WORKFORCE TASK FORCE (Nov. 10, 2021).

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[1] The Vaccine Mandate originated in Executive Order 13,991. *See* Executive Order on Protecting the Federal Workforce and Requiring Mask Wearing. Exec. Order No. 13,991, 86 Fed. Reg. 7,045 (Jan. 20, 2021). Executive Order 13,991 established the Task Force, instilling in it the mission to "provide ongoing guidance" based on "public health best practices" "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)(ix), (x). Notably omitted from the mission statement is any reference to either economy or efficiency in federal procurement. Moreover, the Task Force did not include representatives from either the DoD or NASA—both of which hold critical positions on the FAR Council

[2] *Available at* https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf.

("Task Force Guidance").[3] The Task Force Guidance imposes an array of compliance obligations on Federal Contractors and subcontractors, including the Vaccine Mandate. *See id.*

3. Step Three: OMB Adopts the Task Force Guidance.

Executive Order 14042 required that the OMB Director "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). On September 24, 2021—the same day as the Task Force issued its initial Guidance—OMB published a directive ("OMB Order") adopting the Task Force Guidance, thus making the Task Force Guidance the binding policy of the United States Government. *Id.* On November 10, 2021, the same day Task Force issued its revised Guidance, OMB rescinded and superseded its earlier directive, replacing it with a "Revised Economy & Efficiency Analysis" for the OMB Order, and published that updated OMB Order in the Federal Register on November 16, 2021. *See* 86 Fed. Reg. 63,418 (Nov. 16, 2021).

The Task Force Guidance established as a deadline for covered contractor and subcontractor employees to be fully vaccinated 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. Task Force Guidance at 5.

The Task Force Guidance implemented via the OMB Order asserts 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. Nowhere does the OMB Order acknowledge the unique

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

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, particularly in workplaces where employees do not work in shared spaces or close quarters, or even indoors. To the contrary, the Vaccine Mandate, implemented by the OMB Order cites and relies 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. . . . 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).

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

4. Step Four: FAR Council Issues Its Template Contract Clause.

On September 30, 2021, the FAR Council issued a memorandum entitled "Issuance of Agency Deviations to Implement Executive Order 14042," which imposed on procurement agencies "initial direction for the incorporation of a clause into their solicitations and contracts to

implement" the Task Force Guidance. *Memo. for Chief Acquisition Officers: Issuance of Agency Deviations to Implement Executive Order 14042*, FEDERAL ACQUISITION REGULATION COUNCIL (Sept. 30, 2021) (the "FAR Council Memo"). The FAR Council Memo provided a template FAR Deviation (the "FAR Council Template") that agencies could incorporate into contracts: FAR 52.223-99, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors (OCT 2021) (DEVIATION). *Id.* at 4-5.

The Class Deviation Template, FAR 52.223-99, includes operative language that derives directly from the OMB Order. FAR Counsel Memo at 5. As of the date of this filing, neither the FAR Council Memo nor the Class Deviation Template has been published in the Federal Register.

5. Step Five: Procurement Agencies Issue Memoranda to Promulgate FAR Class Deviations.

In accordance with the FAR Council Memo, the Procurement Agencies issued class deviations on September 30, 2021 (GSA), and October 1, 2021 (DoD, NASA, and VA). These Class Deviations all incorporate the FAR Council Template.[4] All of the class deviation clauses apply to Plaintiffs' members when those clauses are inserted into either existing covered contracts or solicitations for future contracts.

B. Litigation Challenging Executive Order 14042

Several other pending lawsuits challenge the Vaccine Mandate's application to federal

[4] *See Memo. 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); *Memo. 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); *Memo. for Heads of Contracting Activities—Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors*, Department of Veterans Affairs (Oct. 1, 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).

contractors.[5] On November 30, 2021, Judge Van Tatenhove of the Eastern District of Kentucky issued an opinion enjoining implementation of the Executive Order in the states of Tennessee, Ohio, and Kentucky. *Kentucky v. Biden*, No. 3:21-CV-00055-GFVT, 2021 WL 5587446 (E.D. Ky. Nov. 30, 2021) (the "*Kentucky* Litigation"). The next day, the government appealed and filed a motion for an emergency stay of the injunction. As of the date of this filing, the government's motion is fully briefed and pending.

On December 7, Judge Baker of the Southern District of Georgia issued an opinion enjoining implementation of the Executive Order nationwide. *See Georgia v. Biden*, No. 1:21-CV-163, 2021 WL 5779939, at *12 (S.D. Ga. Dec. 7, 2021) (the "*Georgia* Litigation"). On December 9, the government filed both a notice of appeal of the district court's order and a motion for an emergency stay. On December 10, the government filed the same motion for emergency stay of the injunction pending appeal in the Eleventh Circuit.

III. LEGAL STANDARD

To obtain to a preliminary injunction, the movant must demonstrate: "(1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) the threatened injury to the movant outweighs the threatened harm to the party sought to be enjoined; and (4) granting the injunctive relief will not disserve the public interest." *City of Dallas v. Delta Air Lines, Inc.*, 847 F.3d 279, 285 (5th Cir. 2017); *see also McDonald v. Longley*, 4 F.4th 229, 255 (5th Cir. 2021). The third factor is sometimes referred to as the "balance of equities," which the movant must show tips in its favor. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008). The same standards apply to an application for a TRO. Fed. R. Civ. P. 65.

[5] Pending cases include *Florida v. Nelson*, M.D. Fla., No. 8:21-cv-02524; *Brnovich v. Biden*, D. Az., No. 2:21-cv-01568; *Missouri v. Biden*, E.D. Mo., 4:21-cv-01300; *Texas v. Biden*, S.D. Tex., No. 3:21-cv-00309; *Louisiana v. Biden*, W.D. La., 1:21-cv-03867.

IV. ARGUMENT

Plaintiffs have a substantial likelihood of success on the merits because the Executive Order was issued in excess of the President's authority, and because OMB, the FAR Council, and the Procurement Agencies all acted in excess of their own authority and without regard to procedures required by law in implementing the Vaccine Mandate. Simply put, Executive Order 14042 and the agency actions taken to implement it were not authorized by law. But even if the Court finds statutory support for these actions, the Vaccine Mandate still fails because the Government implemented it without observation of procedures required by law and, in substance, in an arbitrary and capricious way. Plaintiffs also satisfy the remaining three requirements for a preliminary injunction. And because AGC of America members operate nationwide, only a nationwide injunction affords adequate equitable relief. *See Georgia.*, 2021 WL 5779939, at *12.

A. Plaintiffs are Likely to Succeed on the Merits.

1. The Executive Order is Beyond the Scope of the President's Statutory and Constitutional Authority and is *Ultra Vires* (Count I).

Executive Orders and the rules and agency guidance that implement them are subject to judicial review. *Coliseum Square Ass'n, Inc. v. Jackson*, 465 F.3d 215, 232 (5th Cir. 2006); *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1324 (D.C. Cir. 1996). Here, the Executive Order exceeds the President's statutory authority under the Procurement Act, and his constitutional authority under Article II of the Constitution. 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.

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 President's power under the Procurement Act must be exercised consistently with its text, structure and purposes. And 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. Where presidential action fails to demonstrate any such nexus, the President exceeds his authority under the Procurement Act and acts *ultra vires*.

The Executive Order exceeds the President's statutory authority both substantively and procedurally, for a host of reasons.

First, the Executive Order is aimed squarely at *public health policy*, not procurement. This is evident from the source of the "guidance" that is now dictating its implementation: the *ad hoc* Task Force created by President Biden in January 2021 to address and advise on COVID-19 public health priorities. The Task Force was not designed to implement or even advise on procurement policy. Whatever good intentions the President and his Administration may have, or however sound its vaccine mandate policy may be from a public health perspective, Plaintiffs have a substantial likelihood of success in showing that the Executive Order is not within the scope of the Procurement Act. *See Georgia*, 2021 WL 5779939, at *9; *cf. Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (holding that the Centers for Disease Control & Prevention ("CDC") COVID-19 eviction moratorium exceeded its statutory authority).

The Procurement Act cannot be interpreted to serve as a tool of convenience for a President to implement unrelated policies that are legislative in nature, even in support of other laudable public policy goals. The Vaccine Mandate compels millions of individual Americans to get vaccinated or find other employment, without a clear nexus to a federal procurement goal. Insofar as it applies to the construction industry, the Vaccine Mandate does not have a manifest nexus with

even the President's public health objective. Plaintiffs' members work largely outdoors, largely safely, and have done so largely free of COVID-19 infection since the pandemic began.[6] Congress did not intend—and the Procurement Act does not allow—the President to exercise such sweeping authority in the absence of congressional authorization. *See Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 635-40 (1952) (Jackson, J., concurring); *see also Chamber of Commerce of U.S. v. Reich*, 74 F.3d at 1324 (discussing limits of the Procurement Act).

Second, 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 Liberty Mut. Ins. Co. v. Friedman*, 639 F.2d 164, 166 (4th Cir. 1981) (presidential directives must be "reasonably related" to statutory purpose). The Procurement Act is not a "blank check for the President to fill in his will." *Am. Fed'n of Lab. & Cong. of Indus. Organizations v. Kahn*, 618 F.2d 784, 793 (D.C. Cir. 1979). And here, Executive Order 14042's "directives and resulting impact radiate too far beyond the purposes of the Procurement Act and the authority it grants to the President." *See Georgia*, 2021 WL 5779939, at *10.

The Vaccine Mandate utterly fails to advance the objectives of the Procurement Act. The opposite is demonstrably true; implementation of 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. *Georgia*, 2021 WL 5779939, at *9. Yet the Executive Order is already disrupting the stability and reliability of the contractor workforce by limiting covered contractors' workforces to vaccinated individuals.

[6] *See* Ex. D at 65 (Declaration of Bridgette Wiggins ("Wiggins") ¶¶ 15 16); Ex. E at 68-69 (Declaration of Robert Barnes III ("Barnes") ¶ 7).

Appx:60 (Declaration of Jordan Howard ("Howard") ¶ 11, indicating that 14% of AGC survey respondents had employees quit, citing the Vaccine Mandate). The Executive Order will exacerbate a severe labor shortage that is already plaguing the construction industry.

The Vaccine Mandate cannot be salvaged by the OMB Order—its conclusory assertions about promoting economy and efficiency in procurement are demonstrably false as to construction contracts. To the contrary, the Vaccine Mandate will cause a dramatic migration of the construction industry workforce away from companies operating in the federal market, led by the significant percentage of construction workers who are vaccine-hesitant. Appx:6-9 (Declaration of William J. McConnell, PE, JD, MSCE ("McConnell") ¶¶ 14-18). This will result in an ever-shrinking pool of workers available to work on federal construction projects and inevitably increase wage inflation. Appx:8-9 (McConnell ¶ 18). Workforce turnover of skilled craft workers and specialized personnel will immediately impair the ability of Federal Contractors to perform on covered contracts, as these individuals cannot be readily and safely replaced by other, less qualified individuals. Appx:8-12 (McConnell ¶¶ 18, 21-26). Workforce attrition also will have a profoundly negative impact on productivity, and will cause significant project delays. Appx:4-15 (McConnell ¶¶ 32-33.) The uncertainties caused by the Vaccine Mandate will make it extremely difficult for construction companies to formulate responsive bids for federal projects, which will inevitably force prudent Federal Contractors to raise their bids for federal projects.[7]

[7] OMB's principal justification of the Vaccine Mandate is a comparison of the construction industry to companies in other U.S. industries, including airlines, food processing, and health care, which have adopted a vaccine mandate. That analysis is an apples-to-oranges comparison with numerous, fatal flaws. Appx:12-14 (McConnell ¶¶ 27-31, explaining that different market positions of Fortune 500 companies, like those that the OMB Order cited, is distinct from the smaller size (average of 20 employees) of federal construction contractors); Appx:14(McConnell ¶ 31, "OMB's juxtaposition of construction contractors to multi-billion dollar conglomerates such as United Airlines, Tyson Foods, and Kaiser Permanente is unsound due to the drastic difference

The Vaccine Mandate is a blunt instrument ill-suited for its stated objective. It applies identical obligations nationwide, ignoring a variety of important differences, including the nature of workplaces, the proximity and work customs of workers within the workplace, and local transmission and vaccination levels. In the construction industry, it applies 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 as essential workers, prior to vaccination availability. The Procurement Act provides no justification for interference with federal procurement policy-making on such inflexible terms.

Third, Executive Order 14042 seeks to reallocate *how* federal procurement policy is made by diverting the authority to promulgate government-wide procurement regulations (*i.e.*, the FAR) from the FAR Council, where Congress placed it, to the *ad hoc* Task Force and OMB, in violation of the OFPPA, 41 U.S.C. § 1303. 86 Fed. Reg. at 50,985.

Congress makes choices when it acts, and the President is not free to ignore choices embedded in statutes enacted into law. *See BST Holdings, L.L.C. v. Occupational Safety & Health Admin.*, 17 F.4th 604, 618 (5th Cir. 2021). Here, the President has done precisely that. 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). The Task Force, in contrast, is made up of a different group of people—and notably absent from the Task Force is anyone from DoD or NASA, two of the three members of the FAR Council. Thus, in

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in size and leverage that the comparison companies have when plotted against an average contractor or subcontractor, the difference in the work environment of these industries, and divergence in opportunities that contractors, subcontractors, and construction workers currently have on non-federal construction work.").

directing the creation of new federal procurement regulations, the Executive Order not only excludes the agency authorized by Congress to carry out any such policies, but critical members of that agency. This is contrary to federal procurement policy, and akin to omitting the Department of State from a major foreign policy initiative.

The Executive Order effectively establishes a new government-wide procurement regulation, something that the Procurement Act only allows the FAR Council to do. *Chamber of Commerce v. Reich*, 74 F.3d at 1328. While the Procurement Act does authorize the President to issue "policies and directives" to encourage the FAR Council to carry out of the objectives of the administration, only the FAR Council can lawfully act to establish new procurement requirements, and only by amending the FAR in the manner prescribed by the OFPPA. The Procurement Act simply does not authorize the President to promulgate or dictate government-wide procurement regulations, or to assign the task of doing so to any entity other than the FAR Council.

Fourth, interpreting the Procurement Act to authorize the President to promulgate something as broad and sweeping as Executive Order 14042 would raise serious constitutional questions. The Government would interpret the statute to grant the president the authority to go so far as to interfere with the police powers (*i.e.*, state and local government power to compel vaccinations in certain circumstances) that are reserved to the states, *see Bond v. United States*, 572 U.S. 844, 854 (2014). The Government's interpretation would also raise serious questions about how much legislative authority Congress may, in any case, delegate 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 express its intentions clearly and unambiguously before a statute can be interpreted as authorizing the Executive Branch to act in the manner it claims the right to do. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (stating the "textual

commitment must be a clear one" because "Congress . . . does not, one might say, hide elephants in mouseholes"). 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 establish a broad public health policy and compel federal construction contractors and subcontractors to implement that policy, particularly where doing so will have manifestly negative impacts on the procurement of federal construction projects. Nothing in the Procurement Act ***requires*** the Court to accept the Government's interpretation of its scope, and for that reason, and to avoid all constitutional doubt, the Court should interpret the Procurement Act not to authorize the Executive Order or the actions that various federal agencies have taken to implement it. *See Edward J. DeBartalo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

In addition to being beyond the President's statutory authority, Executive Order 14042 is beyond any authority vested in the Office of the President by Article II of the Constitution. It is unquestionably the exclusive province of Congress to establish the laws, and for the Executive Branch to execute those laws under the leadership of the President. *See Gundy*, 139 S. Ct. at 2119. For the reasons already described, Congress has spoken in the Procurement Act on both the substance and procedure of federal procurement. The President finds no additional authority in Article II to accomplish policy objectives not authorized by the laws enacted by Congress. *See Youngstown Sheet & Tube*, 343 U.S. at 661 (Jackson, J., concurring); *Chamber of Commerce v. Reich*, 74 F.3d at 1328.

In sum, because neither the Procurement Act nor the Constitution in fact give the President the right to issue the Executive Order, the President acted *ultra vires* in doing so.

2. The OMB Order, FAR Council Template, and Procurement Agencies' Class Deviations Are Both Contrary to Law and Arbitrary and Capricious (Counts II-V).

OMB's approval and implementation of the Task Force Guidance was contrary to law and is, in substance, arbitrary and capricious (Count II), in violation of the APA. Both OMB and the FAR Council also deprived the public of notice and an opportunity to comment on their actions, in violation of the OFPPA and the APA (Count III). The FAR Council and the Procurement Agencies acted contrary to law under the APA, and without observance of required procedures required by the OFPPA and the FAR, when they issued the FAR Council Template and the Class Deviation Clauses, respectively (Counts IV, V). Each action was final and gives rise to legal obligations or consequences for non-compliance. As explained below, each action also violates the APA, which 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"; "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right"; or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (C), (D).

a. OMB's Approval and Implementation of the Task Force Guidance is Both Contrary to Law and Arbitrary and Capricious (Count II).

The OMB Order, is both contrary to law and arbitrary and capricious for the following reasons:

First, in adopting and implementing the Task Force Guidance, OMB violated the OFPPA (41 U.S.C. § 1303(a)) because the OMB Order functions, in effect, as a government-wide procurement regulation which only the FAR Council has the authority to issue.

As demonstrated above, the President lacks authority under either the Procurement Act or the 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. *See Chamber of Commerce v. Reich*, 74 F.3d at 1328 ("Even if the Secretary were acting at the behest of the President, this does not leave the courts without power to review the legality of the action, for courts have power to compel subordinate executive officials to disobey illegal Presidential commands.") (citation, internal quotation marks and alteration omitted). Nor can OMB claim for itself authority to act in an area absent a congressional delegation of that authority, which is also lacking here. *See Lyng v. Payne*, 476 U.S. 926, 937 (1986) (agencies have only that authority to act as given to them by Congress).

Second, the OMB Order is contrary to law because it purports to bind the Procurement Agencies, without a shred of statutory authority to do so. Even with respect to the President, 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; neither does it authorize the President to deputize an entity like OMB or its Director to take such actions. For the same reasons stated in the preceding paragraph, OMB itself is not authorized by any act of Congress to bind the Procurement Agencies, and it would be no defense that it was merely carrying out the orders of the President, as the President was not authorized to order this action.

Third, OMB's assertion that the Vaccine Mandate would serve the practical needs of procurement is factually incorrect. In fact, OMB disregarded substantial evidence to the contrary. 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. Appx:3-6 (McConnell ¶¶ 7-12, noting labor shortage in construction industry, caused in part by the simultaneous increase in construction spending and decreasing pool of available labor and decline in the hiring rates, as well as the ease with which construction workers can find other sources of employment). The lack of factual support for OMB's assertion exposes the OMB Order as nothing more than a *post hoc* rationalization for the Executive Order, woven out of whole cloth. *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1896 (2020) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (*abrogated on other grounds*)).

Fourth, the OMB Order is arbitrary and capricious because it disregarded obvious distinctions among the many industries to which it extended the Vaccine Mandate, and among the many employees within each of those industries. Agencies must supply reasoned analysis when they adopt or change rules. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46 (1983). Such an analysis must include a consideration of alternatives. *Id.* This is especially true here, where COVID-19 transmission differs across the country, and certain industries—including construction—have effectively managed to avoid COVID-19 outbreaks without mandating vaccination. Appx:65 (Wiggins ¶¶ 15, 16). It was arbitrary and capricious for OMB to approve and implement the blunt and inflexible Vaccine Mandate.

b. By Virtue of OMB's Unlawful Assumption of Authority, It and the FAR Council Failed to Follow Procedures Required by Law (Count III).

Even putting the legality of the Vaccine Mandate aside, the OFPPA directs the FAR Council to implement new or amended regulations through notice-and-comment rulemaking, pursuant to the APA. Specifically, the OFPPA, as amended, provides 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 "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." OFPPA, 41 U.S.C. § 1707(a)(1). In short, the unlawfulness of the Vaccine Mandate does not excuse the FAR Council's violation of implementation procedures required by law. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 312 (1979).

This 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 lack of substantive authority for OMB's action. Even if OMB were authorized by law to implement the Vaccine Mandate (it is not), 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.

Although the OMB Order implementing the Vaccine Mandate is both a procurement "policy" and "procedure" under 41 U.S.C. § 1707(a), OMB failed to provide the required 60-day comment period before the Vaccine Mandate became effective with the publication of the OMB Order. This is unlawful under 41 U.S.C. § 1707.[8] This is not how amending federal procurement policy is supposed to work—let alone ***government*** in the United States. The Executive Branch cannot ignore procedures required by law any more than it can ignore substantive law. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2490 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582, 585–86 (1952)) (the government's "strong interest in combating the spread of the COVID–19 Delta variant" does not permit it "to act unlawfully even in pursuit of desirable ends").

[8] Unsurprisingly, given that OMB was not authorized by law in the first place to do what it did in publishing the OMB Order, OMB did not invoke "compelling circumstances" that allow a policy or procedure to take effect after only 30 days under 41 U.S.C. § 1707(a)(2).

Thus, 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 notice-and-comment requirements of the OFPPA when it issued the OMB Order. OFPPA, 41 U.S.C. § 1707(a)-(b).

c. The FAR Council's Template and Procurement Agencies' Class Deviation Clauses Are Substantively and Procedurally Unlawful (Count IV).

The FAR Council Template and Procurement Agencies' Class Deviation Clauses each violate the FAR, and the APA's and OFPPA's requirements for notice-and-comment rulemaking.

One could view the FAR Council Template as a class deviation, in its own right, or as an amendment to the FAR within the meaning of the OFPPA that requires APA notice-and-comment rulemaking. Either way, it fails. The FAR Council is not authorized by any statute or regulation to prescribe class deviations. *See* 40 U.S.C. § 121(c); FAR 1.404. Class deviations must fit within one of the discrete definitions set forth in FAR 1.401, all of which FAR 1.404(a) requires to be agency-specific. If the FAR Council Template is a regulation, 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), then it still fails. Before "promulgating a rule that has legal force," federal agencies, including the FAR Council, must publish "a notice of proposed rulemaking in the Federal Register[.]" *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2384 (2020); 41 U.S.C. § 1707(a)-(b); 5 U.S.C. § 553(b). Pursuant to FAR 1.501, "significant revisions" to the FAR must be made through notice-and-comment procedures. The FAR Council violated the OFPPA and APA, not to mention the FAR, by failing to comply with the notice-and-comment requirements for rulemaking, and simultaneously failing to provide a good cause excuse for doing so, 41 U.S.C. § 1707(a)-(b); 5 U.S.C. § 553(b)(3)(B), and the FAR Council failed to observe procedures required by law. *See* 5 U.S.C. § 706(2)(D).

To make matters worse, 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 equally unlawful agency action. The Procurement Agencies' Class Deviation Clauses are neither temporary nor specific to the agencies' individual circumstances. *See* FAR 1.401, 1.404. The FAR Council thus acted contrary to law in publishing its Template, and Procurement Agencies acted contrary to law in accepting it. 5 U.S.C. § 706(2)(C).

Further, the Procurement Agencies' adoption and implementation of the FAR Council Template constituted final agency action by each of them. Accordingly, each of the Procurement Agencies was required to publish its decision to adopt and implement the template clause as its own class deviation in the Federal Register and take public comment to comply with the OFPPA. 41 U.S.C. § 1707(a)(1), (b). None has done so. These failures render each Procurement Agency's class deviation "unenforceable as a matter of law." *Sunoco, Inc. v. United States*, 59 Fed. Cl. 390, 396 (2004). *See also* 5 U.S.C. § 706(2)(D).

B. The Plaintiffs will be Irreparably Harmed Absent Injunctive Relief.

Plaintiffs' allegations easily satisfy the irreparable injury element of the preliminary injunction test. Among many other things, "[C]omplying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring in part and in the judgment).

Members of AGC will incur significant and immediate losses in attempting to comply with the Vaccine Mandate. Moreover, the Vaccine Mandate will imperil their members' businesses moving forward, particularly given their significant labor shortages. Members of AGC are currently facing a shortage of qualified, vaccinated or vaccine-willing workers for federal contracts. *See* Appx:61-62 (Declaration of Robert Fabbro ("Fabbro") ¶¶ 6-10, expressing concern

about anticipated workforce attrition due to employee statements about the Vaccine Mandate); Appx:65-66 (Wiggins ¶¶ 17-19, same); Appx:69 (Barnes ¶ 10, same); Appx:72 (Declaration of Jeff Harper ("Harper") ¶¶ 9-10, same); Appx:74 (Deceleration of Tasha Gardner ("Gardner") ¶¶ 6-7, same); Appx:78 (Declaration of Eddie Stewart ("Stewart") ¶¶ 8-10, same). AGC members, both large and small, anticipate losing critical personnel without whom they will be unable to perform on federal construction projects. Appx:78 (Stewart ¶¶ 8-10, expressing concern about anticipated attrition of senior employees in response to the Vaccine Mandate); Appx:65-66 (Wiggins ¶¶ 17-19, same). Procurement policy obviously is not advanced when contractors are forced to perform on federal projects after losing highly skilled workers without a ready supply of qualified and vaccinated workers to fill the required roles. The Vaccine Mandate will exacerbate the current labor shortage with inevitable adverse consequences on labor costs and productivity, causing project delays and increasing costs to the taxpayer. Appx:15-23 (McConnell ¶ 34-53). For many AGC members, the business risk presented by the Vaccine Mandate has already caused them to decide to abandon the federal construction marketplace. *See* Appx:62 (Fabbro ¶ 11), Appx:67 (Wiggins ¶ 24), Appx:70 (Barnes ¶ 17); Appx:75 (Gardiner ¶ 11). Others are likely to follow suit, and will reallocate their resources to the burgeoning non-federal construction markets. Appx:9-10 (McConnell ¶¶ 19-20).[9] Those AGC members that remain in the federal construction market may be forced to operate in a diminished capacity, because reduced workforces will cause a decrease in monthly revenue, which will result in turn in a lower surety bonding capacity. Appx:72 (Harper ¶ 13). This reduced bonding capacity will in turn limit the amount of work AGC

[9] For some contractors, compliance with the Vaccine Mandate could jeopardize their ability to stay in business. Many construction companies are owned by their employees through an Employee Stock Ownership Plans ("ESOP") structure. Employee departures can result in irreparable harm to such companies, which may have to be dissolved in order to meet funding and other requirements imposed by the Internal Revenue Code. *See* Gardner Decl. ¶ 10.

members can bid on, possibly leading to forced downsizing. *Id.*

Members of AGC will also face unquantifiable business uncertainty due to the drastic change the Vaccine Mandate will require in bidding for future federal contracts. Plaintiffs' members largely compete for government projects through sealed competitive bidding, where contracts are awarded on the basis of price. *See* Appx:69-70 (Barnes ¶¶ 14, 16); Appx:78-79 (Stewart ¶¶ 12, 18). Prudent bidding for large construction projects is both an art and a science; Plaintiffs' members must balance the risk of non-award against the risk of bidding too low and losing money. *See* Appx:69-70 (Barnes ¶¶ 14, 16); Appx:78-79 (Stewart ¶¶ 12, 18). 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. These disruptions are already taking place. *See* Appx:73 (Harper ¶¶ 14-16); Appx:78-79 (Stewart ¶¶ 12-14).

These losses are irreparable for several reasons. ***First***, Plaintiffs' harm is not simply monetary harm that they could recover from a contractual remedy—their harm is to the core of their business models. *Wages & White Lion Inv., L.L.C. v. U.S. Food & Drug Admin.*, No. 21-60766, 2021 WL 4955257 (5th Cir. Oct. 26, 2021); *Teladoc, Inc. v. Tex. Med. Bd.*, 112 F. Supp. 3d 529 (W.D. Tex. 2015). ***Second***, courts have not hesitated to find irreparable harm from similarly overbroad public health-related rules. *Taylor Diving & Salvage Co. v. U. S. Dep't of Lab.*, 537 F.2d 819, 821 (5th Cir. 1976). ***Third***, courts—including the Supreme Court—have found irreparable harm due to compliance with analogous COVID mandates. *See Ass'n of Realtors*, 2021 WL 3783142, at *4; *see also State v. Becerra*, 2021 WL 2514138, at *48. ***Fourth***, the Vaccine Mandate directly and immediately imperils Plaintiffs' business and ability to function given their current labor shortage and the significant number of current employees who will refuse

the vaccine. *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014). Finally, compliance with an unlawful standard is per se irreparable harm. *See, e.g.*, *Am. Trucking Ass'ns., Inc. v. City of Los Angeles*, 559 F.3d 1046, 1058–59 (9th Cir. 2009); *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 950 (N.D. Ill. 2017).

C. The Balance of the Harms and Public Interest Favor Injunction.

The balance of the equities and public interest factors also weigh in favor of granting Plaintiffs' motion. As a general matter, any harm to the government is "'outweigh[ed] by the greater public interest in having governmental agencies abide by the federal laws that govern their existence and operations.'" *State v. Biden*, 10 F.4th 538, 559-60 (5th Cir. 2021) (quoting *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994)). And as with the CDC's COVID-19 Eviction Moratorium, "[a]s harm to the applicant[] has increased, the Government's interests have decreased" because of Federal Contractors' voluntary actions supporting vaccination. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2490.

Here, the lack of either statutory or constitutional authority for the Vaccine Mandate is contrary to the public interest. *See Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) ("[E]nforcement of an unconstitutional law is always contrary to the public interest."). Although "the public has a strong interest in combating the spread of the COVID–19 Delta variant . . . our system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Ala. Ass'n of Realtors*, 141 S. Ct. at 2490.

The public's interest in combatting the spread of COVID-19 must be balanced against the parallel interest of maintaining public trust in the government contracting system, and the benefits of "full and open competition." The harms to Plaintiffs' members summarized above is also public harm. Plaintiffs' members engage in sealed competitive bidding for most federal construction contracts. Their bids depend on predictability of costs, including labor costs, which is "major

driver of the cost of construction." Appx:25 (McConnell ¶ 57). Federal Contractors will be forced to increase their bids to hedge against the uncertainties presented by the Vaccine Mandate, thus increasing taxpayer cost. And many prudent contractors may decide to abandon the federal market altogether, thereby decreasing the cardinal goal of federal procurement to maximize competition in contracting. Appx:78 (Stewart ¶ 13). Taxpayers rely on the competitive pressures of "full and open competition" by sealed bidding to keep the Government's prices for construction projects down. *HP Enter. Servs., LLC v. United States*, 104 Fed. Cl. 230, 245 (2012). This is especially true where, as here, the public has a deep and overriding interest in the efficient contracting process for all federal contracts, especially national security and healthcare facilities. *See id.*

Finally, the injunctive relief Plaintiffs request is necessary and appropriate under the current circumstances. The ultimate outcome of the other litigation mentioned above obviously cannot be predicted; the Government is seeking expedited appeal of the orders issued in both the *Kentucky* and *Georgia* litigations. And the scope of the injunction issued in the *Georgia* Litigation, *see* Section IV, *supra*, is unclear; the order in that case is not explicit as to whether it enjoins enforcement of just the Vaccine Mandate, or the entire product of the Government's many violations of law. The immediate harm to federal procurement policy presented here entitles Plaintiffs to the specific equitable relief requested here. *Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015).

V. CONCLUSION

The Court should grant Plaintiffs' application for TRO and motion for preliminary injunction, with a nationwide scope, and enter an injunction preventing Defendants from taking any action to implement or enforce the unlawful Vaccine Mandate.

December 14, 2021

Respectfully submitted,

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

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. **THE ASSOCIATED GENERAL CONTRACTORS OF TEXAS, HIGHWAY, HEAVY, UTILITIES & INDUSTRIAL BRANCH** **TEXO, THE CONSTRUCTION ASSOCIATION** 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. [INSERT]

PLAINTIFFS' APPLICATION FOR TEMPORARY RESTRAINING ORDER AND MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, Plaintiffs Associated General Contractors of America, Inc. ("AGC of America"), the Associated General Contractors of Texas ("AGC of Texas"), and TEXO Association ("TEXO") file this Application for Temporary

Restraining Order and Motion for Preliminary Injunction seeking to enjoin Defendants from, *inter alia*, mandating compliance with the vaccine mandate for federal contractors and subcontractors during the pendency of this lawsuit.

INTRODUCTION

Defendants have imposed a government-wide mandate that federal contractors and subcontractors ("Federal Contractors") must require their employees to get vaccinated against COVID-19 (the "Vaccine Mandate"). Employees must be "fully vaccinated" by January 18, 2022.

Plaintiffs' members include Federal Contractors who will be immediately covered by the Vaccine Mandate. They face serious and immediate harms—the resignation of skilled employees who are hesitant to be vaccinated, employee turnover that impacts their ability to complete construction for government projects on time and within budget (including potential consequences such as liquidated damages, default and termination), new and burdensome compliance requirements arising from the Vaccine Mandate, and fundamental changes to their processes for developing bids and proposals for federal construction contracts.

FACTUAL BACKGROUND

On September 9, 2021, President Biden issued Executive Order 14,042 which mandates that Federal Contractors comply with all requirements published by the Safer Federal Workforce Task Force ("Task Force Guidance"). As authority for issuing the order, President Biden cited the Constitution, the Federal Property and Administrative Services Act, and the President's statutory delegation authority. The Safer Federal Workforce Task Force ("Task Force") published its initial Guidance ("Task Force Guidance") on September 24, 2021, and the Office of Management and Budget ("OMB") approved that Guidance ("OMB Order").[1] The Task Force Guidance includes,

[1] The Task Force Guidance and OMB Order were superseded and reissued, but the Vaccine Mandate has remained substantively the same.

among other requirements, a Vaccine Mandate that extends to virtually all Federal Contractors' employees. The mechanism established for obligating contractors to comply with the Task Force Guidance is the creation of a new contract clause that must be incorporated into most new and existing federal contracts. On September 30, 2021, the Federal Acquisition Regulatory Council ("FAR Council") issued a template Federal Acquisition Regulation ("FAR") class deviation clause that it urged federal procurement agencies to adopt. Federal procurement agencies, including the Defendant agencies, have promulgated FAR class deviation clauses identical to the FAR Council template, and have begun incorporating them into new and existing federal contracts and solicitations.

Achieving compliance with the Vaccine Mandate and other requirements provided under the Task Force Guidance requires immediate action by Plaintiffs' members and the Vaccine Mandate has already significantly impacted Plaintiffs' members' business activities and ability to conduct business.

Plaintiffs now ask the Court to enjoin Defendants from enforcing a Vaccine Mandate that was unlawfully imposed. As explained in Plaintiffs' Brief in Support of this Motion, Plaintiffs are entitled to the injunctive relief requested herein because: (1) there is a substantial likelihood that Plaintiffs will prevail on the merits of their claims in this action; (2) Plaintiffs' members face a substantial threat of imminent and irreparable harm for which no adequate remedy at law exists if injunctive relief is denied; (3) the injury to Plaintiffs' members outweighs any harm to Defendants that may result from the grant of injunctive relief; and (4) granting injunctive relief will promote, not disserve, the public interest.

No security in the form of a bond is warranted under Federal Rule of Civil Procedure 65 because the Government would not sustain any costs or damages as a result of being enjoined.

However, to the extent a bond is required a matter of law, the value of such a bond should be nominal or the minimum allowed by law.

PRAYER

WHEREFORE, Plaintiffs respectfully request that this Court enter a temporary restraining order without delay, and, upon expiration of that order, a preliminary injunction restraining and enjoining, during the pendency of this lawsuit, Defendants, and their agencies, officials, and employees, agents, and representatives and all persons or entities acting in concert with them from:

(a) implementing or enforcing the Vaccine Mandate;

(b) incorporating or attempting to incorporate the new federal vaccine-mandating contract clauses into federal contracts;

(c) promulgating any new or related Safer Federal Workforce Task Force Guidance in furtherance of the Vaccine Mandate applying to Federal Contractors; and,

(d) promulgating any new agency-level class deviations or requirements in furtherance of the Vaccine Mandate.

December 14, 2021

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CERTIFICATE OF CONFERENCE

The undersigned counsel for Plaintiffs certifies that a conference was not possible because this motion is filed with the initial Complaint and the urgent need to enjoin the current Vaccine Mandate.

Respectfully submitted,

By: */s/ Thomas P. Gies*
Thomas P. Gies

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 14th of December, 2021, I sent a copy of the Motion for a Temporary Restraining Order and Preliminary Injunction via certified mail to the Defendants.

Respectfully submitted,

By: */s/ Thomas P. Gies*
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