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

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

ASSOCIATED BUILDERS AND CONTRACTORS, INC. AND ASSOCIATED BUILDERS AND CONTRACTORS OF GEORGIA, INC.'S MOTION FOR PRELIMINARY INJUNCTION AND BRIEF IN SUPPORT THEREOF

I. INTRODUCTION

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

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

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

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

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

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

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

Plaintiff-Intervenors, along with the State Plaintiffs, seek to enjoin the enforcement of Executive Order 14042 and its implementation by the Office of Management and Budget (OMB), the Safer Federal Workforce Task Force (the "Task Force"), and the Federal Acquisition Regulatory (FAR) Council. The foregoing agencies have imposed a sweeping and unprecedented mandate on all government contractors, including but certainly not limited to construction contractors and subcontractors performing work on Federal contracts. This sweeping federal mandate requires every Federal contractor and subcontractor, regardless of size or resources, to require their covered employees to submit to COVID-19 vaccination in order to perform such contracts, without regard to the nature of the services provided and at a time when workers in every occupation seem hard to find. This

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

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

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

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

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

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

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

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

[3] Bill Anderson Declaration, Par. 8.

[4] Bill Anderson Declaration, Par. 8.

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

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

II. BACKGROUND AND STATEMENT OF FACTS[5]

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

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

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

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

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

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

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

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

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

[9] Bill Anderson Declaration, Par. 9

[10] Bill Anderson Declaration, Par. 9

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

III. LEGAL STANDARD

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

[11] Bill Anderson Declaration, Par. 10

[12] Bill Anderson Declaration, Par. 10

[13] Bill Anderson Declaration, Par. 10

IV. ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

d. The Contractor Mandate Violates the SBREFA Requirements.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. CONCLUSION

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

Respectfully submitted this 18th day of November 2021.

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CERTIFICATE OF SERVICE

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

/s/ J. Larry Stine
J. Larry Stine

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ATTACHMENT

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

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

DECLARATION OF BILL ANDERSON
IN SUPPORT OF PRELIMINARY INJUNCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Dated this 17th day of November 2021.

Bill Anderson