

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION**

STATE OF FLORIDA,

*Plaintiff,*

v.

No. 8:21-cv-2524-SDM-TGW

BILL NELSON, et al.,

*Defendants.*

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**FLORIDA’S MOTION FOR PRELIMINARY INJUNCTION**

For its first six months in office, the Biden Administration assured the American people that mandating vaccines is “not the role of the federal government.”<sup>1</sup> Since that time, however, the President’s “patience” has apparently been “wearing thin,” and he has grown “angr[y] at those who haven’t gotten vaccinated.”<sup>2</sup> He now openly mocks those who make the personal choice to refuse a COVID-19 vaccine, deriding that decision as claiming the “freedom to kill [others] with [their] COVID.”<sup>3</sup>

While this Administration once declared that it could implement a nationwide vaccine mandate using its public health authorities,<sup>4</sup> the Supreme Court has now

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<sup>1</sup> Press Briefing by Press Secretary Jen Psaki, July 23, 2021, White House, <https://www.whitehouse.gov/briefing-room/press-briefings/2021/07/23/press-briefing-by-press-secretary-jen-psaki-july-23-2021/>.

<sup>2</sup> Remarks by President Biden on Fighting the COVID-19 Pandemic, White House (Sept. 9, 2021) [hereinafter President Biden Remarks], <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/>.

<sup>3</sup> Transcript: CNN Presidential Town Hall with President Joe Biden, CNN (Oct. 21, 2021), <https://transcripts.cnn.com/show/se/date/2021-10-21/segment/01>.

<sup>4</sup> Ex. 1 at 29 (explaining that such a mandate “would fall within CDC’s statutory authority”).

clarified that those authorities are narrower than the Administration believed. *See Ala. Ass’n of Realtors v. HHS*, 141 S. Ct. 2485 (2021). Forced to look elsewhere, the President now seeks to compel millions of Americans who work for federal contractors—including officials and employees of the sovereign States—to receive a COVID vaccine that they do not want in the name of “promot[ing] economy and efficiency in procurement.”

The President’s procurement authorities are not a backdoor to a nationwide vaccine mandate. His use of those authorities is unprecedented in our history and intrudes radically on individual autonomy and state sovereignty. Making matters worse, the President’s order runs roughshod over basic statutory procedural protections. For example, it delegates untrammelled authority to a shadowy White House-led “task force” and the Director of the Office of Management and Budget (OMB) to impose COVID-19 restrictions broadly on federal contractors, rather than the body that Congress entrusted with creating and implementing government-wide procurement policy, the Federal Acquisition Regulatory Council (FAR Council). And it does so without the notice and comment procedures that Congress also required.

Florida requests a preliminary injunction to prevent the immediate irreparable harm that it will suffer as a result of these unlawful actions.

## **BACKGROUND**

### The Federal Procurement Scheme

Congress enacted the Federal Property and Administrative Services Act of 1949 (FPASA) “to provide the [f]ederal [g]overnment with an economical and efficient

system for” certain enumerated activities, including procurement.<sup>5</sup> 40 U.S.C. § 101. In FPASA, Congress authorized the President to “prescribe policies and directives that [he] considers necessary to carry out” that act. *Id.* § 121(a). Congress did not, however, authorize the President to issue regulations with the force or effect of law and impose requirements on private individuals, but instead charged him with directing the exercise of procurement powers by the relevant agency officials. *Compare id.* (authorizing the President to “prescribe policies and directives”), *with id.* § 121(c) (authorizing the Administrator of the General Services Administration (GSA) to “prescribe regulations”).

Unsatisfied by the Executive Branch’s management of federal procurement, Congress has made several reforms to the procurement scheme since 1949. As relevant here, Congress created the FAR Council, which controls the Federal Acquisition Regulation (FAR), 41 U.S.C. § 1303(d), and has the exclusive power to issue “[g]overnment-wide procurement regulation[s],” *id.* § 1303(a)(1)–(2). Congress also requires that any “procurement policy, regulation, procedure, or form”—whether issued government wide by the FAR Council or for one agency by that agency—be subject to notice and comment, *id.* § 1707(a)–(b), unless the government can show that “urgent and compelling circumstances make compliance . . . impracticable,” *id.* § 1707(d).

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<sup>5</sup> Florida explained FPASA’s history and purpose in more detail in its complaint. *See* Compl. ¶¶ 31–41.

The Biden Administration's Vaccine Policies

On September 9, 2021, the President announced three new administrative actions aimed at compelling much, if not most, of the adult population in the United States to receive a COVID-19 vaccine. First, the President announced that the Department of Labor would issue an emergency rule mandating that private employers with 100 or more employees require their employees to become fully vaccinated or submit to weekly testing. *See* President Biden Remarks. Second, the President announced that the Centers for Medicare & Medicaid Services would issue a rule mandating vaccines for employees who work at healthcare facilities that accept Medicare and Medicaid. *Id.* Finally, the President announced that he would issue an executive order requiring all executive branch employees and federal contractors to be vaccinated. *Id.* As the President put it, “[i]f you want to work with the federal government and do business with us, get vaccinated. If you want to do business with the federal government, vaccinate your workforce.” *Id.* In making this announcement, President Biden claimed that these combined initiatives would affect about 100 million Americans. *Id.*

That same day, President Biden issued the challenged executive order. *See* Exec. Order No. 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, 86 Fed. Reg. 50,985 (Sept. 9, 2021). The order relies on FPASA, as well as the Constitution and the President’s power under 3 U.S.C. § 301 to delegate his statutory authorities. 86 Fed. Reg. at 50,985. The executive order directs all agencies to ensure that all “contracts and contract-like instruments [covered by the executive

order] . . . include a clause [that specifies] that the contractor or subcontractor shall, for the duration of the contract, comply with all guidance for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force” (Task Force), subject to that guidance being approved by the OMB Director. *Id.*

The executive order instructs the Task Force to develop this guidance and directs the OMB Director, pursuant to the President’s delegation of his FPASA power under 3 U.S.C. § 301, to determine whether the Task Force guidance will promote economy and efficiency in federal procurement. 86 Fed. Reg. at 50,985–86. If the OMB Director makes this determination and publishes it in the Federal Register, agencies must include this clause in covered contracts. *Id.* The order contemplates that the Task Force will update the guidance on a continuing basis, subject to approval by the OMB Director. *Id.*

The executive order also instructs the FAR Council to “amend the [FAR] to provide for inclusion in [f]ederal procurement solicitations and contracts subject to this order” the contract clause discussed in the executive order and further directs agencies to implement the contract clause in contracts not covered by the FAR. *Id.* at 50,986. The executive order applies to contracts entered into, renewed, or with an option to be exercised on or after October 15, 2021. *Id.* at 50,987.

On September 24, 2021, the Task Force issued its guidance (Task Force guidance).<sup>6</sup> The Task Force guidance, which is over thirteen pages single-spaced, outlines the following requirements: (1) vaccination of covered contractor employees, except in limited circumstances where an employee is legally entitled to an accommodation, Task Force guidance at 5–6; (2) compliance with CDC guidance for masking and physical distancing at contractor workplaces, including for visitors, *id.* at 6–7; and (3) designation of a person to coordinate compliance with the guidance and other COVID-19 safety protocols, *id.* at 7–8.

In a lengthy Q&A portion, the guidance makes clear that prior COVID-19 infection, even with an antibody test, does not satisfy the vaccination requirement. *Id.* at 10. The Q&A also explains that employees who work exclusively outdoors are subject to the same stringent requirements. *Id.* The Task Force guidance sets a deadline of December 8, 2021, for all covered contractor employees to be fully vaccinated. *Id.* at 5. The guidance declares that the Task Force will consider updates “based on future changes to [CDC] guidance and as warranted by the circumstances of the pandemic and public health conditions.” *Id.* at 2.

On September 28, 2021, as contemplated by the executive order, the OMB Director published a notice of determination in the Federal Register (OMB rule), without reasoning or explanation, finding that the Task Force guidance “will improve

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<sup>6</sup> COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors, Safer Federal Workforce Task Force (Sept. 24, 2021), [https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc\\_20210922.pdf](https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf).

economy and efficiency by reducing absenteeism and decreasing labor costs for contractors and subcontractors working on or in connection with a [f]ederal [g]overnment contract.” Determination of the Promotion of Economy and Efficiency in Federal Contracting Pursuant to Executive Order No. 14042, 86 Fed. Reg. 53,691–92 (Sept. 28, 2021).

On September 30, 2021, the FAR Council—in compliance with the executive order—issued its “guidance” (FAR Council guidance).<sup>7</sup> *See* 86 Fed. Reg. at 50,986 (instructing the FAR Council to “take initial steps to implement appropriate policy direction” by October 8). In its guidance, the FAR Council “encouraged [agencies] to make . . . deviations” to the FAR, which should be “effective until the FAR is amended.” FAR Council guidance at 3.

The FAR Council guidance includes the text of a contract clause,<sup>8</sup> which contains little substantive content other than requiring compliance with the Task Force guidance, even if that guidance is amended during performance of the contract. FAR Council guidance at 4–5. The FAR Council guidance “remind[s]” agencies that, under the executive order, they are “required” to include an implementing clause in new contracts awarded on or after November 14, new solicitations issued on or after October 15, extensions or renewals of existing contracts awarded on or after October

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<sup>7</sup> *See* Memorandum from FAR Council to Chief Acquisition Officers et al. re: Issuance of Agency Deviations to Implement Executive Order 14042 (Sept. 30, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/09/FAR-Council-Guidance-on-Agency-Issuance-of-Deviations-to-Implement-EO-14042.pdf>.

<sup>8</sup> Using the clause verbatim waives the requirement to consult with the Civilian Agency Acquisition Council. FAR Council guidance at 3; *see* FAR § 1.404(a)(1).

15, and options on existing contracts exercised on or after October 15. *Id.* at 2. The FAR Council guidance also “strongly encourages” agencies to apply the guidance broadly by including the clause in contracts before those deadlines and on contracts not otherwise subject to the executive order. *Id.* at 3. This broad application is meant “[t]o maximize the goal of getting more people vaccinated and decrease the spread of COVID-19.” *Id.*

### The Effect of the Challenged Actions on Florida

Florida’s agencies and other state entities contract with the federal government as a matter of course, and these contracts are worth tens of millions of dollars or more. For example, last year the University of Florida won a contract from the National Aeronautics and Space Administration (NASA) worth over \$12 million. Ex. 3 at 2. And Florida’s Department of Education has several contracts with GSA to provide vending services at federal buildings, which Florida uses to give employment opportunities to blind individuals. Ex. 2 at 2–3. Florida has pending opportunities to enter into or renew a number of such contracts beginning as early as December. *Id.* at 3–4.

Defendants are already pressuring Florida to modify existing contracts, Ex. 4 at 3–6; Ex. 5 at 2–5; Ex. 6 at 2–7, and Florida understands that failing to do so will exclude Florida from consideration for future opportunities, Ex. 2 at 3. As a matter of Florida law, however, state entities may not require vaccination of state employees. *See* § 381.00316(2), Fla. Stat.; Ex. 7 at 2 (enforcing § 381.00316(2) against a local government); Ex. 8 at 3 (explaining that Florida’s public universities lack authority to



mandate vaccines for employees). The challenged actions, therefore, require Florida to choose between changing or violating state law on the one hand or losing tens of millions of dollars in federal funds on the other.

Beyond the mandates on state officials and employees, the challenged actions' effect on private businesses will financially harm Florida. According to polling data, roughly two-thirds of the unvaccinated say they will quit their job in response to a vaccine mandate.<sup>9</sup> Because less than two-thirds of Floridians are fully vaccinated,<sup>10</sup> federal contractors in Florida will soon begin losing a substantial portion of their workforce as a direct result of the President's executive order. And this loss will cause Florida economic harm in the form of reduced corporate income tax revenues.<sup>11</sup> *See* § 220.11, Fla. Stat. (setting a corporate income tax rate of 5.5 percent).

Because Defendants imposed a deadline to be vaccinated of December 8, Florida's irreparable harm is imminent.

## ARGUMENT

A plaintiff seeking a preliminary injunction must establish (1) “that he is likely to succeed on the merits,” (2) “that he is likely to suffer irreparable harm in the absence of preliminary relief,” (3) “that the balance of equities tips in his favor,” and (4) “that

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<sup>9</sup> Liz Hamel et al., *KFF COVID-19 Vaccine Monitor: September 2021*, Kaiser Family Foundation (Sept. 28, 2021), <https://www.kff.org/coronavirus-covid-19/poll-finding/kff-covid-19-vaccine-monitor-september-2021/>.

<sup>10</sup> Florida COVID-19 Vaccine Tracker, Florida Today (last visited Nov. 1, 2021), <https://data.floridatoday.com/covid-19-vaccine-tracker/florida/12/>.

<sup>11</sup> Matthew Boyle, *Vaccine Mandates Reach 25% of Companies After Biden Order* (Sept. 30, 2021), <https://www.bloomberg.com/news/articles/2021-09-30/one-in-four-companies-now-have-vaccine-mandate-after-biden-order>.

an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).<sup>12</sup>

**I. FLORIDA IS LIKELY TO SUCCEED ON THE MERITS OF ITS CLAIMS.**

*a. The challenged actions are contrary to law and in excess of statutory authority.*

Under the Administrative Procedure Act (APA), courts must “hold unlawful and set aside agency action” that is “in excess of statutory jurisdiction, authority, or limitations” or “not in accordance with law.” 5 U.S.C. § 706(2)(A), (C).<sup>13</sup> Because the executive order, the OMB rule, and the FAR Council guidance violate multiple statutes, Defendants have “gone beyond what Congress has permitted [them] to do.” *City of Arlington v. FCC*, 569 U.S. 290, 298 (2013).

*i. Only the FAR Council may issue government-wide procurement regulations.*

Section 1303(a) requires the FAR Council to “issue and maintain . . . a single [g]overnment-wide procurement regulation.” 41 U.S.C. § 1303(a)(1). Further, “[o]ther regulations relating to procurement issued by an executive agency [are] limited to” agency-specific regulations and regulations necessary to implement government-wide procurement policies. *Id.* § 1303(a)(2). The challenged actions violate these provisions.

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<sup>12</sup> Jurisdiction in this Court is proper; although the Court of Federal Claims has jurisdiction over certain procurement-related matters, it does not have jurisdiction to consider Florida’s claims here. *See Land Shark Shredding, LLC v. United States*, 842 F. App’x 589, 593 (Fed. Cir. 2021) (“Challenges to the validity of a regulation governing a procurement must be brought in federal district court under the Administrative Procedure Act.” (citing *Southfork Sys., Inc. v. United States*, 141 F.3d 1124, 1135 (Fed. Cir. 1998))).

<sup>13</sup> Florida’s claim against the President for ultra vires action is not an APA claim, *see* Compl. ¶ 108 (discussing *Chamber of Com. of U.S. v. Reich*, 74 F.3d 1322, 1330 (D.C. Cir. 1996)), but Florida discusses it here for ease of organization.

The executive order violates § 1303 because it asks OMB to issue a government-wide procurement regulation requiring vaccines—a task exclusively reserved to the FAR Council. 86 Fed. Reg. at 50,985–96. The OMB rule similarly violates § 1303 because it carries out the President’s unlawful instruction. 86 Fed. Reg. at 53,691–92. And the FAR Council guidance violates § 1303 because it abdicates the FAR Council’s responsibility to issue government-wide procurement regulations, instead “remind[ing]” agencies what the executive order “require[s].” FAR Council guidance at 2. Moreover, as further explained below, the FAR Council is not authorized to dictate government-wide procurement policy via “guidance.” *See* Section I.b.

Because the President and OMB Director attempt to exercise authority exclusively reserved to the FAR Council and because the FAR Council acquiesces to and even encourages this intrusion, the challenged actions are contrary to law.<sup>14</sup>

ii. The President does not have the authority to issue procurement regulations under FPASA.

The President’s executive order appears to proceed on the premise that FPASA grants the President the power to issue government-wide procurement regulations with the force or effect of law himself. It does not. Section 121(a) only authorizes the President to “prescribe *policies and directives* that the President considers necessary to carry out” FPASA. 40 U.S.C. § 121(a) (emphasis added). “[P]olicies and directives”

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<sup>14</sup> As best Florida can tell from monitoring the FAQs on [saferfederalworkforce.gov](https://saferfederalworkforce.gov), the government is updating the Task Force guidance without approval of the OMB Director, in flagrant violation of the Constitution. *See* Compl. at 15 n.9; FAR Council guidance at 5 (requiring compliance with the Task Force’s “Frequently Asked Questions,” even if “amended during the performance” of a contract).

describe the President's power to direct the exercise of procurement authority throughout the government. *See Centralizing Border Control Policy Under the Supervision of the Attorney General*, 26 Op. O.L.C. 22, 23 (2002) ("Congress may prescribe that a particular executive function may be performed only by a designated official within the Executive Branch, and not by the President."). This authority is quite different from authority for the President himself to issue regulations imposing requirements on private parties.

Congress knows how to confer that power, as it authorized the GSA Administrator to "prescribe regulations" in the same section of the statute. 40 U.S.C. § 121(c). It even gave the President, in another section of FPASA, the power to "prescribe regulations establishing procedures to carry out" the establishment of motor vehicle pools and transportation systems. *Id.* § 603; *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended."). And Congress has given the President the power to "prescribe regulations" in other contexts, typically in the realms of foreign affairs and national defense. *E.g.*, 18 U.S.C. § 3496 ("The President is authorized to prescribe regulations governing the manner of executing and returning commissions by consular officers."); 32 U.S.C. § 110 ("The President shall prescribe regulations, and issue orders, necessary to organize, discipline, and govern the National Guard.").

Because § 121(a) only authorizes the President to direct the exercise of agency authority, the challenged actions are *ultra vires*.

iii. FPASA does not authorize a vaccine mandate.

In any event, FPASA contains no authority for the President to leverage the federal government’s procurement authorities into a nationwide vaccine mandate in the name of promoting “economy and efficiency.” In suggesting otherwise, the government appears to assume that 40 U.S.C. § 101, which states that FPASA’s purpose is to “provide the [f]ederal [g]overnment with an economical and efficient system” for activities that include procurement, is an affirmative grant of authority for the government to include in contracts anything it thinks “economical” or “efficient.” But that mistakes a prefatory purpose statement for a grant of authority. *D.C. v. Heller*, 554 U.S. 570, 578 (2008) (“[A]part from [a] clarifying function, a prefatory clause does not limit or expand the scope of the operative clause.”); *see also Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 n.9 (D.C. Cir. 1995) (“[T]he agency may not simply disregard the specific scheme Congress has created . . . in order to follow a broad purpose statement.”).

In fact, FPASA specifies when “economy and efficiency” define the scope of an official’s authority. *See* 40 U.S.C. § 501(a)(1)(A); *id.* § 506(b); *id.* § 581(c)(4); *id.* § 584(a)(2)(C); *id.* § 603(a)(1). And those provisions—none of which Defendants have invoked here—would be surplusage if the President’s authority under FPASA were a general grant to do anything with respect to contracting that promotes economy and efficiency. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (“We are thus ‘reluctan[t] to treat statutory terms as surplusage’ in any setting.” (quoting *Babbitt v. Sweet Home Chapter, Cmty. for Great Ore*, 515 U.S. 687, 698 (1995))).

Similarly, when Congress authorizes the Executive Branch to implement social policy through its procurement authorities, it speaks clearly. *See, e.g.*, 41 U.S.C. § 8302(a)(1) (requiring the procurement of American-made materials unless the “head of the department . . . determines their acquisition to be inconsistent with the public interest or their cost to be unreasonable”); *id.* § 6703(1) (requiring contractors to pay employees a minimum wage set by the Secretary of Labor); *see also* 34 U.S.C. § 10102(a)(6) (discussing the Department of Justice’s authority to “plac[e] special conditions on all grants”).

Indeed, the grant of authority to the President in FPASA is quite narrow. Beyond the fact that he is not authorized to issue regulations, *see* Section I.a.ii, his power is limited to prescribing policies and directives he “considers *necessary* to carry out this subtitle.” 40 U.S.C. § 121(a) (emphasis added). “Necessary” is a “word of limitation” and is synonymous with “required,” “indispensable,” and “essential.” *Vorheimer v. Phila. Owners Assoc.*, 903 F.3d 100, 105 (3d Cir. 2018); *accord In re Microsoft Corp. Antitrust Litig.*, 355 F.3d 322, 327 (4th Cir. 2004). The President’s authority is therefore limited to that which he considers “essential” or “indispensable” to carry out FPASA.

The phrase in § 121(a)—even coupled with the purpose statement in § 101—cannot bear the weight the government has placed on it, especially because Congress does not delegate decisions of major economic and social significance “in so cryptic a

fashion.”<sup>15</sup> *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160–61 (2000). And nothing in FPASA overcomes the presumption that Congress “preserves the constitutional balance between the National Government and the States.” *Bond v. United States*, 572 U.S. 844, 862 (2014). In short, coercing state officials and employees, and millions of American workers, to receive an injection that they do not want is an elephant far too large for the mousehole the government relies on here. *See Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001).

To be sure, there is authority embracing a broader reading of FPASA, principally *AFL-CIO v. Kahn*, 618 F.2d 784 (D.C. Cir. 1979), and its progeny. But *Kahn* is wrongly decided. Invoking the purpose statement in § 101, *Kahn* considers whether the President can impose wage and price standards on contractors based on the “‘economy and efficiency’ touchstone” of FPASA. *Kahn*, 618 F.2d at 788, 793. In addition to misreading § 101 as a grant of authority, the court conflates FPASA’s legislative history with its statutory text, *id.* at 788–89 nn. 22–24, and turns basic statutory interpretation on its head by treating specific examples in which Congress authorized the use of the contracting power to advance policy—for example, setting aside certain purchases for small businesses—as evidence that Congress authorized the President to do so unilaterally in unrelated circumstances, *id.* at 789 & n.25.

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<sup>15</sup> In addition to affecting millions of American workers, the challenged actions affect hundreds of billions of dollars in federal contracts. *See, e.g.*, Federal Government Awards Record-Breaking \$145.7 Billion in Contracting to Small Businesses, U.S. Small Business Administration (July 28, 2021), <https://www.sba.gov/article/2021/jul/28/federal-government-awards-record-breaking-1457-billion-contracting-small-businesses>.



Regardless, the link between the challenged actions and economy and efficiency is far too attenuated. Immediately losing a substantial part of their workforce will not help contractors efficiently serve the government, *see supra* notes 9–11, especially in Florida, which has the lowest COVID cases per capita in the United States.<sup>16</sup> Moreover, even if the benefits of reduced COVID transmission could outweigh that cost, recent data call into question the degree to which vaccines mitigate the spread of the delta variant.<sup>17</sup> Finally, the challenged actions are at a minimum overbroad in refusing to account for natural immunity, subjecting those who work exclusively outdoors to the same requirements as those who work indoors and, as best Florida can tell, requiring vaccination of those who work exclusively from home, *see* Compl. at 15 n.8.<sup>18</sup>

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<sup>16</sup> David Schutz, *Florida Has Lowest COVID Cases Per Capita in US, Data Shows*, South Florida Sun Sentinel (Oct. 28, 2021), <https://www.sun-sentinel.com/coronavirus/fl-ne-florida-covid-19-lowest-case-rate-in-nation-20211028-gvcy2hxdnngufnv3vpwm23yuae-story.html>.

<sup>17</sup> *See* Anika Singanayagam et al., *Community Transmission and Viral Load Kinetics of the SARS-CoV-2 Delta (B.1.617.2) Variant in Vaccinated and Unvaccinated Individuals in the UK: A Prospective, Longitudinal, Cohort Study*, *Lancet* (Oct. 29, 2021), [https://www.thelancet.com/journals/laninf/article/PIIS1473-3099\(21\)00648-4/fulltext](https://www.thelancet.com/journals/laninf/article/PIIS1473-3099(21)00648-4/fulltext).

<sup>18</sup> *See, e.g.*, Yair Goldberg et al., *Protection of Previous SARS-CoV-2 Infection Is Similar to That of BNT162b2 Vaccine Protection: A Three-Month Nationwide Experience from Israel*, medRxiv (2021 preprint), <https://www.medrxiv.org/content/10.1101/2021.04.20.21255670v1> (concluding that the “overall estimated level of protection from prior . . . infection” was comparable to that from vaccination); Nabin K. Shrestha et al., *Necessity of COVID-19 Vaccination in Previously Infected Individuals*, medRxiv, (2021 preprint), <https://www.medrxiv.org/content/10.1101/2021.06.01.21258176v2> (concluding that those with natural immunity are “unlikely to benefit from COVID-19 vaccination”); Galit Perez et al., *A 1 to 1000 SARS-Cov-2 Reinfection Proportion in Members of a Large Healthcare Provider in Israel: A Preliminary Report*, medRxiv, (2021 preprint), <https://www.medrxiv.org/content/10.1101/2021.03.06.21253051v1> (finding that approximately 1/1000 of participants in a study of persons who previously tested positive for COVID-19 were reinfect); Tommaso Celeste Bulfone et al., *Outdoor Transmission of SARS-CoV-2 and Other Respiratory Viruses: A Systematic Review*, *Journal of Infectious Diseases* (Nov. 29, 2020), <https://academic.oup.com/jid/article/223/4/550/6009483> (concluding that “[e]xisting evidence supports the wide-held belief that risk of SARS-CoV-2 transmission is lower outdoors”).



For these reasons, FPASA does not authorize the challenged actions.

iv. The challenged actions violate the Competition in Contracting Act.

Federal agencies are required to provide for “full and open competition through the use of competitive procedures” in procurement. 41 U.S.C. § 3301(a)(1). The President’s § 121(a) authority is expressly subject to that requirement. *See* 40 U.S.C. § 121(a) (requiring “policies” issued by the President pursuant to FPASA to be “consistent with this subtitle”); 40 U.S.C. § 111 (defining “this subtitle” to include portions of Title 41, including § 3301).

The challenged actions violate that provision because they “effectively exclude[] an offeror from winning an award, even if that offeror represents the best value to the government.” *Nat’l Gov’t Servs., Inc. v. United States*, 923 F.3d 977, 990 (Fed. Cir. 2019). The COVID-19 pandemic has become part of normal life. A company may, for example, be able to have its employees work remotely in the case of an outbreak. But Defendants refuse to consider the specific situation of particular bidders, instead categorically excluding contractors that refuse to acquiesce to the Administration’s preferred COVID policies.

By excluding an entire class of contractors without regard to their ability to perform the contract, the challenged actions violate § 3301.

*b. Defendants failed to conduct notice and comment.*

Section 1707 requires procurement “polic[ies], regulation[s], procedure[s], or form[s]” to go through notice and comment, so long as they “relate[] to the

expenditure of appropriate funds” and either have “a significant effect beyond the internal operating procedures of” the issuing agency or “a significant cost or administrative impact on contractors or offerors.” 41 U.S.C. § 1707(a)–(b).

Federal contracts involve the expenditure of appropriated funds, and the vaccine mandate has both a significant effect beyond the internal operating procedures of the agencies and a significant cost and administrative impact on Florida and other contractors. Section 1707 therefore applies, and the challenged actions violate it.

This is true even as to the FAR Council guidance. Though framed as non-binding, agencies are treating it as binding. Ex. 4 at 5–6; Ex. 5 at 2–3; Ex. 6 at 2; *see Texas v. EEOC*, 933 F.3d 433, 441–42 (5th Cir. 2019) (explaining that agency action treated as binding is reviewed as a regulation). It even gives government-wide preapproval of the draft contract clause, providing that “agencies that adopt the attached clause language without change in their deviations will be presumed to have consulted with the Chair of the Civilian Agency Acquisition Council” as “required by FAR 1.404(a)(1).” FAR Council guidance at 3.

And even if it were not binding, it is still a procurement “policy” subject to § 1707’s requirements. Because Congress separately used the word “regulation,” the word “policy” indicates an intent to cover non-binding government pronouncements. *See Bailey v. United States*, 516 U.S. 137, 146 (1995) (“We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.”).

Moreover, Defendants have not and cannot invoke the exception in § 1707(d). That exception, which applies when “urgent and compelling circumstances make compliance with the requirements impracticable,” 41 U.S.C. § 1707(d), must be invoked by designating the action as “temporary” and providing a thirty-day comment period, *id.* § 1707(e). Defendants have not done so. And even if they had, there is no reason to think that notice and comment was impracticable. Neither the COVID-19 pandemic nor the availability of vaccines is a recent development. *Cf. Florida v. Becerra*, 8:21-cv-839-SDM-AAS, 2021 WL 2514138, at \*45 (M.D. Fla. June 18, 2021) (concluding that the COVID-19 pandemic was insufficient for “good cause”); *Regeneron Pharms. v. HHS*, 510 F. Supp. 3d 29, 48 (S.D.N.Y. 2020) (similar).

For these reasons, the challenged actions are subject to notice and comment and violate § 1707.

*c. The OMB rule and FAR Council guidance are arbitrary and capricious.*

Under the APA, a court must “hold unlawful and set aside agency action” that is “arbitrary [or] capricious,” as Defendants’ actions are here. 5 U.S.C. § 706(2)(A).

First, neither the OMB rule nor the FAR Council guidance provide any explanation for how they promote economy and efficiency in procurement other than a pro forma, conclusory statement. That is per se arbitrary and capricious. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016) (“Whatever potential reasons the Department might have given, the agency in fact gave almost no reasons at all. . . . [C]onclusory statements do not suffice to explain [an agency’s] decision.”).

Second, the OMB rule and FAR Council guidance do not promote economy and efficiency for the reasons discussed above. *See supra* at 16–17. And at a minimum, Defendants were required to consider and address the shortfalls Florida has highlighted. But Defendants apparently did not even consider the possibility that their actions would cause a labor shortage. *See Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 664, 658 (2007) (stating the rule that an agency decision is arbitrary and capricious if the agency “entirely failed to consider an important aspect of the problem” (quoting *Motor Vehicle Mfrs. Ass’n of U.S. v State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983))).

Third, the OMB rule and FAR Council guidance ignore costs to the States, a “centrally relevant factor when deciding whether to regulate.” *Michigan v. EPA*, 576 U.S. 743, 752–53 (2015). In fact, neither the OMB rule nor the FAR Council guidance display an awareness that the government is imposing requirements on the States at all, which is reason alone to find them arbitrary and capricious. *State Farm*, 463 U.S. at 43.

Fourth, the OMB Rule and FAR Council guidance neither account for Florida’s reliance interests on the previous policy of not requiring vaccines, nor consider lesser alternatives, such as subjecting States like Florida with low COVID-19 rates to lesser burdens. *See DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913–14 (2020).

Fifth, the conclusion that the Task Force guidance and FAR Council guidance will improve procurement efficiency by reducing absenteeism and decreasing labor costs is blatantly pretextual and a trojan horse for regulation of public health. *See Dep’t*

*of Com. v. New York*, 139 S. Ct. 2551, 2576 (2019) (“Accepting contrived reasons would defeat the purpose of the enterprise [of judicial review.]”). President Biden, in his remarks announcing the executive order, stated that he was “frustrated with the nearly 80 million Americans who are still not vaccinated,” referred to “overcrowd[ed] . . . hospitals” and “overrun[] . . . emergency rooms,” and blamed “elected officials actively working to undermine the fight against COVID-19.” President Biden Remarks. The FAR Council guidance likewise admits that the goal of this effort is “getting more people vaccinated and decreas[ing] the spread of COVID-19.” FAR Council guidance at 3. That is smoking-gun evidence of pretext.

For these reasons, the OMB rule and FAR Council guidance are arbitrary and capricious.

*d. The challenged actions violate the Constitution.*

Even if the challenged actions are not in excess of authority, they are at a minimum unconstitutional.

If FPASA authorizes the President to condition procurement contracts on anything that he believes promotes economy and efficiency, and if that authority reaches as far as requiring contractors to force vaccination of their employees, then FPASA lacks an intelligible principle and violates the non-delegation doctrine. *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541–42 (1935); *accord Becerra*, 2021 WL 2514138, at \*31.

Further, the challenged actions would also violate the Spending Clause by conditioning the receipt of federal funds on the States agreeing to a contract term that

is subject to change. FAR Council guidance at 5. “[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously,” so “States [can] exercise their choice knowingly.” *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Florida has no opportunity for a knowing choice here because the Task Force guidance is subject to change at any time.

## **II. FLORIDA HAS STANDING AND IS IRREPARABLY HARMED BY THE CHALLENGED ACTIONS.**

States are entitled to “special solicitude” in establishing standing. *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007); *see also Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982) (recognizing the States’ “quasi-sovereign interest in the health and well-being—both physical and economic—of its residents”). Moreover, a “state has standing to sue in its sovereign capacity when it has suffered an economic injury” or must “expend[] any of its resources.” *Chiles v. Thornburgh*, 865 F.2d 1197, 1208 (11th Cir. 1989). For example, the Eleventh Circuit “readily conclude[d]” that Florida has standing to challenge an allegedly illegal agency action that “*may* adversely impact” its “economy” and “thereby injur[e]” Florida. *Alabama v. U.S. Army Corps of Eng’rs*, 424 F.3d 1117, 1130 (11th Cir. 2005) (emphasis added).

Economic harm caused by federal agency action also establishes irreparable harm. These harms “cannot be undone through monetary remedies,” *Ferrero v. Associated Materials Inc.*, 923 F.2d 1441, 1449 (11th Cir. 1991), because the United States has sovereign immunity, *Odebrecht Const., Inc. v. Sec’y, Fla. Dep’t of Transp.*, 715

F.3d 1268, 1289 (11th Cir. 2013).<sup>19</sup> And sovereign injury—such as preemption of state law or interference with state policy—is also irreparable harm because it likewise cannot be addressed through monetary remedies. *See Kansas v. United States*, 249 F.3d 1213, 1227–28 (10th Cir. 2001).

As discussed, Florida faces the untenable choice between suffering widespread and irreparable economic harm through lost contracts with the federal government or violating state law and changing state policy. Florida’s universities alone receive tens of millions from federal contracts, *e.g.*, Ex. 3 at 2, for which they will be ineligible if the challenged actions stand. And Florida’s Department of Education will lose GSA contracts beginning next month, which will not only harm Florida economically, but will also frustrate Florida’s policy of providing employment opportunities to blind individuals and force Florida to expend resources pursuing alternative means of doing so. Ex. 2 at 2–5. Finally, Florida faces lost corporate income tax revenue from businesses forced to fire employees who choose not to be vaccinated.

Beyond these direct harms, Florida has *parens patriae* standing to assert the injury of the thousands of Floridians who work for federal contractors and do not wish to receive a vaccine. While *Massachusetts v. Mellon*, 262 U.S. 447 (1923), recognized certain limits on the use of that standing theory against the federal government, “there is a critical difference between allowing a State ‘to protect her citizens from the operation of federal statutes’ (which is what *Mellon* prohibits) and allowing a State to

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<sup>19</sup> The procedural harm from the failure to provide notice and comment may also be irreparable. *See Becerra*, 2021 WL 2514138, at \*47.

assert its rights under federal law (which it has standing to do).” *Massachusetts v. EPA*, 549 U.S. at 520 n.17. Because Florida asserts several federal rights here—such as the notice and comment guarantees of § 1707 and the full and open competition guarantees of § 3301—it has *parens patriae* standing. *See Texas v. United States*, 328 F. Supp. 3d 662, 697 (S.D. Tex. 2018); *Texas v. United States*, No. 1:18-cv-00086, 2021 WL 3025857, at \*14 (S.D. Tex. July 16, 2021); *Aziz v. Trump*, 231 F. Supp. 3d 23, 31–32 (E.D. Va. 2017).

Absent this Court’s intervention, Florida will suffer irreparable harm.

### **III. THE BALANCE OF THE EQUITIES AND PUBLIC INTEREST FAVOR PRELIMINARY INJUNCTIVE RELIEF.**

The equities and public-interest factors merge for federal-government action. *Nken v. Holder*, 556 U.S. 418, 435 (2009). Both favor an injunction here. “Forcing federal agencies to comply with the law is undoubtedly in the public interest.” *Cent. United Life, Inc. v. Burwell*, 128 F. Supp. 3d 321, 330 (D.D.C. 2015). And “[t]he effect on the health of the local economy is a proper consideration in the public interest analysis.” *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011). It also is “against the public interest to force a person out of a job.” *Vencor, Inc. v. Webb*, 829 F. Supp. 244, 251 (N.D. Ill. 1993).

### **IV. NO BOND IS REQUIRED UNDER RULE 65.**

“[T]he amount of security . . . is a matter within the discretion of the trial court.” *BellSouth Telecomm. v. MCIMetro Access Transmission Servs.*, 425 F.3d 964, 971 (11th Cir. 2005). No bond should be required here.



## CONCLUSION

For the foregoing reasons, the Court should preliminarily enjoin Defendants from enforcing, implementing, or giving any effect to the executive order, OMB rule, or FAR Council guidance in Florida.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing has been served by e-mail on Kevin J. Wynosky of the U.S. Department of Justice, who has agreed to accept e-mail service for all Defendants.

/s/ James H. Percival  
James H. Percival

# **EXHIBIT 1**

BEFORE THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ALABAMA ASSOCIATION OF REALTORS, .  
et al., .  
Plaintiffs, . Case Number 20-cv-3377  
vs. .  
UNITED STATES DEPARTMENT OF .  
HEALTH AND HUMAN SERVICES, . April 29, 2021  
et al., . 10:02 a.m.  
Defendants. .  
- - - - -

TRANSCRIPT OF MOTIONS HEARING  
BEFORE THE HONORABLE DABNEY L. FRIEDRICH  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Official Court Reporter: SARA A. WICK, RPR, CRR  
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for the District of Columbia  
333 Constitution Avenue Northwest  
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Proceedings recorded by stenotype shorthand.  
Transcript produced by computer-aided transcription.

## P R O C E E D I N G S

(All participants present via video conference.)

THE COURTROOM DEPUTY: Your Honor, we are in Civil Action 20-3377, Alabama Association of Realtors, et al., versus the U.S. Department of Health and Human Services, et al.

If I can have the parties identify themselves for the record, beginning with the counsel for the plaintiff.

MR. SHUMATE: Good morning, Your Honor. This is Brett Shumate from Jones Day on behalf of the plaintiffs.

I also wanted to let the Court know we have several representatives from my client on the line today from the Alabama Association of Realtors, Georgia Association of Realtors, and the National Association of Realtors.

I also have a few colleagues of mine from Jones Day on the line: Stephen Kenny, Megan Lacey Owen, and Charlotte Taylor.

THE COURT: All right. Thank you. Good morning, Mr. Shumate.

MR. SHUMATE: Good morning, Your Honor.

MS. VIGEN: And Your Honor, I'm Lesley Vigen from the Department of Justice for the defendants.

I am joined by my Department of Justice colleagues Steven Myers and Eric Beckenhauer, as well as colleagues from the Department of Health and Human Services and Centers For Disease Control and Prevention.

THE COURT: All right. Good morning, Ms. Vigen.

1           So before the Court are the parties' cross-motions for  
2           summary judgment and the defendants' motion to dismiss. I will  
3           hear first from the plaintiffs, but I would like both sides to  
4           focus on the plaintiffs' argument that the CDC exceeded the  
5           statutory authority and the defendants' argument, ratification  
6           argument.

7           Mr. Shumate, you may begin.

8           MR. SHUMATE: Thank you, Your Honor. May it please  
9           the Court.

10          The federal ban on eviction has been in place for more than  
11          a year. This means that my clients have some tenants that  
12          haven't paid rent in over 12 months. Property owners like my  
13          clients still have to pay taxes, mortgages, and their insurance.  
14          My clients are not Wall Street bankers or private equity funds.  
15          Instead, they are small business owners in Alabama and Georgia  
16          who own and manage rental properties for a living.

17          We all recognize that many renters have been struggling  
18          financially throughout the pandemic. The government shouldn't  
19          be shifting the economic burdens of the pandemic from one group  
20          to another unless Congress has given the government permission  
21          to do so. In fact, a number of courts, including the Sixth  
22          Circuit Court of Appeals, have already held that the CDC lacks  
23          statutory authority to ban evictions.

24          Today I would like to focus on four reasons why the CDC  
25          lacks statutory authority for the eviction moratorium. First is

1 that Congress spoke directly to the problem of evictions during  
2 the pandemic in the CARES Act. Congress enacted in March of  
3 2020 a limited restriction on evictions that was supposed to  
4 expire in the summer of 2020. Of course, that's not what  
5 happened. Instead, the president issued an executive order  
6 directing the CDC to take action, and within three weeks, CDC  
7 issued the eviction moratorium. In taking office, the new  
8 administration has extended the eviction moratorium not once,  
9 but twice. The CDC's decision to extend the eviction moratorium  
10 beyond the expiration date set by Congress conflicts with the  
11 plain and unambiguous intent of Congress.

12 Second, the eviction moratorium is nothing like the other  
13 sanitation measures described in the second sentence of Section  
14 361(a) of the Public Health Service Act. As the Sixth Circuit  
15 explained, banning evictions is radically different from  
16 sanitizing property that's been exposed to contagion. If the  
17 second sentence of the statute doesn't impose some limit on the  
18 first sentence, as the government argues, then the second  
19 sentence of the statute is entirely superfluous, and there is no  
20 limit on the CDC's authority under this statute.

21 This brings me to my third point, Your Honor, which is that  
22 if the CDC can regulate evictions, then the CDC can regulate any  
23 human activity that could possibly contribute to the spread of a  
24 communicable disease. This means that CDC could ban all  
25 foreclosures. CDC could impose a nationwide lockdown. CDC

1 could regulate businesses opening and closing throughout a  
2 pandemic. And CDC could even regulate and restrict religious  
3 worship.

4 These are all measures that state and local governments  
5 have taken throughout the pandemic, but there is no way that  
6 Congress would have intended to give CDC a blank check to  
7 regulate all human activity. If the government -- if Congress  
8 had given the CDC that amount of authority, as the Sixth Circuit  
9 recognized, that would raise a significant problem under the  
10 nondelegation doctrine.

11 Fourth, Your Honor, even if you think that the CDC has  
12 reasonably interpreted the statute, that's not enough, because  
13 there is no clear delegation of authority for the eviction  
14 moratorium. But there must be a clear delegation of authority  
15 because CDC decided a major question with significant  
16 constitutional implications, as the Sixth Circuit recognized.  
17 But there is no clear delegation of authority for CDC to  
18 regulate evictions or regulate landlord/tenant relationships.

19 By contrast, Congress knows how to expressly (distorted  
20 audio) the eviction moratorium, because Congress did so in the  
21 CARES Act.

22 Your Honor, you asked about ratification, and I have a  
23 number of points in response to that concern. We don't think  
24 there is any ratification here of the CDC's eviction moratorium  
25 for a couple of reasons. The first is that the Appropriations



1 Act did not clearly ratify under this circuit's case law the  
2 eviction moratorium. All Congress did was extend the moratorium  
3 for one month.

4 THE COURT: But Mr. Shumate, why isn't the reference  
5 to Section 361 of the Public Health Service Act sufficient?

6 MR. SHUMATE: It's not sufficient, Your Honor, because  
7 it is merely descriptive, and (distorted audio) with a  
8 description of what CDC did. The CDC took action pursuant to  
9 Section 361 of the statute. When Congress ratifies agency  
10 action, we pointed to a number of cases where Congress does so  
11 expressly. They say, "We hereby ratify and approve," or  
12 Congress appropriated money for an agency to take some action  
13 that it had previously not authorized.

14 But that's not what occurred here. All Congress did was  
15 extend the moratorium for one month. It didn't say anything  
16 about the legality of the agency's action before Congress had  
17 acted.

18 But even if you think --

19 THE COURT: Mr. Shumate, sorry to interrupt, but in  
20 the *Skyworks* case, the judge there referred to what Congress did  
21 as just an extension to get past the change in administrations.

22 Is there anything in the record that supports that?

23 MR. SHUMATE: Nothing more than common sense and  
24 timing, Your Honor, because given the timing, the original  
25 moratorium was supposed to have expired in December. We had the

1 election, obviously, in November. Congress acted in December,  
2 and it extended the moratorium through the end of January.  
3 Obviously, there was an inauguration on January 20th. The new  
4 administration came in, and I think this is a critical point,  
5 they've extended the moratorium twice.

6 So even if you were to be persuaded that there was a  
7 ratification of the moratorium for a one-month period of time,  
8 CDC has again done exactly what they did last summer, last  
9 September, by extending the moratorium again beyond the  
10 expiration date set by Congress.

11 So originally you had the CARES Act moratorium that  
12 expired, was supposed to expire in July of 2020. CDC in  
13 September extended that moratorium through executive action. We  
14 think that violates the statute.

15 Second, you have the statutory extension that was supposed  
16 to last until January 31st of 2021. But again, you have  
17 executive action that extends beyond the expiration date set by  
18 Congress.

19 So I think the government's ratification argument only gets  
20 them so far. And we are now in a place where the moratorium is  
21 only in force pursuant to executive action. So the ratification  
22 that may have occurred, we don't concede it did happen,  
23 ratification couldn't help the government in this point in time  
24 when the executive -- the moratorium was only in force through  
25 executive action.

1           Your Honor, I can shift to other arguments, but -- if you  
2           have no other questions about ratification or the agency  
3           statutory authority, I'm happy to --

4           THE COURT: Let me back up on the agency statutory  
5           authority. So you argue in your brief that *Chevron* shouldn't  
6           apply because the agency didn't follow notice and comment.  
7           Given that there was a clear delegation from Congress to the HHS  
8           to administer the Public Health Service Act, why isn't that not  
9           enough to get us within *Chevron*? Wasn't the order intended to  
10          have the force of law, and isn't that really the question I  
11          should be asking?

12          MR. SHUMATE: Your Honor, it's a good question. The  
13          fact that the agency did not act pursuant to notice-and-comment  
14          rulemaking we think is one of the factors why the *Chevron*  
15          framework or *Chevron* deference wouldn't apply, because the first  
16          sentence of Section 361(a) authorizes the agency to enact and  
17          enforce regulations. Of course, the agency didn't act pursuant  
18          to regulation here. They simply issued an order, what they call  
19          an emergency action.

20          So certainly the fact that the agency didn't act pursuant  
21          to notice-and-comment rulemaking is not dispositive of whether  
22          *Chevron* applies or not, but it is one of the factors that courts  
23          look to after *Mead* to look at the formality of the agency's  
24          action to decide whether this is something that is entitled to  
25          deference. And here --

1 THE COURT: Don't the other *Barnhart* factors cut the  
2 other way?

3 MR. SHUMATE: I don't think so, Your Honor. I think  
4 it's telling that there's not one lick of statutory analysis in  
5 the order itself. There's nothing for the Court to defer to  
6 other than the Department of Justice's interpretation of the  
7 statute in their briefs. Instead, the moratorium was thrown  
8 together in three weeks after President Trump issued his  
9 executive order. But typically, when courts defer to agency  
10 action, they're deferring to the agency's interpretation of the  
11 statute in a rule or preamble or some agency opinion where  
12 there's an interpretation of the statute.

13 But you won't find a lick of that analysis anywhere in the  
14 CDC's orders, not in the first order, the second order, or the  
15 third order. So what the government is asking you to do is to  
16 defer to this rationalization of counsel.

17 THE COURT: All right. You made this point about the  
18 CDC and the FDA being two separate agencies. That really  
19 doesn't matter here, does it, given these are both a part of  
20 HHS?

21 MR. SHUMATE: It's certainly not the dispositive  
22 factor, Your Honor. There is case law where the D.C. Circuit  
23 cannot grant *Chevron* deference to an agency where there was a  
24 split delegation of authority, I believe within Treasury.

25 But I wouldn't concede that the CDC is entitled to

1        deference because the statute is the government's authority  
2        to -- the authority is split between the FDA and the CDC. So it  
3        is another one of many factors why the CDC is not entitled to  
4        deference. And I think the principal reason, Your Honor, is  
5        because their interpretation of the statute is unreasonable.  
6        That is the bottom-line reason why no deference is due here.

7                So we have a number of reasons why we should win our  
8        statutory argument. We have the major questions doctrine. We  
9        have constitutional avoidance. We have *Chevron* step 1. The  
10       Court doesn't even need to get to *Chevron* step 2, but if you do,  
11       look at this -- the breadth and the scope of the agency's  
12       assertion of authority here. The Sixth Circuit properly  
13       recognized that if the CDC has authority to man evictions, there  
14       is no limit to what the CDC could do in the name of public  
15       health. That would raise a significant concern under the  
16       nondelegation doctrine.

17               THE COURT: All right. In terms of the major  
18       questions doctrine in the D.C. Circuit, isn't that a canon of  
19       construction that I should look at as to step 1?

20               MR. SHUMATE: I think that's fair. The D.C. Circuit  
21       has done that a number of times, the *Loving* case and the *Merck*  
22       case from last year. A number of panels have looked at the  
23       major questions doctrine as one of the factors at *Chevron* step  
24       1.

25               So I think --

1 THE COURT: Merck wasn't -- didn't the Court say  
2 regardless of where it considered it, it suggested that Congress  
3 didn't grant the authority to the agency?

4 MR. SHUMATE: I think that's a fair description of the  
5 case, Your Honor. But there was a discussion in the opinion, I  
6 think, citing *Brown & Williamson* and citing the *Loving* case  
7 that, look, the bottom line principle of the major questions  
8 doctrine is courts don't presume that Congress would have  
9 ambiguously intended to delegate to an agency the power to  
10 decide a major question.

11 And in a case like this one where the CDC is making a  
12 decision that has a significant economic and nationwide impact,  
13 it is a major question, and it's viewed with serious  
14 constitutional implications, just like the other express  
15 delegations to CDC in the statute.

16 Now, Section 361 gives the CDC a lot of power, the power to  
17 quarantine individuals, that implicates liberty interests, the  
18 power to destroy personal property. It's telling that Congress  
19 gave the CDC express authority to do these specific measures,  
20 but it said nothing about regulating evictions or  
21 landlord/tenant relationships, because that's a significant  
22 decision that in fact Congress made for itself in the CARES Act.

23 THE COURT: All right. The enumerated measures in  
24 Section 361, is it your position that these are not exhaustive  
25 but, rather, illustrative of what the CDC could do here? In

1 other words, whatever actions they take, whatever other measures  
2 the Secretary would take here need to be comparable in nature?  
3 Is that your argument, or is it really that these are  
4 exhaustive?

5 MR. SHUMATE: The former, Your Honor. I agree with  
6 how you described our argument, that this list in the second  
7 sentence is illustrative, not exhaustive. There's a catchall at  
8 the end of the list that says "other measures."

9 And as the Sixth Circuit, we think, correctly recognized,  
10 the ejusdem canon applies here because you have a list of  
11 measures followed by a general catchall. So the canon of  
12 construction you would apply is that you would expect "other  
13 measures" to be other measures that are akin to things that are  
14 in the list of measures, which are all about sanitizing  
15 property, personal property, animals, or articles that have been  
16 exposed to contagion.

17 As the Sixth Circuit said and we agree, banning evictions  
18 is radically unlike dealing with property, real personal  
19 property that has been exposed to a communicable disease.

20 THE COURT: All right. Let me ask you about the  
21 remedy you seek. In your complaint, you seek an injunction.  
22 But as I understand your briefing, you're not pressing that  
23 here. Is that because you believe that an injunction would have  
24 no independent legal effect here, that the Secretary would  
25 follow any ruling of the Court?

1 MR. SHUMATE: I would hope so, Your Honor. I don't  
2 think the Court needs to enter an injunction at this point. We  
3 think it would be -- for the Court to enter a judgment vacating  
4 the eviction moratorium, but we think it's essential that the  
5 Court be clear about the scope of the vacatur of the eviction  
6 moratorium.

7 As you've seen from a number of our filings, other courts  
8 have issued declaratory judgments. And the government has taken  
9 the position that those declaratory judgments only apply in that  
10 particular case.

11 As you know from the *NAACP* case last year, circuit  
12 precedent in this court is different from the National Mining  
13 Congress which is that where a court vacates an agency's rule,  
14 especially if the agency lacks statutory authority, the rule is  
15 void, not just for the plaintiffs that brought the case but  
16 because of -- but also for all affected parties.

17 And here, we're asking the Court to be very clear before it  
18 vacates that the remedy applies not just for the property owners  
19 in this case but for property owners across the country. The  
20 reason why, the Court explained in National Mining Congress why  
21 this remedy is appropriate, especially in a case like this one,  
22 because of the possibility of duplicative filings.

23 If the Court agrees with our arguments and vacates the  
24 eviction moratorium only for the plaintiffs in this case, venue  
25 and forum is proper in this court, as you know, for anyone



1 across the country, any property owner. And as we've submitted  
2 in the record, there's 10 to 11 million property owners across  
3 the country who may be affected by the eviction moratorium.  
4 They could be plaintiffs seeking the same relief in this court,  
5 and that would be, I think, a waste of time for everybody.

6 So there are also a number -- to answer your specific  
7 question about the injunction, the Court doesn't need to enter  
8 an injunction at this point because we expect the government  
9 will comply with a vacatur ruling.

10 And one other point on this is in the Supreme Court's  
11 recent decision, I think, last term in the *DACA* case, Justice  
12 Roberts explained in a footnote -- he affirmed Judge Bates's  
13 vacatur decision in this court but said in a footnote we don't  
14 need to decide the issue of the propriety of a nationwide  
15 injunction because vacatur of a rule is different under the APA.

16 So bottom line, Your Honor, we ask the Court to vacate. We  
17 don't need to get into this debate about nationwide injunctions.

18 THE COURT: All right. Thank you, Mr. Shumate.

19 Ms. Vigen?

20 MS. VIGEN: Good morning, Your Honor. May it please  
21 the Court.

22 Across two presidential administrations, public health  
23 experts at the CDC have agreed a temporary eviction moratorium  
24 is necessary and an appropriate tool to fight the ongoing spread  
25 of a disease that has killed over half a million Americans.

1 This is based on clear scientific evidence that COVID-19  
2 exacerbates the spread -- I'm sorry, that evictions exacerbate  
3 the spread of COVID-19. And as CDC noted in the most recent  
4 extension, levels of transmission remain high, and even deadlier  
5 and more contagious variants of the virus demonstrates this is  
6 the appropriate action.

7 Contrary to plaintiffs' arguments, the CDC order is well  
8 within the agency's authority under the Public Health Service  
9 Act, as both the *Brown* and *Chambless* courts found.

10 The text of the Public Service Health Act is clear. The  
11 Secretary can, quote, make and enforce such regulations as in  
12 his judgment are necessary to prevent the introduction,  
13 transmission, or spread of communicable diseases, either into  
14 the country or between the states.

15 THE COURT: Ms. Vigen, let me stop you there. Is it  
16 the government's position that that's the only limitation on the  
17 Secretary's authority?

18 MS. VIGEN: Your Honor, the primary limitations on the  
19 Secretary's authority are that the order be intended for disease  
20 prevention purposes, that those disease prevention purposes be  
21 directed towards either the spread into the country or among the  
22 states.

23 But in addition to that, there are certain limits based on  
24 the Secretary's ability to, for example, quarantine persons, and  
25 that's in the Subsections (b) through (d) of the statute.

1           THE COURT: What about the limitations, if you see  
2       them that way, in the second sentence? I take it you don't view  
3       these as limitations but just examples of things that the  
4       Secretary can do.

5           MS. VIGEN: That's correct, Your Honor. These are  
6       just illustrations of measures the Secretary may take -- and  
7       that's the language that the statute itself uses -- in the event  
8       of communicable diseases that risk interstate spread.

9           THE COURT: Under that reading, what is the  
10      limitation? As the plaintiffs have argued here, could the  
11      Secretary put a ban on all foreclosures? A nationwide lockdown?  
12      Could the Secretary put out orders about attending church or  
13      sporting events? At what point is the Secretary's authority  
14      constrained in some way?

15          MS. VIGEN: Your Honor, I think it's really important  
16      to look here at the language Congress has chosen and what  
17      Congress intended in granting what we view as broad, flexible  
18      authority to public health experts. And the language Congress  
19      has chosen to use is to refer to public health experts' judgment  
20      as necessary.

21          And this type of measure was put into place knowing that  
22      public health expertise is not -- it doesn't reside in Congress;  
23      it resides in agency experts. And Congress -- excuse me. As  
24      the Supreme Court said, Congress knows how to enlarge agency  
25      discretion when it wishes to, and that's what it does here, is

1 grant a broad and flexible statute.

2 And that's not to say there is no limit --

3 THE COURT: Sorry to interrupt, Ms. Vigen. But under  
4 that interpretation, doesn't that really push up against the  
5 unconstitutional delegation, that Congress can just delegate the  
6 authority to the experts without any limitation?

7 MS. VIGEN: So I think it -- it's really not correct  
8 that there's no limitation here. That limitation for disease  
9 control purposes is a real limitation. This is not just a broad  
10 statute that allows HHS or CDC to regulate in the interest of  
11 public health. There really needs to be a nexus to the control  
12 of disease, and there is here very clearly. You know, no one  
13 disputes we have a global pandemic. Plaintiffs don't dispute  
14 that eviction moratoria are effective deterrents to the spread  
15 of COVID-19.

16 And if you look at the history of the nondelegation  
17 doctrine, the Supreme Court approved delegations that are much  
18 broader than what Congress did here. The Court noted in the  
19 *Gundy* case that the courts often approved delegations that  
20 merely instruct an agency to delegate in the public interest  
21 within its realm of expertise.

22 So pointing to one of the specific cases we cite, *National*  
23 *Broadcasting Co. versus the United States*, the Court in that  
24 case approved an FEC -- FEC regulations issued under a statute  
25 that required that those regulations be, quote -- I'm sorry,

1 where the touchstone provided by Congress was, quote, the public  
2 interest convenience or necessity. And the Supreme Court said  
3 that's enough. The Supreme Court specifically said this  
4 criterion is not to be interpreted as setting up a standard so  
5 indefinite as to confer an unlimited power. When interpreted in  
6 the context of -- in that case it was the communications  
7 doctrine, and the FEC was the agency.

8 That's the same here. In context, this grant of authority  
9 to HHS, which has been delegated to CDC for disease control  
10 purposes, provides a sufficient and intelligent principle, and  
11 it's squarely in line with (distorted audio) holdings on the  
12 nondelegation doctrine.

13 THE COURT: Couldn't the CDC just shut down all travel  
14 completely to stop the threat of disease under your  
15 interpretation?

16 MS. VIGEN: I think it's important here to look at  
17 what -- what disease threat CDC is responding to and what CDC  
18 has determined is necessary in its judgment. What we have here  
19 in COVID-19 is a pandemic that's proved, you know, extremely  
20 easy to spread, extremely dangerous, and quite deadly. But  
21 there could be a future pandemic that is even worse that  
22 requires even broader measures that require -- that require CDC  
23 to take steps it hasn't had to take here.

24 Now, what CDC has done here is it's looked at what COVID-19  
25 does, how COVID-19 spreads, and it's determined a response to

1 the COVID-19 pandemic.

2 So what I would say was -- is, in answer to your question,  
3 Congress has purposely delegated broad authority to allow public  
4 health experts to respond specifically to the threat of  
5 communicable diseases. There are limitations on that power. It  
6 has to be necessary in the judgment of those public health  
7 experts, and it has to be targeted to the interstate spread of  
8 disease or the spread of disease into the country. And those  
9 are really the limitations that Congress intended in granting  
10 this type of broad power.

11 THE COURT: What do I make of Congress's decision back  
12 in -- last summer to have the moratorium that Congress placed in  
13 effect? Why did Congress need to do that if Congress intended  
14 to delegate this entirely to the CDC?

15 MS. VIGEN: So it's my understanding that the CARES  
16 Act moratorium was implemented by Congress for different  
17 purposes. The CARES Act moratorium was a part of a  
18 congressional economic package. The CDC's moratorium is a  
19 public health measure, and it's based on public health  
20 conclusions included in each version of the order.

21 So Congress --

22 THE COURT: It too has an economic impact.

23 MS. VIGEN: It certainly has an economic impact.  
24 We're not denying that. But at bottom, this is a public health  
25 measure that CDC determined was necessary in order to prevent

1 the spread of COVID-19. So it's different in that way.

2 And in addition, the fact that Congress passed the CARES  
3 Act for only a limited amount of time doesn't in any way affect  
4 CDC's preexisting statutory authority.

5 As we pointed out in our brief, that would go against the  
6 canon of -- the harmonious-readings canon.

7 THE COURT: Ms. Vigen, at what stage do you think that  
8 the Court should appropriately consider the major questions  
9 doctrine?

10 MS. VIGEN: The major questions doctrine, as the D.C.  
11 Circuit recently talked about in the *American Lung Association*  
12 case, appears to be a *Chevron* step 1 question and appears to be  
13 a determination of whether or not it's appropriate to go to  
14 *Chevron* step 2. The D.C. Circuit noted in *American Lung*  
15 *Association* that, you know -- I think they called it a so-called  
16 doctrine was a -- has been used by the Supreme Court in a few  
17 very extraordinary cases like the *Brown & Williamson* case where  
18 there are significant reasons to believe that Congress wouldn't  
19 have wanted an agency to interpret it as the U.S. segment. In  
20 *Brown & Williamson*, as we pointed out in our brief, there was  
21 something like an 80-year history of FDA having interpreted a  
22 specific term in its enabling statute a certain way and Congress  
23 having relied upon that in subsequent legislation, and then FDA  
24 changed its position. We have nothing like that here.

25 THE COURT: You don't disagree, do you, that the

1 moratorium has vast political and economic consequences here?

2 MS. VIGEN: So I don't think that the consequences are  
3 as vast as plaintiffs point to. Important factors --

4 THE COURT: The CDC -- sorry to interrupt. The CDC  
5 itself estimates that as many as 30 to 40 million people could  
6 be at risk of eviction, and it also states, I believe, that it  
7 is expected to have an annual effect on the economy of 100  
8 million or more.

9 Is that --

10 MS. VIGEN: So that's all in the order. But I  
11 specifically want to point out something, a few points about the  
12 first number you cited to there. So that number is total  
13 persons at risk of eviction. The CDC order specifically only  
14 applies in jurisdictions that don't have equal or greater  
15 protection. So this order doesn't even apply everywhere. The  
16 order only applies to covered persons, and those figures aren't  
17 covered persons under the CDC order. Covered persons are  
18 limited to, you know -- it says persons who meet a set of  
19 criteria designed to reach persons who would be likely to become  
20 homeless or move into new congregate settings where COVID-19  
21 spreads easily. So it wouldn't apply to all of those persons.

22 In addition, another really important thing to remember in  
23 looking at the economic impact of this regulation that  
24 Mr. Shumate neglected to mention is that Congress has now  
25 appropriated over \$46 billion in aid designed to reach



1 landlords. And that's in the 2021 Appropriations Act and then  
2 later also in the American Rescue Plan Act. So that  
3 certainly -- if you're considering the economic impact of the  
4 federal government's actions on landlords, that has to be taken  
5 into consideration.

6 And I think the other thing I would just point out with  
7 respect to this major questions doctrine is that CDC's use of  
8 its authority is novel because the COVID-19 pandemic is novel.  
9 The Public Health Services Act was enacted in 1944. There has  
10 not been a pandemic on this scope or this scale since the time  
11 the statute was enacted. And it's not because the statute  
12 doesn't provide the authority or the CDC suddenly found some new  
13 authority in a statute that it previously interpreted a  
14 different way. What has happened is there is a new and great  
15 threat of disease that CDC has responded to.

16 THE COURT: I get the point, this is a novel pandemic  
17 with extreme consequences. But given the significance of this  
18 issue, would you not expect Congress to state more clearly that  
19 yes, this is what Congress intended here, that the CDC is acting  
20 with lawful authority?

21 MS. VIGEN: I think that Congress did speak clearly,  
22 not only in the Public Health Services Act where it included a  
23 broad delegation of authority to CDC for these exact type of  
24 purposes, but then in extending the CDC's action in the 2021  
25 Appropriations Act. Congress didn't do what it showed us it

1 knows how to do in the CARES Act, which is to say there is an  
2 eviction moratorium and here are the contours. It says, CDC has  
3 already passed an eviction moratorium under its statutory  
4 authority, and we are simply extending that moratorium under  
5 that authority. So Congress really has spoken to this issue.

6 THE COURT: But again, what do I make of the 30-day  
7 extension rather than a longer extension?

8 MS. VIGEN: You know, I can't speak to the motives of  
9 Congress, but what I can point to is the rationale behind the  
10 Public Service -- the delegation in the Public Service Health  
11 Act in the first place. The reason Congress would have  
12 delegated such authority to public health experts, as the  
13 Supreme Court has recognized, is that these are hard questions.  
14 The pandemic is -- has been evolving. Whether or not to impose  
15 or continue an eviction moratorium for the purpose of protecting  
16 the public and preventing the spread of disease is a question  
17 best left to the experts. And what Congress -- Congress did  
18 just that.

19 And as we pointed out in our briefs, the state of the  
20 pandemic at the time that the -- I'm sorry, that Congress  
21 extended the CDC moratorium were such that Congress surely could  
22 have anticipated that CDC would once again extend the moratorium  
23 after the conclusion of that 30-day congressional extension.  
24 And Congress could have said we are extending the moratorium for  
25 this amount of time and then no further extensions are

1 permitted. But it didn't say that. It knew that CDC had this  
2 authority, and it allowed the -- it allowed CDC the possibility  
3 of further extension after --

4 THE COURT: Doesn't the case law suggest that it's the  
5 other way around, that Congress needs to be express in ratifying  
6 the action of an agency?

7 MS. VIGEN: So I don't think so. The cases to which  
8 the plaintiffs point in which Congress was very specific in  
9 ratifying a certain action are cases in which courts have  
10 already found those actions illegal and said the agency couldn't  
11 take the actions they took. And so Congress needed to be really  
12 clear in those cases and say we are ratifying this agency  
13 action.

14 That's not what we have here. At the time of the  
15 extension, no court -- two courts had found specifically that  
16 CDC did have authority to issue a temporary eviction moratorium  
17 under the Public Health Service Act. And so Congress had no  
18 need to do that in ratifying the order. But the controlling  
19 cases here, the *Heinszen* case in the Supreme Court and the  
20 *Thomas* case in the D.C. Circuit, don't say anything about there  
21 needs to be magic words. And in fact, the *Thomas* case indicates  
22 the exact opposite, for ratification, that is.

23 But I think there are -- while we're on this topic of  
24 ratification, I think there are two really important things that  
25 Congress's ratification of the CDC's order shows, and that's,

1 one, that Congress approved the CDC's actions in imposing a  
2 temporary eviction moratorium and, two, that Congress agreed  
3 that the order was within CDC's statutory authority. And the  
4 courts that have discounted the import of Congress's  
5 ratification have really, in our view, erred by not recognizing  
6 those two things.

7 So -- sorry. Did Your Honor have a question?

8 THE COURT: No. Sorry.

9 MS. VIGEN: So I just want to go back to our plain  
10 language argument and touch upon a point about whether or not  
11 the measures listed in the second sentence of 264(a) restrict  
12 the authority granted in the first sentence of 264(a) such that  
13 it precludes a -- the issuance of a temporary eviction  
14 moratorium.

15 And a really important and easy way to see that it doesn't  
16 is that the subsections of this statute, (b) through (d), all  
17 deal with the quarantine of persons. And there's nothing in  
18 Subsection (a) that talks about the quarantine of persons. And  
19 the Sixth Circuit order to which Mr. Shumate referred gets that  
20 wrong. It doesn't recognize the fact that Subsections (b)  
21 through (c) actually rely on authority that is implicit but not  
22 stated in Subsection (a).

23 And I also did want to point out, Mr. Shumate kept  
24 referring to the Sixth Circuit opinion. There's actually just  
25 an interlocutory order by a Sixth Circuit motions panel which

1       isn't even binding upon other -- it's not strictly binding at  
2       least upon other panels in that circuit. So there's not a Sixth  
3       Circuit merits decision here.

4               THE COURT: So just to be clear, the Sixth Circuit's  
5       order in which it found that these two sections were  
6       structurally distinct, the one applied to property interests and  
7       the other to liberty interests?

8               MS. VIGEN: I'm sorry. You cut out for a second  
9       there, Your Honor.

10              THE COURT: I'm trying to understand what exactly you  
11       disagree with about the Sixth Circuit's order. Is it that the  
12       Sixth Circuit found that these two provisions, these two  
13       subsections, were structurally distinct and that one referred to  
14       property interests and the other liberty interests? Is that  
15       what you're disagreeing about?

16              MS. VIGEN: That's right, Your Honor. They all refer  
17       to the same grant of authority in Subsection (a) of the statute.

18              THE COURT: All right. But even if I accept your  
19       point that the methods or the measures that are listed in the  
20       second sentence of the statute, the Section 361, are not  
21       limiting, they're just illustrative rather than exhaustive, even  
22       if I accept that and I consider the fact that CDC does have the  
23       authority to quarantine individuals, it seems very different  
24       than what the CDC has done here, because even with the  
25       quarantine provision it's directed at individuals, specific

1 individuals believed to be infected. And I don't think you  
2 could reasonably say that everyone who could be evicted is  
3 infected. The CDC hasn't done that kind of analysis that would  
4 support that. It's a possibility.

5 So this does seem -- even accepting your argument that this  
6 is -- CDC has gone a lot farther. It's not just akin to a  
7 quarantine. Perhaps you could envision a situation where  
8 there's an entire neighborhood that was infected, but that's --  
9 you've basically applied it across the country.

10 MS. VIGEN: And this point goes to again the fact that  
11 Congress granted CDC flexible authority to respond to specific  
12 threats. So the CDC noted in its order, and I think it's widely  
13 known now, that asymptomatic persons can transmit COVID-19. So  
14 it would be extraordinarily difficult to limit an order like  
15 that to symptomatic persons -- or to persons who have COVID-19,  
16 because, quite frankly, no one knows who has had it, and the  
17 nature of the disease is such that it spreads very quickly and  
18 easily.

19 So because of the widespread scope of COVID-19, a  
20 widespread response was necessary given the science that shows  
21 that evictions do exacerbate the spread and that eviction  
22 moratoria work to lessen the spread and reduce mortality.

23 THE COURT: But could the CDC use its authority to --  
24 basically to force everyone to become vaccinated in order to  
25 prevent the spread of disease?

1 MS. VIGEN: So Your Honor, I don't mean to suggest  
2 that CDC's statutory authority would overcome what may be  
3 potential constitutional concerns, and that's something that I  
4 haven't thought through with respect to concerns about, you  
5 know, a person's body.

6 In addition, the CDC's order does -- I'm sorry. The  
7 statute does impose additional limits on quarantining a person,  
8 which, you know, suggests that any measure involving specific  
9 individuals may -- there may be additional considerations there.

10 But as a matter of statutory authority, that would be a  
11 measure to prevent the spread of disease among the states. And  
12 so if CDC has made the proper findings and it would be necessary  
13 within the judgment of the CDC director, then yes, it would fall  
14 within CDC's statutory authority, and that's what Congress  
15 intended.

16 Again, I don't mean to suggest there aren't other  
17 considerations here or that CDC wouldn't be required to follow  
18 the Constitution. Obviously, it would be.

19 THE COURT: You do agree that the enumerated examples  
20 in the second sentence of the statute do inform what the CDC can  
21 do?

22 MS. VIGEN: I think they inform what the CDC can do  
23 insofar as they're obviously included in the steps that CDC can  
24 take. I don't think they limit the other measures CDC could  
25 take beyond what the statute provides, which is that measures

1 must be required to prevent the spread of disease, and that's  
2 specific to the interstate or -- spread of disease or spread of  
3 disease into the country.

4 THE COURT: You don't think that the CDC has to act in  
5 a comparable way in looking at these enumerated measures?

6 MS. VIGEN: I don't think that's what the statute  
7 requires.

8 THE COURT: Why did Congress include it at all if it  
9 has no limitations, it doesn't inform what the agency can do at  
10 all? What was the point? Why not stop after the first  
11 sentence? Why even include the quarantine provisions? Why not  
12 just say -- the first sentence of the act? I'm guessing you'll  
13 say because that could be -- I don't know. I'm interested.

14 MS. VIGEN: So --

15 THE COURT: Why didn't Congress stop at sentence 1?

16 MS. VIGEN: Your Honor is sort of referring to  
17 plaintiffs' surplusage argument, the canon of surplusage. And I  
18 would like to point out first that when the statutory language  
19 is clear, as the first sentence of Section 264(a) is, there is  
20 no need to resort to those canons. And that canon is also  
21 not -- it's not mandatory, as the D.C. Circuit has said and as  
22 we point out in our brief.

23 I would also point out that this is a list of inclusive  
24 measures. So it wouldn't make sense that -- it is a list of  
25 inclusive measures that also include other measures. So it



1 really wouldn't make sense that a list of inclusive measures  
2 limited the initial grant of authority.

3 But even if Your Honor were to conclude that based on some  
4 of the canons that plaintiffs have pointed to that the order  
5 needed -- I'm sorry, that CDC's actions would somehow -- needed  
6 to be somehow related to those measures listed in the statute,  
7 it is of a kind related to those measures. A temporary eviction  
8 moratorium is an imposition on property. The statute clearly  
9 allows impositions on property, such as destruction of animals  
10 and articles. And looking at it, those are, in fact, much  
11 more -- that's a permanent destruction of a person's property;  
12 whereas, we're only talking about a temporary measure here.

13 And I want to point out, when -- I think when plaintiffs  
14 point to those provisions in the statute, they're trying to  
15 conjure up images of a single farm. But really, something like  
16 an order for destruction of animals can affect an entire  
17 industry. Let's say there was a disease that affected all hogs  
18 in the country, and CDC, under the explicit language of this  
19 statute, could order all hogs in the country to be destroyed to  
20 prevent the spread of disease.

21 So really, there is no scope limitations there --

22 THE COURT: Sorry to interrupt, but there is this  
23 important qualifying phrase. After animals and articles, it  
24 says, "Found to be so infected or contaminated as to be sources  
25 of dangerous infection to human beings." So there does seem to

1 be a limitation there, and you say here in the pandemic we can't  
2 possibly know who is infected with COVID.

3 But if that is so, doesn't that mean this is a situation  
4 that Congress needs to step in and clearly legislate rather than  
5 the CDC rely on this statute that really doesn't address the  
6 situation before us now?

7 MS. VIGEN: Well, again, as I pointed out, the act of  
8 destruction of animals and articles is a permanent depravation  
9 of property, and that's not what we have here. So the  
10 limitation on that is directly correlated to the fact that  
11 that's a greater intrusion on property than the CDC has  
12 implemented here in this temporary eviction moratorium.

13 That said -- that said, you know, I would just go back to  
14 the plain language of the statute. And it's only with respect  
15 to destruction of animals or articles that the statute  
16 requires -- that the statute refers to sources of infection.  
17 And so that type of limitation wouldn't be imposed on a  
18 temporary eviction moratorium. And indeed, it wouldn't make  
19 sense here because of the nature of this disease and how easily  
20 interstate spreads happen.

21 And if you look at some of the -- the few cases that have  
22 analyzed this provision before the CDC's eviction moratorium,  
23 the two turtle ban cases from the Western District of Louisiana,  
24 the Courts in both of those cases considered the same type of  
25 argument, namely that a ban on the sale of small turtles should

1       only be limited to those turtles that are actually infected.  
2       And both of those courts said no, that didn't make sense,  
3       because the nature of commerce and the way people and goods move  
4       in our modern society make such a limitation impossible to  
5       implement.

6               THE COURT: Thank you, Ms. Vigen. If I were to  
7       conclude that the agency did exceed its statutory authority, do  
8       you agree that vacatur would be the appropriate remedy in this  
9       case?

10              MS. VIGEN: So Your Honor, we've argued in our brief  
11       that any remedy should be limited to the plaintiffs that are  
12       found to have standing. And we think that's appropriate in line  
13       with principles of Article III standing where plaintiffs have to  
14       show standing for each type of relief they seek, as well as  
15       principles of equity under which typically equitable relief,  
16       which vacatur is essentially a form of it, it's very akin to it,  
17       where equitable relief should be limited to the parties seeking  
18       it.

19              THE COURT: Sorry. But that's not an approach the  
20       circuit has embraced, is it? Aren't I bound by the *National*  
21       *Mining* decision?

22              MS. VIGEN: We recognize that in *National Mining* the  
23       D.C. Circuit has admitted -- has decided that universal vacatur  
24       is an available remedy under the ACA. That said, it's not  
25       required under *National Mining*.

1           THE COURT: Can you give me a case -- I'm familiar  
2 with Judge Moss's decision in *O.A.* Can you cite any decision in  
3 which a judge on this court has vacated a rule, an order and --  
4 or has determined that a rule exceeds statutory authority and  
5 has not vacated it?

6           MS. VIGEN: So Your Honor, I don't know of such a case  
7 off the top of my head. But I would like to emphasize that  
8 *National Mining* doesn't require universal vacatur. It says it's  
9 the ordinary remedy.

10          And I would like to submit that this is an extraordinary  
11 case for two principal reasons. First of all, the eviction  
12 moratorium is a response to a wide-ranging global pandemic  
13 that's killed over 500,000 Americans, and scientific studies  
14 have shown that eviction moratoria like the CDC order helps to  
15 prevent the spread of disease and death.

16          And then second, as Your Honor is well aware, there are  
17 multiple other courts considering the same question that Your  
18 Honor is considering here, including three courts of appeal, and  
19 a nationwide remedy in this court would not be effective cutting  
20 off that ongoing conversation in which courts have reached  
21 different conclusions and which there obviously is a healthy  
22 debate over CDC's authority under Section 264.

23          THE COURT: Is it fair to assume that -- if I were to  
24 disagree with you and I were to find that the agency exceeded  
25 its authority and that the appropriate remedy is to vacate the

1 order, is it fair to assume that the government would ask for a  
2 temporary stay so that it could determine whether to appeal my  
3 ruling and to seek a stay?

4 MS. VIGEN: So that would be a question for my  
5 clients, but I wouldn't be -- I would assume that would be the  
6 result, but I can't tell you without talking with my clients and  
7 my --

8 THE COURT: Understood. On the standing point, the  
9 government doesn't disagree, at least with respect to the  
10 companies, that those companies have standing? It's just the  
11 individuals and the related associations that you think don't  
12 have standing?

13 MS. VIGEN: Yes. So our argument with respect to  
14 standing is that I believe the individuals are property  
15 managers, not actual property owners, and so they haven't shown  
16 injury from the order because they're not the ones who are not  
17 being paid rent, they merely collect rent, in my understanding  
18 of it.

19 THE COURT: Thank you, Mr. Vigen.

20 Mr. Shumate, do you want to discuss the standing point, and  
21 then if you can direct your argument to the government's  
22 argument on the ratification issue.

23 MR. SHUMATE: Sure.

24 So on the standing issue, Your Honor, on the standing  
25 question, the government acknowledges that the CDC's order

1 applies to both individuals and organizations, and it's backed  
2 by criminal penalties enforced by the Department of Justice. We  
3 have individual plaintiffs and organizational plaintiffs. If my  
4 two individual clients were to file eviction notices, they would  
5 be squarely subject to the criminal penalties in the order. The  
6 order identifies different criminal penalties for both  
7 organizations and individuals. So they are the direct objects  
8 of the order. There's no question that they are exposed to  
9 criminal penalties. They have standing. And from their  
10 membership in the associations, the associations also have  
11 standing.

12 So I don't think it's a hard question. Even if it were,  
13 Your Honor, there's no dispute that the other -- the two  
14 organizational plaintiffs or the three organizational  
15 plaintiffs, the property management companies are proper  
16 plaintiffs. They can raise all the same claims as the  
17 individuals. And if the Court agrees with our arguments on the  
18 merits, the Court should, as you've noted, vacate the moratorium  
19 for all affected parties under *National Mining*.

20 As you consider the remedy, I just wanted to make two other  
21 points that I would ask the Court to consider in evaluating the  
22 remedy. The first is that conditions have changed a lot since  
23 March of 2020 when the eviction moratorium was first put in  
24 place by Congress. And I wanted to correct something that  
25 Ms. Vigen has said a couple of times, which is that this is just

1 a temporary eviction moratorium. We're going on a year now that  
2 this federal eviction ban has been in place. Things are very  
3 different now. We are through the dark days of 2020. We are  
4 through the cold winter months of 2021. Vaccines are rolling  
5 out. The economy is booming again. Job numbers are going up.  
6 Things are different now than they were before.

7 And the second point I would like you to consider, Your  
8 Honor, when you're evaluating the appropriate remedy, is  
9 consider the impact on my clients. Not one time has CDC ever  
10 considered, not once, the impact of its decision on small  
11 businesses like my clients. Three times the CDC issued an  
12 eviction moratorium that's essentially the same but never once  
13 considers the impact on small businesses. All together, as we  
14 put in the record, the moratorium will cost property owners like  
15 my clients across the country approximately \$200 billion. The  
16 CDC doesn't bat an eye at that impact.

17 So this thing needs to end, or it will continue  
18 indefinitely. It's telling that the initial eviction moratorium  
19 from the CDC was for four months. Then Congress extended it for  
20 one month. And then the new administration comes in and does a  
21 two-month extension. And now it's a three-month extension.  
22 What's next? A six-month extension?

23 It's also telling that a number of state and local  
24 governments are now easing their restrictions. Why? Because  
25 conditions have changed. But the CDC doesn't change its

1 approach. Instead, they're continuing to enforce an eviction  
2 moratorium that most state and local governments have dropped.

3 Your Honor, going back to the statute, it's telling that  
4 Ms. Vigen can't identify any limit in the statute and she can't  
5 answer your hypothetical, because the answer to all of them is  
6 yes. If the second sentence of the statute imposes no limit on  
7 the first sentence, then CDC has unbounded authority to do  
8 whatever it wants in the name of public health.

9 I would like to walk the Court through the statute because  
10 we've talked about language and we've talked about the  
11 quarantine authority. I think there are at least five textual  
12 clues in Subsection (a) that supports our reading of the statute  
13 that the second sentence must be a limitation on the first  
14 sentence.

15 Let's start with the first sentence. It says, "The  
16 Secretary is authorized to make and enforce such regulations."  
17 As you know and as the Court has mentioned a number of times,  
18 that's a general grant of rulemaking authority. That's a  
19 starting point, but it's not an ending point.

20 The second sentence of the statute describes the means by  
21 which the CDC is authorized to carry out that general rulemaking  
22 authority. The first textual clue is the opening clause, "For  
23 purposes of carrying out and enforcing such regulations." "Such  
24 regulations" is the same phrase used in the first sentence. You  
25 have a tether right there from the first sentence to the second



1 sentence.

2           Going on, you have a list starting with "inspection" and  
3 ending with "articles." And then you have, as you pointed  
4 out, "Found to be infected or contaminated." That's another  
5 limit. And then finally, you have "and other measures," the  
6 catchall phrase at the end of the list. As the Sixth Circuit  
7 said, that's a signal that you should apply the ejusdem canon,  
8 that the other measures that CDC may do have to be similar in  
9 kind to the measures in the list. And the measures in the list  
10 refer to personal property, animals, articles, things like  
11 clothing, garments that have been infected by a contaminated  
12 disease as found by the CDC. It doesn't say anything about real  
13 property.

14           And you would expect Congress to speak clearly, given the  
15 point that Ms. Vigen made that this is a very powerful statute.  
16 The CDC could tell a farmer you need to destroy your entire  
17 flock, all your cattle. That presents serious Fifth Amendment  
18 takings problems, that Congress has clearly authorized a takings  
19 claim to recover money for that property. But there is nothing  
20 in the statute about real property at all. If the government is  
21 right, there's not only no limit on the CDC's authority pursuant  
22 to the first sentence, the second sentence is entirely  
23 superfluous.

24           The government has mentioned this quarantine authority.  
25 I'm glad Ms. Vigen brought it up. Obviously, quarantine fits

1 nowhere in the list in the second sentence. So it can't be  
2 authorized by Subsection (a). It's not related to personal  
3 property. It's not related to articles. As the Sixth Circuit  
4 said, Subsection (a) is limited to property. It doesn't affect  
5 liberty interests. The only reference to quarantine authority  
6 in the statute is (b), (c), and (d). If you look at (b) (1),  
7 that's the grant of authority to impose a quarantine. (b) (1)  
8 says, "Regulations prescribed under this section may provide for  
9 the apprehension and examination of anyone reasonably believed  
10 to be infected with a communicable disease." The next sentence  
11 goes on to say that "such regulations may provide that if upon  
12 examination any individual is found to be infected, he may be  
13 detained." That's the quarantine delegation. It doesn't come  
14 from Subsection (a). It can't because the statute doesn't  
15 encompass liberty restrictions. Then you have (b) and (c) which  
16 also impose limits on the quarantine authority.

17 In terms of the nondelegation doctrine, Your Honor, you  
18 don't need to decide that as a separate claim. You can do what  
19 the Sixth Circuit did, which is to find that as a matter of  
20 constitutional avoidance there has to be a limit on the statute  
21 or else it violates the nondelegation doctrine. If there is no  
22 limit, this is the most powerful statute that I have ever seen.

23 Yes, the courts have upheld broad language and found  
24 intelligible principles in language like the public interest.  
25 But I don't think I've ever seen a statute with a staggering

1 delegation of power like Section 361 under the CDC's  
2 interpretation. It can regulate all human activity, any  
3 economic activity, any human interaction, worship limits.  
4 That's a lot like the National Recovery Act struck down by the  
5 Supreme Court in 1935.

6 You don't need to go there. It's enough to recognize that  
7 this is an extremely broad statute with a very weak intelligible  
8 principle. According to Ms. Vigen, the only limit is the CDC  
9 director's own imagination as to what might be necessary or  
10 appropriate to limit the spread of communicable disease, and  
11 that's anything.

12 In terms of ratification, Your Honor, again, you're right,  
13 the case law requires that a ratification be done clearly, and  
14 that's really a matter of common sense. We don't assume that  
15 Congress blesses agency action unless they say so, because  
16 there's the APA. There's judicial review of unlawful agency  
17 action. If a court is going to defer to unlawful agency action  
18 and upheld it, we expect Congress to speak clearly. And the  
19 ways in which this court and the circuit have upheld  
20 ratification in the past is where Congress has said we hereby  
21 ratify and approve. We quoted a lot of that language in our  
22 ratification supplemental briefing. Congress appropriates  
23 money. Congress did none of that. All Congress did is describe  
24 and extend.

25 And the Sixth Circuit recognized that. That's exactly what

1 the Sixth Circuit held in the *Skyworks* case as well, that the  
2 extension was just that. The government can't point to a single  
3 case where a court has found ratification in the form of an  
4 extension of an agency action. It's unprecedented what they're  
5 asking the Court to do.

6 I think that's all I have, Your Honor, unless Your Honor  
7 has more questions.

8 THE COURT: Thank you, Mr. Shumate.

9 Ms. Vigen, do you want to respond to any of his points?

10 MS. VIGEN: Yes, Your Honor.

11 I point out with respect to Mr. Shumate's argument about  
12 the changing situation, CDC did take that into consideration in  
13 issuing the March order. CDC acknowledged that fact and has  
14 begun rolling out. The CDC also pointed to the fact that rates  
15 of transmission remain high and that variants of the virus that  
16 are more easily transmissible and more deadly are increasing  
17 in -- are increasing in circulation. So CDC did take the  
18 ongoing developments of the pandemic into effect and in its  
19 scientific and public health expertise determined that keeping  
20 the order in place was required.

21 In response to Mr. Shumate's entirely new argument that  
22 he's just raised right now as to the meaning of Subsection  
23 (d)(1), the language in Subsection (d)(1) is the same as the  
24 language in Subsection (b) and (c). It says, "The regulations  
25 prescribed under this section." "The regulations prescribed

1 under this section." "Under this section" means under  
2 Subsection (a).

3 And I would also point out that the *Brown* and *Chambless*  
4 courts both agreed with our interpretation of the language in  
5 Subsection (a).

6 And then finally as to the rest of the authorities provided  
7 here, Congress knows how to provide an agency with broad  
8 authority where it needs to, and the Supreme Court has  
9 recognized that broad delegations of authority are appropriate  
10 where areas of technical or scientific expertise are at issue.

11 And that's what we have here. We have Congress providing  
12 expert public health agencies with the ability to respond  
13 liberally and flexibly to new situations, and that includes this  
14 pandemic, and that includes a future pandemic that could be even  
15 worse.

16 So this authority is important. Congress intended it. And  
17 Congress showed us that it intended it by expressly approving of  
18 CDC's action and extending CDC's action issued under the statute  
19 that it passed in the 2021 Appropriations Act.

20 THE COURT: All right. Thank you both. This was very  
21 helpful. The briefing was outstanding. I'm very appreciative  
22 for your time and your arguments today. I will take this under  
23 advisement, and I hope to issue a decision in the next week or  
24 two.

25 Is there anything else we need to address now?

1 Mr. Shumate?

2 MR. SHUMATE: No, Your Honor. Thank you for your time  
3 today. We really appreciate it.

4 THE COURT: Of course.

5 Ms. Vigen?

6 MS. VIGEN: No, Your Honor.

7 THE COURT: All right. Thank you all.

8 (Proceedings adjourned at 11:08 a.m.)  
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## 1 CERTIFICATE OF OFFICIAL COURT REPORTER

2  
3 I, Sara A. Wick, certify that the foregoing is a  
4 correct transcript from the record of proceedings in the  
5 above-entitled matter.  
6

7 Please Note: This hearing occurred during the  
8 COVID-19 pandemic and is, therefore, subject to the  
9 technological limitations of court reporting remotely.  
10  
11

12 /s/ Sara A. WickMay 6, 2021

13 SIGNATURE OF COURT REPORTER

DATE  
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## **EXHIBIT 2**



UNITED STATES DISTRICT COURT  
MIDDLE OF FLORIDA  
TAMPA DIVISION

STATE OF FLORIDA,

*Plaintiff,*

v.

Case No. 8:21-cv-2524-SDM-TGW

BILL NELSON, *et al.*,

*Defendants.*

---

**DECLARATION OF WILLIAM JAMES FINDLEY**

I, WILLIAM JAMES FINDLEY, hereby declare:

1. I make this declaration based on my personal and professional knowledge, experience, information available to me in my position in public service, and publicly available information.

2. I am the Bureau Chief of the Florida Department of Education's (FDOE) Division of Blind Service's Business Enterprise Program (BEP). BEP is authorized by the federal Randolph-Sheppard Act (R-S Act), 20 U.S.C. § 107, and its implementing regulations found in 34 CFR § 395. BEP participates in this program as directed by the Legislature. *See* § 413.011, Fla. Stat. Specifically, it is the policy of the State of Florida to "ensur[e] the greatest possible efficiency and effectiveness of services to the blind." *Id.* § 413.011(3).

3. The R-S Act provides blind persons with employment opportunities and self-support through the operation of vending on federal and other property. As Bureau Chief, I oversee the program that recruits, trains, licenses and offers business placements to legally blind men and women throughout Florida in vending and food service-related facilities.

4. FDOE's blind vending and food service program was severely impacted by the pandemic. Since March 15, 2020, FDOE has experienced a record thirteen (13) licensed blind vendors retire from the BEP or resign their vending or food service facility. Two reasons often provided are that businesses can no longer support them

and that future sales and potential income are declining. In fact, several income producing facilities have closed or have become unviable, the result of a greatly reduced customer base.

5. FDOE has a number of contracts with GSA providing vending and food service-related services within GSA facilities. These locations provide critical financial income to the blind vendors that service the vending facilities in those buildings. While blind vendors retain most of their earned income, they remit to Florida 6% of their net monthly proceeds, which Florida uses to pay for equipment maintenance, management services, and other similar expenses.

6. On October 12, 2021, the FDOE received a letter from GSA stating it would implement Executive Order 14042, “Ensuring Adequate COVID Safety Protocols for Federal Contractors,” via Federal Acquisition Regulation (FAR) deviation. GSA further explained, “the clause in the FAR deviation will be incorporated into GSA contracts and contract-like instruments via a bilateral modification. Last, GSA notified the FDOE that “modification is mandatory before GSA will renew, extend the period of performance of your license or permit, or exercise an option, as applicable,” and instructed the FDOE to return the signed modification by November 14, 2021.

7. By signing the modification, the signee would agree to the following in the FAR deviation, “[t]he 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 (Task Force Guidance) at <https://www.saferfederalworkforce.gov/contractors/>.”

8. GSA has offered the FDOE several future vending facility opportunities at GSA locations scheduled to open over a range of time from a few months to a few years. FDOE understands that GSA would not renew a current permit/contract if the modification were not signed, therefore jeopardizing future GSA vending and food service-related opportunities.

9. Please see below a table of future GSA managed opportunities, all of which are for vending machine placement and service by a licensed blind vendor:

**Future GSA-managed Federal Leases & Pending Projects:**

AGENCY	ADDRESS	CITY	LEASE	PROPOSED DATE
US Customs	5880 NW 183 St	Hialeah	Existing/May relocate	10/24/23
US Customs	8801 NW 7 <sup>th</sup> Ave	Miami	Existing/May relocate	12/9/23
NAVAIR	Cecil Field	Jacksonville	N/A	10/1/24

US Coast Guard	13520 Aerospace Way	Jacksonville	N/A	TBD
DHS Immigration	865 79 <sup>th</sup> Ave	Plantation	N/A	5/1/22
VA Mental Health	Temple Terrance Hwy	Tampa	N/A	3/1/24
DHS TSA Customs	1050 Lee Wagener Blvd	Ft Lauderdale	N/A	4/14/22
IRS	201 S Orange Ave	Orlando	N/A	April 2022
Veterans Benefit Admin	TBD	Orlando	N/A	TBD
Social Security Admin	4030 W Vine St	Kissimmee	N/A	Oct 2022
IRS	TBD	Clearwater	N/A	Jan 2022
IRS	3848 Commerce Pkwy	Tampa	N/A	TBD
ATF / DCMA	3452 Lake Lynda Dr	Orlando	N/A	April 2022
Social Security Admin	500 N Orange Ave	Orlando	N/A	October 2022
DHS Immigration	TBD	Tampa	Existing/May relocate	TBD
ATF	TBD	Jacksonville	N/A	June 2022
DEA	J Turner Butler Blvd	Jacksonville	N/A	June 2022
FBI	TBD	West Palm Beach	N/A	June 2022
Social Security Admin	10050 N Florida Ave	Tampa	N/A	Dec 2021
Social Security Admin	E Oakland Park Blvd	Ft Lauderdale	N/A	Nov 2023
ATF	TBD	Miami	N/A	July 2022

10. The Randolph-Sheppard Vending Facility Program provides a livelihood of over one hundred (100) individual blind vendors in Florida. The pandemic has already had a devastating effect on these individuals. Many blind vendors in federal cafeterias, snack bars, and prison facilities within our State have been out of work for eighteen months. Further restrictions, as included in Executive Order 14042, would essentially end the careers of many blind individuals who are already struggling to survive.

11. Finally, these restrictions will make it more difficult, if not impossible, for BEP to fulfill its statutorily prescribed mission of “ensuring the greatest possible efficiency and effectiveness of services to the blind.” § 413.011(3), Fla. Stat. If BEP loses access to the opportunities described above, it will immediately need to deploy state resources in pursuit of alternative opportunities to fulfill its mission.

12. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct, to the best of my knowledge.

11/1/21

Date

William James Findley

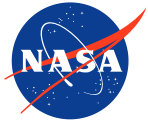
WILLIAM JAMES FINDLEY

Bureau Chief

Division of Blind Services

Florida Department of Education

## **EXHIBIT 3**



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Dec 21, 2020

**CONTRACT RELEASE C020-021**

# NASA Awards Contract for LISA Charge Management Device

NASA has awarded the Laser Interferometer Space Antenna (LISA) Charge Management Device (CMD) contract to the University of Florida, Gainesville.

The total value of this cost-no-fee contract is \$12,582,356.00. The period of performance is from Jan 1, 2021 through July 31, 2025. The work under this contract will be performed at the University of Florida.

Under this contract the contractor will design, fabricate, integrate, test, verify and deliver the breadboard, the Engineering Development Unit, and Engineering Test Unit CMD and the Fiber Optic Harness. The CMD is part of LISA, a state-of-the-art space-based gravitational wave telescope to address key questions in astrophysics and is a part of the (ESA) European Space Agency's Cosmic Visions Program.

LISA is an international project led by ESA as a space-borne gravitational wave observatory. NASA has partnered with ESA on this space mission to provide key enabling technologies. LISA is planned to consist of three spacecraft that are separated by 1.5 million miles (2.5 million kilometers) in an Earth-trailing orbit. These three spacecraft relay laser beams back and forth between different spacecraft and the signals are combined to search for gravitational wave signatures that come from distortions of space-time. The study of the universe through gravitational waves will yield a revolutionary perspective on the universe, which has been intensely studied using electromagnetic waves in many wavelength bands.

persist-into-november)

NASA's Webb Will Join Forces with the  
Event Horizon Telescope to Reveal the

For information about NASA and agency programs, visit:

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-end-

Cynthia M.  
O'Carroll  
Goddard Space Flight Center, Greenbelt, Md.  
301-286-4787  
[cynthia.m.ocarroll@nasa.gov](mailto:cynthia.m.ocarroll@nasa.gov)  
(<mailto:cynthia.m.ocarroll@nasa.gov>)

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*Last Updated: Dec 22, 2020*

*Editor: Miles Hatfield*

Tags: [Goddard Space Flight Center](/centers/goddard/home/index.html)  
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## **EXHIBIT 4**



## James Percival

---

**From:** [REDACTED]@spaceflorida.gov>  
**Sent:** Monday, October 18, 2021 1:27 PM  
**To:** James Percival; Ryan Newman; Alex Kelly; Michael Ferro; Natalie Christmas  
**Subject:** Fwd: [EXTERNAL] RE: ACTION REQUIRED: Contract 80KSC021PA010 Modification P00001

Email chain of communications.

[REDACTED]

Begin forwarded message:

**From:** [REDACTED]@spaceflorida.gov>  
**Date:** October 18, 2021 at 1:18:02 PM EDT  
**To:** [REDACTED]@spaceflorida.gov>  
**Subject:** FW: [EXTERNAL] RE: ACTION REQUIRED: Contract 80KSC021PA010 Modification P00001

---

**From:** [REDACTED]@nasa.gov>  
**Sent:** Monday, October 18, 2021 9:47 AM  
**To:** [REDACTED]@spaceflorida.gov>; [REDACTED]  
[REDACTED]@spaceflorida.gov>; [REDACTED]@spaceflorida.gov>; [REDACTED]  
[REDACTED]@spaceflorida.gov>  
**Subject:** RE: [EXTERNAL] RE: ACTION REQUIRED: Contract 80KSC021PA010 Modification P00001  
**Importance:** High

Good morning,

Please provide an update to the modification. Do you have an anticipated date when a decision will be made?

Respectfully,

[REDACTED]

---

**From:** [REDACTED]@spaceflorida.gov>  
**Sent:** Friday, October 15, 2021 9:22 AM  
**To:** [REDACTED]@nasa.gov>; [REDACTED]  
[REDACTED]@spaceflorida.gov>; [REDACTED]@spaceflorida.gov>; [REDACTED]  
[REDACTED]@spaceflorida.gov>  
**Subject:** RE: [EXTERNAL] RE: ACTION REQUIRED: Contract 80KSC021PA010 Modification P00001

[REDACTED],

The modification is in legal review and Space Florida is not able to sign the modification.

Thank you,

[REDACTED]

[REDACTED]

---

**From:** [REDACTED] <[\[REDACTED\]@nasa.gov](mailto:[REDACTED]@nasa.gov)>  
**Sent:** Friday, October 15, 2021 9:13 AM  
**To:** [REDACTED] <[\[REDACTED\]@spaceflorida.gov](mailto:[REDACTED]@spaceflorida.gov)>; [REDACTED] <[\[REDACTED\]@spaceflorida.gov](mailto:[REDACTED]@spaceflorida.gov)>; [REDACTED] <[\[REDACTED\]@spaceflorida.gov](mailto:[REDACTED]@spaceflorida.gov)>; [REDACTED] <[\[REDACTED\]@spaceflorida.gov](mailto:[REDACTED]@spaceflorida.gov)>  
**Subject:** RE: [EXTERNAL] RE: ACTION REQUIRED: Contract 80KSC021PA010 Modification P00001  
**Importance:** High

Good morning,

The deadline to incorporate FAR clause 52.223-99 (Deviation 21-03) is today, 15 October 2021.

If Space Florida does not intend to sign and return the modification, please let me know as soon as possible and with your reason(s).

Let me know if you have any questions or concerns, thank you.

Respectfully,

[REDACTED]

[REDACTED]

John F. Kennedy Space Center, NASA  
Procurement Office, Mail Code: OP-ES  
Central Campus, Room 5210E  
[REDACTED]



---

**From:** [REDACTED] <[\[REDACTED\]@spaceflorida.gov](mailto:[REDACTED]@spaceflorida.gov)>  
**Sent:** Wednesday, October 13, 2021 4:14 PM  
**To:** [REDACTED] <[\[REDACTED\]@nasa.gov](mailto:[REDACTED]@nasa.gov)>  
**Cc:** [REDACTED] <[\[REDACTED\]@spaceflorida.gov](mailto:[REDACTED]@spaceflorida.gov)>  
**Subject:** RE: [EXTERNAL] RE: ACTION REQUIRED: Contract 80KSC021PA010 Modification P00001

[REDACTED]

The modification is under legal review and Space Florida is unable to sign the modification at this time.

Thank you,

[REDACTED]

[REDACTED]



505 Odyssey Way, Suite 300,  
Exploration Park, FL 32953

[REDACTED]  
[REDACTED]

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**From:** [REDACTED] <[\[REDACTED\]@nasa.gov](mailto:[REDACTED]@nasa.gov)>  
**Sent:** Wednesday, October 13, 2021 2:22 PM  
**To:** [REDACTED] <[\[REDACTED\]@spaceflorida.gov](mailto:[REDACTED]@spaceflorida.gov)>  
**Cc:** [REDACTED] <[\[REDACTED\]@spaceflorida.gov](mailto:[REDACTED]@spaceflorida.gov)>  
**Subject:** RE: [EXTERNAL] RE: ACTION REQUIRED: Contract 80KSC021PA010 Modification P00001

Good afternoon [REDACTED]

Thank you for the update. Do you think we will see the signed modification today?

Respectfully,

[REDACTED]

---

**From:** [REDACTED] <[\[REDACTED\]@spaceflorida.gov](mailto:[REDACTED]@spaceflorida.gov)>  
**Sent:** Wednesday, October 13, 2021 11:28 AM  
**To:** [REDACTED] <[\[REDACTED\]@nasa.gov](mailto:[REDACTED]@nasa.gov)>  
**Cc:** [REDACTED] <[\[REDACTED\]@spaceflorida.gov](mailto:[REDACTED]@spaceflorida.gov)>  
**Subject:** [EXTERNAL] RE: ACTION REQUIRED: Contract 80KSC021PA010 Modification P00001

[REDACTED]

The Amendment is still under internal review and hasn't been signed yet, we will get back to you as soon as possible.

Thank you,



505 Odyssey Way, Suite 300,  
Exploration Park, FL 32953



[SpaceFlorida.gov](http://SpaceFlorida.gov)  
[Twitter](#) | [Facebook](#) | [LinkedIn](#)

---

**From:** [REDACTED] [@nasa.gov](mailto:[REDACTED]@nasa.gov)>  
**Sent:** Wednesday, October 13, 2021 9:56 AM  
**To:** [REDACTED] [@spaceflorida.gov](mailto:[REDACTED]@spaceflorida.gov)>  
**Subject:** RE: ACTION REQUIRED: Contract 80KSC021PA010 Modification P00001  
**Importance:** High

Good morning [REDACTED]

I am following-up on this modification. If you do not intend to sign, I need to forward your intention to NASA-HQ immediately.

Please let me know if you have any questions or concerns, thank you.

Respectfully,



---

**From:** [REDACTED]  
**Sent:** Tuesday, October 5, 2021 4:33 PM  
**To:** [REDACTED] [@spaceflorida.gov](mailto:[REDACTED]@spaceflorida.gov)  
**Subject:** ACTION REQUIRED: Contract 80KSC021PA010 Modification P00001  
**Importance:** High

Good afternoon [REDACTED]

Please review, sign, and return the attached modification 80KSC021CA016-P00001 no later than 8 October 2021. The purpose of this modification is to incorporate required PCD clauses.

A conformed copy of the contract clauses is also attached for your records; the two incorporated clauses are highlighted in red font:

- FAR 52.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors. (DEVIATION 21-03)
- NFS 1852.204-76 Security Requirements for Unclassified Technology Resources (DEVIATION 21-01)

Per Procurement Class Deviation (PCD) 21-03 and 21-01, we are required to incorporate these clauses into the current contract. More information detailing the requirement can be found at <https://www.hq.nasa.gov/office/procurement/regs/pcd.pdf>

Let me know if you have any questions or concerns, thank you in advance for your time and assistance.

Respectfully,

[REDACTED]

[REDACTED]

John F. Kennedy Space Center, NASA  
Procurement Office, Mail Code: OP-ES  
Central Campus, Room 5210E

[REDACTED]



## **EXHIBIT 5**

**From:** [REDACTED]  
**To:** [REDACTED]  
**Subject:** FW: [EXTERNAL] RE: Aerofusion (80LARC21CA005) Mod 3 - FAR 52.223-99  
**Date:** Wednesday, October 20, 2021 5:06:40 PM  
**Attachments:** [image001.png](#)

---

[REDACTED]  
Please let me know if you would like me to respond this inquiry and, if so, provide guidance as to how to respond.

Thank you,  
[REDACTED]

---

**From:** [REDACTED]@nasa.gov>  
**Sent:** Wednesday, October 20, 2021 2:46 PM  
**To:** [REDACTED]@ufl.edu>  
**Cc:** [REDACTED]@ufl.edu>  
**Subject:** RE: [EXTERNAL] RE: Aerofusion (80LARC21CA005) Mod 3 - FAR 52.223-99

[External Email]

Good afternoon [REDACTED] – Any updates on the mod? Do you have any additional concerns/questions?

---

**From:** [REDACTED]  
**Sent:** Thursday, October 14, 2021 11:59 AM  
**To:** [REDACTED]@ufl.edu>  
**Cc:** [REDACTED]@ufl.edu>  
**Subject:** RE: [EXTERNAL] RE: Aerofusion (80LARC21CA005) Mod 3 - FAR 52.223-99

[REDACTED] – Regarding your question about only including the clause in the case of option exercise or extension, NASA has made the decision to modify all active contracts. We are asking for the actions back by October 15, which is the effective date of the clause.

Let me know if you have any further questions.

Thanks,  
[REDACTED]

---

**From:** [REDACTED]  
**Sent:** Thursday, October 14, 2021 11:38 AM  
**To:** [REDACTED]@ufl.edu>  
**Cc:** [REDACTED]@ufl.edu>  
**Subject:** RE: [EXTERNAL] RE: Aerofusion (80LARC21CA005) Mod 3 - FAR 52.223-99

Good morning [REDACTED] – The deadline is being pushed down from NASA HQ. We (the COs) have been

told by NASA HQ to get our contracts modified by the 15<sup>th</sup>.

I'll forward your questions about incorporation of the clause only in the case of an option or extension to my management.

Thanks,

[REDACTED]

---

**From:** [REDACTED] <[REDACTED]@ufl.edu>  
**Sent:** Thursday, October 14, 2021 11:18 AM  
**To:** [REDACTED] <[REDACTED]@nasa.gov>  
**Cc:** [REDACTED] <[REDACTED]@ufl.edu>  
**Subject:** RE: [EXTERNAL] RE: Aerofusion (80LARC21CA005) Mod 3 - FAR 52.223-99

Dear [REDACTED]

[REDACTED] forwarded your email regarding the execution of Mod 3 to me for response. This Mod is still under review by the University of Florida. Can you please provide the agency's reasons for needing this by COB today?

Our review of FAR 52.223-99, the associated Executive Order 14042 and FAQ's reveals nothing that requires the execution of a Mod to existing contracts by a certain date. The FAQ's indicate that the requirement must be incorporated when an option is exercised or an extension is made.

Any information you can provide would be appreciated.

Best regards,

[REDACTED]

---

[REDACTED]  
University of Florida  
274 Grinter Hall  
PO Box 115500 Gainesville, FL 32611-5500

[REDACTED]  
[REDACTED]



Advance Notice: None.



**From:** [REDACTED]@ufl.edu>  
**Sent:** Thursday, October 14, 2021 10:50 AM  
**To:** [REDACTED]@ufl.edu>  
**Subject:** FW: [EXTERNAL] RE: Aerofusion (80LARC21CA005) Mod 3 - FAR 52.223-99  
**Importance:** High

---

**From:** [REDACTED]@nasa.gov>  
**Sent:** Thursday, October 14, 2021 10:49 AM  
**To:** [REDACTED]@ufl.edu>  
**Subject:** RE: [EXTERNAL] RE: Aerofusion (80LARC21CA005) Mod 3 - FAR 52.223-99

**[External Email]**

[REDACTED] – If the University has any specific questions or concerns about the mod, please send those to me via email. I'll forward them up to my management. The agency is trying to collect all of the feedback to identify common questions or concerns.

What's the likelihood of getting a copy of the mod to me by COB today?

[REDACTED]

---

**From:** [REDACTED]@ufl.edu>  
**Sent:** Wednesday, October 13, 2021 11:04 AM  
**To:** [REDACTED]@nasa.gov>  
**Subject:** [EXTERNAL] RE: Aerofusion (80LARC21CA005) Mod 3 - FAR 52.223-99

Hi [REDACTED]

This is still under review internally.

Best Regards,  
[REDACTED]

---

**From:** [REDACTED]@nasa.gov>  
**Sent:** Wednesday, October 13, 2021 10:01 AM  
**To:** [REDACTED]@ufl.edu>  
**Subject:** RE: Aerofusion (80LARC21CA005) Mod 3 - FAR 52.223-99  
**Importance:** High

**[External Email]**

Good morning [REDACTED] - Checking on the status of this mod. Any updates/questions/concerns? I need to get this mod done by the 15th (Friday), so I need a signed copy back as soon as possible.

Thanks,

[REDACTED]

---

**From:** [REDACTED]  
**Sent:** Tuesday, October 5, 2021 2:06 PM  
**To:** [REDACTED] <[\[REDACTED\]@ufl.edu](mailto:[REDACTED]@ufl.edu)>  
**Subject:** Aerofusion (80LARC21CA005) Mod 3 - FAR 52.223-99  
**Importance:** High

Good afternoon [REDACTED] - I've attached mod 3 to the AEROFUSION contract (80LARC21CA005). This mod adds FAR clause 52.223-99 ENSURING ADEQUATE COVID-19 SAFETY PROTOCOLS FOR FEDERAL CONTRACTORS (DEVIATION 21-03) to the contract at clause I.7. The full text of the clause has been included.

Please review and return a signed copy no later than 12 OCT.

Let me know if you have any questions.

Thanks,

[REDACTED]

[REDACTED]

[REDACTED]

NASA Langley Research Center

Office of Procurement - Science & Flight Projects Contracting Branch

[REDACTED] <[\[REDACTED\]@nasa.gov](mailto:[REDACTED]@nasa.gov)>

## **EXHIBIT 6**

**From:** [REDACTED]  
**To:** [REDACTED]  
**Cc:** [REDACTED]  
**Subject:** RE: [EXTERNAL] RE: Subcontract LSP 19-003 Mod 07  
**Date:** Friday, October 15, 2021 12:26:32 PM  
**Importance:** High

---

**[External Email]**

Thank you for your prompt reply [REDACTED]. NASA has mandated to a.i. that they are requiring implementation of the FAR clause to comply with the President's executive order, including the final executed agreement, no later than 10/15/21. This is the reason for the push. If UF will not furnish their signature by close of business today, I need to know promptly so I can inform NASA. Also, if signature will not be forthcoming today, I need a firm expedited date as to when we can expect UF signature.

Thank you.

[REDACTED]  
[REDACTED]  
[REDACTED]

a.i. solutions, Inc. / [www.ai-solutions.com](http://www.ai-solutions.com)

[REDACTED]

---

**From:** [REDACTED]@ufl.edu>  
**Sent:** Friday, October 15, 2021 12:03 PM  
**To:** [REDACTED]@nasa.gov>  
**Cc:** [REDACTED]@ufl.edu>; [REDACTED]@ufl.edu>; [REDACTED]  
[REDACTED]@ufl.edu>; [REDACTED]@ufl.edu>; [REDACTED]  
[REDACTED]@eng.ufl.edu>; [REDACTED]@eng.ufl.edu>  
**Subject:** RE: [EXTERNAL] RE: Subcontract LSP 19-003 Mod 07

Hi [REDACTED],

The University of Florida is reviewing the amendment with our General Counsel. I'm not able to ascertain the business, compliance or contractual reason for the October 15 deadline. Can you tell us the nature of the deadline so we can maintain our relationship and performance with this contract?

[REDACTED]

[REDACTED]

UNIVERSITY OF FLORIDA  
Division of Sponsored Programs | UF Research  
213 Grinter Hall | PO Box 115500 | Gainesville, FL 32611-5500

[REDACTED]@ufl.edu

---

**From:** [REDACTED]@nasa.gov>

**Sent:** Friday, October 15, 2021 11:49 AM

**To:** [REDACTED]@ufl.edu>; [REDACTED]@ufl.edu>; [REDACTED]  
[REDACTED]@eng.ufl.edu>

**Cc:** [REDACTED]@eng.ufl.edu>

**Subject:** FW: [EXTERNAL] RE: Subcontract LSP 19-003 Mod 07

**Importance:** High

**[External Email]**

Can anyone please tell me where we are on this? We need signature today. In order to help expedite the process, is there anything else our office can do to help move the UF signature process along quickly.

Somebody please advise where we are with signature as soon as possible please as our NASA Contracting Officer is requiring signature by close of business today.

Thank you.

[REDACTED]

[REDACTED]

[REDACTED]

*a.i. solutions, Inc. / [www.ai-solutions.com](http://www.ai-solutions.com)*

[REDACTED]

---

**From:** [REDACTED]

**Sent:** Thursday, October 14, 2021 1:37 PM

**To:** [REDACTED]@ufl.edu>; [REDACTED]@eng.ufl.edu>

**Cc:** [REDACTED]@eng.ufl.edu>; [REDACTED]@ufl.edu>

**Subject:** RE: [EXTERNAL] RE: Subcontract LSP 19-003 Mod 07

**Importance:** High

I sent the Mod is Word Version just in case we had minor edits as a precaution. You folks input your updated technical point of contact, then return to me PDF with our signature, then I will immediately countersign and return a copy to your for your records. If you are unable to PDF, send me the Word version with the updated PI, then I will PDF, sign and sent to your office for immediate signature.

Thank you.

[REDACTED]  
[REDACTED]  
[REDACTED]  
*a.i. solutions, Inc. / [www.ai-solutions.com](http://www.ai-solutions.com)*  
[REDACTED]

---

**From:** [REDACTED] <[\[REDACTED\]@ufl.edu](mailto:[REDACTED]@ufl.edu)>  
**Sent:** Thursday, October 14, 2021 1:27 PM  
**To:** [REDACTED] <[\[REDACTED\]@eng.ufl.edu](mailto:[REDACTED]@eng.ufl.edu)>; [REDACTED]  
[REDACTED] <[\[REDACTED\]@nasa.gov](mailto:[REDACTED]@nasa.gov)>  
**Cc:** [REDACTED] <[\[REDACTED\]@eng.ufl.edu](mailto:[REDACTED]@eng.ufl.edu)>; [REDACTED] <[\[REDACTED\]@ufl.edu](mailto:[REDACTED]@ufl.edu)>  
**Subject:** [EXTERNAL] RE: Subcontract LSP 19-003 Mod 07

Hi [REDACTED],

We sent a request a while back to change the PI on this award to [REDACTED], but [REDACTED] is still listed as the technical representative on Mod 07. Can this be updated at this time before we send back for signature?

Thank you,

---

[REDACTED]  
[REDACTED]  
UNIVERSITY OF FLORIDA  
Division of Sponsored Programs | UF|Research  
207 Grinter Hall | PO Box 115500 | Gainesville, FL 32611-5500  
[REDACTED] <[\[REDACTED\]@ufl.edu](mailto:[REDACTED]@ufl.edu)>  
*None.*

---

**From:** [REDACTED] <[\[REDACTED\]@eng.ufl.edu](mailto:[REDACTED]@eng.ufl.edu)>  
**Sent:** Wednesday, October 13, 2021 11:00 AM  
**To:** [REDACTED] <[\[REDACTED\]@nasa.gov](mailto:[REDACTED]@nasa.gov)>  
**Cc:** [REDACTED] <[\[REDACTED\]@eng.ufl.edu](mailto:[REDACTED]@eng.ufl.edu)>; [REDACTED] <[\[REDACTED\]@ufl.edu](mailto:[REDACTED]@ufl.edu)>; [REDACTED]  
[REDACTED] <[\[REDACTED\]@ufl.edu](mailto:[REDACTED]@ufl.edu)>; [REDACTED] <[\[REDACTED\]@ufl.edu](mailto:[REDACTED]@ufl.edu)>  
**Subject:** Re: Subcontract LSP 19-003 Mod 07

Hi [REDACTED]

I forwarded your original email to [REDACTED] and [REDACTED] as well

Someone will respond to you shortly

Thank you

Warmest Regards,  
[REDACTED]

---

**From:** [REDACTED] <[REDACTED]@nasa.gov>

**Sent:** Wednesday, October 13, 2021 10:50 AM

**To:** UF-Awards

**Cc:** [REDACTED]

**Subject:** FW: Subcontract LSP 19-003 Mod 07

[External Email]

Thank you.

[REDACTED]

[REDACTED]

[REDACTED]

*a.i. solutions, Inc. / [www.ai-solutions.com](http://www.ai-solutions.com)*

[REDACTED]

---

**From:** [REDACTED]

**Sent:** Wednesday, October 13, 2021 10:46 AM

**To:** [REDACTED] <[REDACTED]@ufl.edu>

**Cc:** [REDACTED] <[REDACTED]@eng.ufl.edu>

**Subject:** FW: Subcontract LSP 19-003 Mod 07

**Importance:** High

Good Morning [REDACTED],

We are requesting signature for this administrative mod no later than close of business tomorrow as NASA is requiring implementation by 10/15/21 for the NASA FAR Clause.

Thank you.

[REDACTED]

[REDACTED]

[REDACTED]

*a.i. solutions, Inc. / [www.ai-solutions.com](http://www.ai-solutions.com)*

[REDACTED]

**From:** [REDACTED]  
**Sent:** Tuesday, October 12, 2021 1:18 PM  
**To:** [REDACTED] <[REDACTED]@ufl.edu>  
**Cc:** [REDACTED] <[REDACTED]@eng.ufl.edu>; [REDACTED] <[REDACTED]@eng.ufl.edu>  
**Subject:** Subcontract LSP 19-003 Mod 07  
**Importance:** High

[REDACTED],

On September 9th, the president signed an executive order requiring that parties who contract with the federal government provide COVID-19 safeguards in the workplace. This will include mandatory COVID-19 vaccinations for all employees, except those requiring accommodations (disability, sincerely held religious beliefs), by December 8th. The attached "Contractor Guidance" document sets forth workplace safety protocols for contractor or subcontractor workplace locations pursuant to Executive Order 14042 on Ensuring Adequate COVID Safety Protocols for Federal Contractors. The document can be found at: <http://www.saferfederalworkforce.gov/contractors>.

Yesterday, we received a modification to the ELVIS 3 contract with the following email notification and attachment "pcd21=03" from the NASA contracting officer:

*"As you may be aware, an Executive Order (E.O.) 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, was signed by the President on September 9, 2021 (and published in the Federal Register on September 14, 2021 at 86 FR 50985). This EO 14042 directs executive departments and agencies, including independent establishments subject to the Federal Property and Administrative Services Act, 40 U.S.C. § 102(4)(A), to ensure that covered contracts and contract-like instruments include a clause requiring contractor and any subcontractors (at any tier) to comply with all guidance for covered contractor or subcontractor workplace locations as published by the Safer Federal Workforce Task Force at: <https://www.saferfederalworkforce.gov/contractors>. For your review and concurrence, please find the attached modification that incorporates FAR Clause 52.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors.(DEVIATION 21-03). In accordance with the attached pcd21-03, the above action is required to be no later than October 15, 2021."*

**To comply with this NASA directive, please find the attached modification for your review and signature that incorporates FAR Clause 52.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors.(DEVIATION 21-03).**

In addition, we received the following information via email this morning from the NASA KSC Emergency Preparedness Office:

*"Reasonable Accommodations for COVID-19 Vaccine Exemptions/Deferments*



*(KSC Contractor Workforce Only) Contractors are responsible for their own Reasonable Accommodation process to adjudicate employee requests for exemption from the COVID-19 vaccination mandate; contact your contract supervisor or leadership team for further guidance."*

a.i. solutions employees will receive direction from our corporate office with more detail on how the company plans to satisfy the requirement. We expect our subcontractor teammates will provide similar guidance to their employees.

If you have any questions, please let me know.

Also, we have extended the end date for Option 04. All redlines are in red. If UF concurs, please expedite signature no later than close of business October 15, 2021. Our office will then immediately countersign and return a final executed copy for UF records.

Thank you.

[REDACTED]

[REDACTED]

[REDACTED]

a.i. solutions, Inc. / [www.ai-solutions.com](http://www.ai-solutions.com)

[REDACTED]

## **EXHIBIT 7**

**Mission:**

To protect, promote & improve the health of all people in Florida through integrated state, county & community efforts.



**Ron DeSantis**

Governor

**Joseph A. Ladapo, MD, PhD**

State Surgeon General

**Vision:** To be the Healthiest State in the Nation

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**NOTICE OF VIOLATION**

October 6, 2021

Vincent S. Long, Administrator  
Leon County Government  
301 S. Monroe Street  
Tallahassee, FL 32301

Via Certified Mail Service, Article Number:  
9414 7266 9904 2177 2936 31

In Re: Violation of Section 381.00316, Florida Statutes

Dear Mr. Long:

This letter is notice that Leon County Government, a governmental entity as defined in section 768.38, Florida Statutes, is being assessed a total fine of \$3,570,000.00 for 714 counts of violating section 381.00316, Florida Statutes. The Department finds that Leon County Government required 714 employees, or former employees, of Leon County Government to provide documentation certifying COVID-19 vaccination in order to gain access to, entry upon, or service from the governmental entity's operations in this state, in violation of section 381.00316, Florida Statutes.

Section 381.00316, Florida Statutes, prohibits governmental entities from requiring that a person provide any documentation certifying COVID-19 vaccination or post-infection recovery to gain access to, entry upon, or service from the governmental entity's operations. Pursuant to section 381.00316, Florida Statutes, and Rule 64-8.001, *Florida Administrative Code*, the Department is authorized to impose a \$5,000 fine per individual and separate violation.

On July 28, 2021, Leon County Government required all employees to become fully vaccinated against COVID-19 and to provide vaccination verification to Leon County Government's Human Resources office no later than 11:59 p.m. on October 1, 2021.

As of on or about October 2, 2021, 700 Leon County Government employees provided documentation certifying that they had received a complete series of a COVID-19 vaccination to, and upon the demand of, Leon County Government in order to gain access to, entry upon, or service from Leon County Government's operations in this state.

On or about October 4, 2021, Leon County Government terminated 14 employees as a result of their refusal or failure to submit documentation certifying COVID-19 vaccination, thereby terminating their access to, entry upon, or service from Leon County Government's operations in this state.

Accordingly, Leon County Government is assessed a total fine of \$3,570,000.00. Payment must be made within 30 days of entry of the final order in this matter. Payment must be paid by certified check or money order payable to the Department of Health and mailed to:

---

**Florida Department of Health**  
Division of Emergency Preparedness and Community Support  
4052 Bald Cypress Way, Bin A-22 • Tallahassee, FL 32399  
PHONE: 850/245-4864 • FAX: 850/921-8162  
**FloridaHealth.gov**

 **Accredited Health Department**  
Public Health Accreditation Board

**Exhibit 7 - 002**

Florida Department of Health  
Division of Emergency Preparedness and Community Support  
4052 Bald Cypress Way, A22  
Tallahassee, FL 32399-1734  
Attention: COVID-19 Vaccine Documentation

By:   
Douglas Woodlief, Division Director  
Florida Department of Health

cc: Agency Clerk

**NOTICE OF RIGHTS**

A party whose substantial interest is affected by this action may petition for an administrative hearing pursuant to sections 120.569 and 120.571, Florida Statutes. Chapter 28-106, Florida Administrative Code, governs such proceedings. The petition must be in writing and must be received by the Agency Clerk within 21 days of receipt of this notice. The petition may be mailed to the Agency Clerk, Department of Health, 4052 Bald Cypress Way, BIN #A-02, Tallahassee, FL 32399-1703; hand-delivered to the Agency Clerk, Department of Health, 2585 Merchants Row Boulevard, Prather Building, Suite 110, Tallahassee, FL; or sent by facsimile to (850) 413-8743. Email filing is not available.

Mediation is not available as an alternative remedy.

The failure of any person to petition for a hearing within 21 days from receipt of this notice waives that person's right to an administrative hearing such that this notice becomes a Final Order imposing the administrative action described herein without further notice.

If this notice becomes a Final Order, an adversely affected party is entitled to seek judicial review pursuant to section 120.68, Florida Statutes. The Florida Rules of Appellate procedure govern review proceedings. Review is initiated by filing, within 30 days of the date of the Final Order, a Notice of Appeal with the appropriate Court of Appeal in the appropriate District Court, accompanied by the filing fees required by law, and filing a copy of the Notice of Appeal with the Department of Health Agency Clerk.

## **EXHIBIT 8**



## Statements By Year

Pages

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## Statements Issued By

Pages

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# STATE OF THE UNIVERSITY: NOW IS THE TIME TO RAISE STATURE, REPUTATION OF ALL COLLEGES AND DEPARTMENTS

*President Kent Fuchs*

August 26, 2021

Thank you, Professor Bloom. Thank you to the Faculty Senate for hosting this annual State of the University address as we begin the new academic year. Earlier today I met with the new members of the faculty senate and I expressed my deep appreciation for UF's tradition of effective shared governance and a collaborative spirit across the university that encompasses not only faculty, but also students, staff, administration and alumni.

This afternoon I will speak to the coming year and also reflect on the past year, but I will begin with what is most pressing on my mind, and I expect on yours: Covid and the delta variant. To provide some perspective, let me take us back to the end of last academic year, when we celebrated our graduating students with in-person commencement ceremonies.

for an in-person ceremony. To the dismay of the faculty marshals who had to hear it 27 times, I sang solo Tom Petty's "I won't back down" as part of my commencement address.

By the time of those ceremonies in April and May, most of our faculty had been fully vaccinated, tens of thousands of students had been vaccinated and the number of positive cases of Covid had dropped to 5 new cases per day. The number of new Covid cases in our community continued to drop and by the middle of June on average there was less than one new case per day. Due to the vaccine, herd immunity had been achieved, or rather that was what I thought.

We decided to celebrate all the remarkable work of our health care workers, our faculty, students, and incredible staff who had kept our campus safe and fully operational in the midst of the pandemic, and so we planned an all-campus day of gratitude for Friday, September 17, three weeks from tomorrow, the day before the Gators are scheduled to beat Alabama in football.

But then, just six weeks ago, the Covid Delta variant exploded across our state and our local community. Delta is more than twice as contagious as all previous variants and we have reached an all-time high in new cases per day, as well as an all-time high in hospitalizations and deaths, locally and across the state.

Now, with all hands on deck, we are again fighting the virus. There are several tools available to stop the spread of this virus, and all of us must use them. First, everyone MUST get vaccinated. Second, everyone MUST wear a mask while indoors in a public space.

We have also learned in the past six months that a significant portion of our nation will not choose to be vaccinated, even though the vaccine is fully approved by the FDA, free, and easily accessible. The percentage of our nation's population choosing to not be vaccinated is sufficient for the delta variant to thrive and to create new variants that are even more contagious.

What about UF? A year and a half ago, as soon as we saw the first community spread of Covid, UF was the first university in the State of Florida to move classes online to "flatten the curve". At that point, I hadn't heard of contact tracing and it wasn't clear to me there would ever be a vaccine. Now, we have multiple incredibly effective vaccines and at UF we have an effective Screen, Test, and Protect program that kept us safe this past year. However, we do not have some other tools. We do not have the authority to mandate the vaccine for our students and employees, we do not have the authority to require everyone to wear a mask indoors, and we no longer have the authority to move our classes online.



wear the mask.

Finally, our epidemiologists are projecting that the current record surge of Covid will soon decline rapidly across the state of Florida. Here at UF, we can expect a growing number of new cases for several weeks, followed also by a rapid decline. However, even with the expected future rapid decline in new cases, again, please, everyone must get the shot and must wear the mask.

Although we have postponed our campus-wide day of gratitude, I have to express how grateful I am for everyone's role in keeping our campus safe the past 18 months, and for continuing to do so in this new academic year. I am also so grateful for how our faculty, staff and students have excelled in the past 18 months in our university's mission of education, scholarship, and making a difference in society through clinical work, extension, and service. Let me share a few of those collective accomplishments.

We announced earlier this year that research expenditures reached a new record high of \$942M in FY 2020. We are a whisker away from our goal of \$1B in annual research spending.

Despite the economic challenges faced by the State of Florida due to Covid, our elected officials invested even more in the University of Florida this past year, for which we are incredibly grateful. In the past five years we are the only university in the nation to have increased the size of our faculty by 500, and this past year the Governor and the State Legislature invested additional funding in UF to further increase the size of the faculty, particularly in the area of artificial intelligence. Although no new funds were provided for salary increases, the provost, vice presidents, and deans reallocated funds from existing budgets to provide compensation increases for both faculty and staff this year.

As we hire additional AI faculty, UF continues to advance our artificial intelligence initiative and partnership with Nvidia announced last year. In July, UF's HiPerGator AI supercomputer was ranked second most powerful computer among universities nationwide and third across higher education worldwide.

I am so grateful that although we are one of the nation's leading research universities, we are also a university that celebrates its commitment to students, undergraduate, professional, and graduate students.

For example, two days ago, Dean Nicole Stedman, Provost Joe Glover, the college deans, and I, hosted an event with nearly a hundred faculty, staff, and guests in celebration of university and college awards for teaching, advising, and mentoring.



social sciences. As of this academic year, Quest 1 and Quest 2 courses are required for all entering students.

Faculty and academic leaders are currently at work on Quest 3, which will focus on providing students new opportunities for experiential learning. Thank you to the Heavener School of Business for piloting Quest 3 and many thanks to everyone who has worked for years in developing and implementing Quest and to every faculty and staff member committed every day to excellence in undergraduate, graduate and professional education.

Although our people and our programs are most important, we also need a physical environment that enables our success.

Our physical infrastructure must be maintained, renewed, and at times grown to support our community and programs. As you can tell from the closed streets and cranes on campus, there is a lot of current activity associated with our infrastructure. On our 2,000 acre main campus here in Gainesville, we have more than 1 million square feet currently in construction or authorized for construction this academic year. An additional 300,000 square feet is in renovation or authorized for renovation this year.

Apart from our campus in Gainesville, UF has a presence in every county across our state, and we are currently considering additional new focused opportunities, particularly in South Florida. In July, we announced that UF Health and the College of Medicine are in discussions with the Scripps Research Institute to integrate Palm Beach County-based Scripps Research Florida with the University of Florida. This partnership will marry both institutions' research strengths while giving UF a strategic research presence in a rapidly growing region of our state.

In addition, the Mayors of West Palm Beach and Palm Beach County announced this week that UF is in discussions with them about creating a focused graduate education campus in the city of West Palm Beach.

Philanthropy is an important and growing revenue stream for strategic initiatives in departments, colleges, and for initiatives such as those just mentioned in South Florida. Despite the economic challenges caused by Covid, philanthropy to the University of Florida set a new record this past fiscal year.

As of this week, we have raised \$3.3B in our Go Greater fundraising campaign. We've already surpassed our original goal of \$3B by \$300M and the campaign is scheduled to continue for more than another

This past fiscal year's record in new gifts and commitments was \$562M. It was the third year in a row that fundraising topped \$500M. This is really remarkable, considering that 2014 was the first year that we raised over \$300M annually.

In this first week of classes, I want to welcome all our new students, including new undergraduates, graduate, and professional students. The new first year in college undergraduates were selected from a record 52,513 applications. For context, for the fall entering class of 2017, four years ago, we had 34,500 applications.

Our entering students also set a record academically. The average GPA and SAT for admitted students was 4.51 and 1392 respectively, both of which are all-time highs.

In addition to new students, I also want to welcome all new faculty and staff and welcome new university leaders. I'm going to acknowledge just a few of our new university leaders. If I call your name, please stand and remain standing. I ask the audience to hold your applause until all are standing.

- Hub Brown, dean of the College of Journalism and Communications.
- Colleen Koch, dean of the College of Medicine.
- Mary Parker, vice president for enrollment management.
- Nicole Stedman, dean of the Graduate School.
- Dana Zimmer, dean of the College of Veterinary Medicine.

Our ongoing searches include the UF chief diversity officer and the UF dean for extension and director, Florida Cooperative Extension Service. We expect to complete those two searches this semester.

I'm old enough to have had a variety of leadership roles and positions in my career and so I know that the most important leadership position is not the president, but the leadership that occurs in departments and units across the university. I would like to recognize everyone in this room and those watching online who has assumed a new leadership role since last fall. Would everyone, faculty and staff, who has a new leadership position in a department, unit, or college or elsewhere at the university, please stand?

Finally, we remain deeply saddened by the loss of one of our university's important and beloved leaders, Dr. Leon Haley to a tragic accident in July. Dr. Haley was the exceptional CEO of UF Health Jacksonville,

On Monday, Dec. 13, 2021, Dr. Haley became the first person in the State of Florida to get a COVID vaccine after UF Health – Jacksonville became the first hospital to receive vaccines in the state.

As I described at his funeral in his hometown of Pittsburgh, PA, the day before his death, with the Delta variant raging through the unvaccinated in Jacksonville, he went to the hospital wards to personally administer shots. He was concerned that not all of his healthcare workers were vaccinated. He personally vaccinated 15 people in his hospital the day before he died.

After his death, more than 150 UF Health staff and faculty chose to be vaccinated in Dr. Haley's honor.

Although the loss of Dr. Haley left a huge void, two excellent individuals have been selected to fill his position: Russ Armistead, who will serve as CEO of UF Health Jacksonville, and Dr. Linda Edwards, who will serve as dean of the UF College of Medicine – Jacksonville.

I conclude with a comment about university rankings.

This past year UF, again, moved up in the U.S. News rankings from tied for 7th to tied for 6th among public universities and we are now in the top 30 of all universities, public or private. Almost every year we have moved up by at least one position in those rankings. We are committed to being ranked among the nation's top-5 public research universities, and so we will continue to work at the university level on the metrics that will drive these rankings higher, including graduation rates, faculty resources and alumni giving rates.

However, in addition to those efforts, it's important that every UF department and all of our 16 colleges also raise their statures and reputations among their aspirational peers. Out of 11 UF colleges with graduate programs that are currently ranked by U.S. News, five are currently in the top-ten and two in the top-5.

UF ranks third in total publications by its faculty behind only Harvard and Michigan among 400 top national public and private universities, according to Academic Analytics. We rank 21st in total citations, 28th in total awards and honors and 20th in total grant dollars among those 400 universities.

However, per capita measures reflect significant gaps. UF faculty rank 78th in citations per faculty member, 79th in awards per faculty member and 92nd in grant dollars per faculty member.

While we have steadily increased research expenditures -- reaching the record \$942M I mentioned earlier -- we need to significantly increase our share of the most competitive federal research spending.

rankings. But with UF today solidly ensconced among the top-10 publics, I believe there is no better time than now to double down on our plan to enhance the stature of every department and college at UF.

A year ago, as we faced incredible uncertainty regarding the pandemic and the university's finances and programs, I challenged myself and the entire university to make last year one of the best ever. In retrospect, this past year was one of the most difficult ever, but it was also one of the best ever in what was accomplished, due to everyone at this university.

With what I observed this past year and what I know of our UF community, I am incredibly optimistic about our current new academic year and the years beyond. As I say often, I am immensely grateful for the privilege I have to be your colleague.

Thank you.



University of Florida  
Gainesville, FL 32611  
UF Operator: (352) 392-3261  
[Website text-only version](#)

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## RESOURCES





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## **WEBSITE**



**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION**

STATE OF FLORIDA,

*Plaintiff,*

v.

No. 8:21-cv-2524-SDM-TGW

BILL NELSON, et al.,

*Defendants.*

\_\_\_\_\_/

**PROPOSED ORDER**

Pending before the Court is Florida's Motion for Preliminary Injunction. (Doc. \_\_) After reviewing the motion, the response, the record, and the applicable law, the Court preliminarily enjoins Defendants from implementing, enforcing, or giving any effect to (a) the executive order, Exec. Order No. 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, 86 Fed. Reg. 50,985 (Sept. 9, 2021), (b) the OMB rule approving the Task Force guidance, Determination of the Promotion of Economy and Efficiency in Federal Contracting Pursuant to Executive Order No. 14042, 86 Fed. Reg. 53,691 (Sept. 28, 2021), and (c) the FAR Council guidance, Memorandum from FAR Council to Chief Acquisition Officers et al. re: Issuance of Agency Deviations to Implement Executive Order 14042 (Sept. 30, 2021). No security bond is required under Federal Rule of Civil Procedure 65(c).

ORDERED in Tampa, Florida on \_\_\_\_\_, 2021.

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STEVEN D. MERRYDAY  
UNITED STATES DISTRICT JUDGE