

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

STATE OF MISSOURI,
STATE OF NEBRASKA,
STATE OF ALASKA,
STATE OF ARKANSAS,
STATE OF IOWA,
STATE OF MONTANA,
STATE OF NEW HAMPSHIRE,
STATE OF NORTH DAKOTA,
STATE OF SOUTH DAKOTA,
STATE OF WYOMING,

Plaintiffs,

v.

JOSEPH R. BIDEN, et al.,

Defendants.

No. 4:21-cv-01300

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION**

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INTRODUCTION

For over a century, the U.S. Supreme Court has recognized that policies on compulsory vaccination lie within the police powers of the States, and that “[t]hey are matters that do not ordinarily concern the national government.” *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905). Until quite recently, the Biden Administration agreed, stating on July 23 of this year that mandating vaccines is “not the role of the federal government.” But on September 9, 2021, that position underwent a dramatic about-face. The President announced several sweeping vaccine mandates, including a mandate requiring vaccination of employees for all federal contractors and subcontractors—a mandate that encompasses one-fifth of the entire American workforce. This mandate is unconstitutional, unlawful, and unwise. The federal Government lacks authority under its enumerated powers to issue the mandate, and its attempt to do so unconstitutionally infringes on the States’ powers expressly reserved by the Tenth Amendment; the Executive Branch lacks statutory authority to issue this mandate, which it shoe-horned into statutes that govern efficiency in federal procurement and say nothing about federalizing public-health policy; and the mandate is arbitrary and capricious because the federal agencies implementing it gave literally no consideration to important aspects of the problem—such as the fact that 72 percent of unvaccinated workers say they will forego their jobs rather than succumb to such a mandate. Indeed, the mandate’s justification is manifestly pretextual, as the President openly announced that its actual justification is to federalize COVID-19 health policy as part of a nationwide plan to increase vaccination rates, not to improve efficiency in federal procurement. And the policy was unlawfully issued without required notice-and-comment. The policy threatens to inflict enormous disruption and irreparable injury on the Plaintiff States, as well as working families throughout the nation. The Court should enjoin this illegal action.

STATEMENT OF FACTS

I. Creation of the Safer Federal Workforce Task Force.

On January 20, 2021, President Biden signed Executive Order 13991, 86 Fed. Reg. 7045, which established the Safer Federal Workforce Task Force (“Task Force”) to provide “ongoing guidance to heads of agencies on the operation of the Federal Government, the safety of its employees, and the continuity of Government functions during the COVID–19 pandemic.” 86 Fed. Reg. at 7046. The Task Force is headed by three co-chairs: (1) the Director of the Office of Personnel Management (OPM); (2) the Administrator of General Services Administration (GSA); and (3) the COVID–19 Response Coordinator. The Executive Order also required that GSA “provide funding and administrative support for the” Task Force. *Id.*

But what the Task Force did not do was issue a vaccine mandate. For the first six months of the Administration, neither the Task Force nor any other federal agency sought to impose vaccine mandates on the American population. As recently as July 23, 2021, the White House announced that mandating vaccines is “not the role of the federal government.” 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-presssecretary-jen-psaki-july-23-2021/>.

II. President Biden’s September 9, 2021, Speech Announces Federal Vaccine Mandates.

On September 9, 2021, amid flagging poll numbers due to the crisis in Afghanistan and on the southern border, the Administration’s policy on federal vaccine mandates underwent a dramatic about-face. President Biden gave a speech announcing his “six-point Plan” to “turn the tide on COVID-19.” Joseph Biden, Remarks at the White House (Sept. 9, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/> (“Biden Speech”). The speech announced several federal vaccine mandates, including the federal contractor mandate challenged here. *Id.*

In his speech, President Biden laid principal responsibility for the ongoing pandemic with unvaccinated Americans, saying that he is “frustrated with the nearly 80 million Americans who are still not vaccinated.” *Id.* He stated that “[t]his is a pandemic of the unvaccinated,” and that the “nearly 80 million Americans [who] are not vaccinated ... can cause a lot of damage—and they are.” *Id.* He blamed the unvaccinated for health-care shortages: “The unvaccinated overcrowd our hospitals, are overrunning the emergency rooms and intensive care units, leaving no room for someone with a heart attack, or [pancreatitis], or cancer.” *Id.* With respect to the unvaccinated, he stated, “our patience is wearing thin.” *Id.* He also stated, “For the vast majority of you who have gotten vaccinated, I understand your anger at those who haven’t gotten vaccinated.” *Id.*

President Biden repeatedly emphasized that the vaccines provide robust protection from severe health outcomes. He “emphasize[d] that the vaccines provide very strong protection from severe illness from COVID-19. ... [T]he world’s leading scientists confirm that if you are fully vaccinated, your risk of severe illness from COVID-19 is very low.” *Id.* “In fact, based on available data from the summer, only one of out of every 160,000 fully vaccinated Americans was hospitalized for COVID per day.” *Id.* He stated that, “as the science makes clear, if you’re fully vaccinated, you’re highly protected from severe illness, even if you get COVID-19.” *Id.* “In fact, recent data indicates there is only one confirmed positive case per 5,000 fully vaccinated Americans per day.” *Id.* President Biden advised Americans, if you are vaccinated, “[y]ou’re as safe as possible.” *Id.*

Despite his repeated acknowledgement of the effectiveness of vaccines, the President nevertheless deemed it necessary to “protect vaccinated [persons] from unvaccinated.” *Id.* In the speech, President Biden announced the first plank of his plan, which is to “require more Americans

to be vaccinated” in order to “combat those blocking public health.” *Id.* The purpose of his plan is to “reduce the number of unvaccinated Americans.” *Id.* To that end, according to the President, “[f]irst, we must increase vaccinations among the unvaccinated with new vaccination requirements.” *Id.* President Biden stated: “The bottom line: We’re going to protect vaccinated workers from unvaccinated co-workers. We’re going to reduce the spread of COVID-19 by increasing the share of the workforce that is vaccinated in businesses all across America.” *Id.*

To that end, the President announced several new vaccine mandates—a mandate from OSHA for employers that employ more than 100 employees, a mandate for health-care workers at facilities receiving federal funds, a mandate for federal employees, and a mandate for employees of federal contractors and subcontractors. *Id.* As relevant here, the President stated: “I will sign an executive order that will now require all executive branch federal employees to be vaccinated—all. And I’ve signed another executive order that will require federal contractors to do the same.” *Id.* “If 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.* At no point in his speech the President mention—or even hint—that the mandates had anything to do with promoting “efficiency and economy” in federal procurement.

The President also expressed a dismissive view of States that have adopted contrary public-health policies in our system of federalism. He stated: “Let me be blunt. My plan also takes on elected officials and states that are undermining you and these lifesaving actions.” *Id.* Speaking scornfully of “governor[s]” who oppose such federal mandates, he said, “if these governors won’t help us beat the pandemic, I’ll use my power as President to get them out of the way.” *Id.*

III. Executive Order 14042’s Vaccine Mandate for Federal Contractors.

On the same day, September 9, 2021, President Biden signed Executive Order 14042 (“EO 14042”), 86 Fed. Reg. 50,985 (Sept. 14, 2021) (attached as Exhibit A). EO 14042 instructs

departments and agencies, including independent establishments, to require their contractors and subcontractors to “comply with all guidance for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force, provided that the Director of the Office of Management and Budget approves the Task Force Guidance and determines that the Guidance ... will promote economy and efficiency in Federal contracting.” *Id.* § 2(a).

Section 1 of EO 14042 recites that it was intended to promote “economy and efficiency” in federal procurement, stating: “This order promotes economy and efficiency in Federal procurement by ensuring that the parties that contract with the Federal Government provide adequate COVID-19 safeguards to their workers performing on or in connection with a Federal Government contract or contract-like instrument....” *Id.* § 1. According to the order, “[t]hese safeguards will decrease the spread of COVID-19, which will decrease worker absence, reduce labor costs, and improve the efficiency of contractors and subcontractors at sites where they are performing work for the Federal Government.” *Id.* “Accordingly, ensuring that Federal contractors and subcontractors are adequately protected from COVID-19 will bolster economy and efficiency in Federal procurement.” *Id.* Other than these bare recitals, the order provides no further discussion of how it would promote “efficiency and economy.” *Id.*

Section 2(a) of EO 14042 directs all “[e]xecutive departments and agencies” to “ensure that contracts and contract-like instruments ... include a clause that the contractor and any subcontractors (at any tier) shall incorporate into lower-tier contracts.” *Id.* § 2(a). “This clause shall specify 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 ... , provided that the Director of the Office of Management and Budget ... approves the Task Force Guidance and determines that the Guidance, if adhered to by

contractors or subcontractors, will promote economy and efficiency in Federal contracting.” *Id.* “This clause shall apply to any workplace locations (as specified by the Task Force Guidance) in which an individual is working on or in connection with a Federal Government contract or contract-like instrument....” *Id.*

Section 2(b) of EO 14042 directs the Task Force, “[b]y September 24, 2021,” to “provide definitions of relevant terms for contractors and subcontractors, explanations of protocols required of contractors and subcontractors to comply with workplace safety guidance, and any exceptions to Task Force Guidance that apply to contractor and subcontractor workplace locations and individuals in those locations working on or in connection with a Federal Government contract or contract-like instrument.” *Id.* § 2(b). “Prior to the Task Force publishing new Guidance related to COVID-19 for contractor or subcontractor workplace locations,” the President instructed, “the [OMB] Director shall, as an exercise of the delegation of my authority under the Federal Property and Administrative Services Act, *see* 3 U.S.C. 301, determine whether such Guidance will promote economy and efficiency in Federal contracting if adhered to by Government contractors and subcontractors.” *Id.* § 2(c). “Upon an affirmative determination by the Director, the Director’s approval of the Guidance, and subsequent issuance of such Guidance by the Task Force, contractors and subcontractors working on or in connection with a Federal Government contract or contract-like instrument ... *shall adhere to the requirements of the newly published Guidance*, in accordance with the clause described in subsection (a) of this section.” *Id.* (emphasis added).

Section 3 of EO 14042 provides instructions to the FAR Council to prepare a new contract “clause” incorporating the Task Force’s Guidance to implement OMB’s directive. Section 3 also says that “[t]he Federal Acquisition Regulatory Council, to the extent permitted by law, shall amend the Federal Acquisition Regulation to provide for inclusion in Federal procurement

solicitations and contracts subject to this order the clause described in section 2(a) of this order....” *Id.* § 3(a). It further provides that the FAR Council “shall, by October 8, 2021, take initial steps to implement appropriate policy direction to acquisition offices for use of the clause by recommending that agencies exercise their authority under subpart 1.4 of the Federal Acquisition Regulation.” *Id.* § 3(a). “By October 8, 2021, agencies shall take steps, to the extent permitted by law, to exercise any applicable authority to ensure that contracts and contract-like instruments ... that are not subject to the Federal Acquisition Regulation and that are entered into on or after October 15, 2021 ... include the clause described in section 2(a) of this order.” *Id.* § 3(b).

Section 5 of EO 14042, entitled “Applicability,” specifies that the Order “shall apply to any new contract; new contract-like instrument; new solicitation for a contract or contract-like instrument; extension or renewal of an existing contract or contract-like instrument; and exercise of an option on an existing contract or contract-like instrument,” in four broad categories, including procurement and construction contracts, contracts for services covered by the Service Contract Act, concessions, and contracts in connection with federal lands and services. *Id.* § 5(a). It exempts grants, contracts with Indian Tribes under the Indian Self-Determination and Education Assistance Act, “contracts or subcontracts whose value is equal to or less than the simplified acquisition threshold, as that term is defined in section 2.101 of the Federal Acquisition Regulation,” employees who work outside the U.S. and its outlying areas, and “subcontracts solely for the provision of products.” *Id.* § 5(b).

Section 6 of EO 14042, “Effective date,” states that the Order applies immediately to new contracts and new extensions or renewals on existing contracts, where the relevant contract or extension will be executed on or after “October 15, 2021, consistent with the effective date for the

action taken by the Federal Acquisition Regulatory Council pursuant to section 3(a) of this order.”
Id. § 6(a)(i).

IV. The Task Force’s Guidance Adopts a Sweeping Vaccine Mandate.

On September 24, 2021, the Safer Federal Workforce Task Force (“Task Force”) released its *COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors* (attached as Exhibit B) (“Task Force Guidance” or “Guidance”). The Task Force Guidance was never published in the Federal Register. Rather, it is available on the Task Force’s website at: https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf. Nor did OMB or the Task Force call for public comment, wait 60 days before the Guidance became effective, or provide a waiver from an authorized officer indicating that “urgent and compelling circumstances ma[d]e compliance with” notice and comment and the effective period impracticable. *See* 41 U.S.C. § 1707(d).

The Task Force Guidance announces that “[o]ne of the main goals of [the President’s] plan is to get more people vaccinated.” Ex. B, at 1. The Guidance notes that EO 14042 “directs executive departments and agencies ... to ensure that covered contracts and contract-like instruments include a clause (‘the clause’) that the contractor and any subcontractors (at any tier) shall incorporate into lower-tier subcontracts.” *Id.* “This clause shall specify 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, provided that the Director of the Office of Management and Budget (‘OMB’) approves the Task Force Guidance and determines that the Guidance, if adhered to by covered contractors, will promote economy and efficiency in Federal contracting.” *Id.*

The Task Force Guidance provides no new justification for the sweeping vaccine mandate for federal contractors. Instead, it just parrots the reasoning of EO 14042 on how a vaccine

mandate would promote economy and efficiency: “These safeguards will decrease the spread of SARS-CoV-2, the virus that causes COVID-19, which will decrease worker absence, reduce labor costs, and improve the efficiency of contractors and subcontractors performing work for the Federal Government.” *Id.* No further justification for the mandate was provided. *See id.*

Under the Task Force Guidance, “Federal contractors and subcontractors with a covered contract will be required to conform to the following workplace safety protocols,” the first of which is “COVID-19 vaccination of covered contractor employees, except in limited circumstances where an employee is legally entitled to an accommodation.” *Id.* The Guidance notes that, because OMB approved the Guidance, its directives are mandatory: “Covered contractors shall adhere to the requirements of this Guidance.” *Id.* at 2. “Covered contractors must ensure that all covered contractor employees are fully vaccinated for COVID-19, unless the employee is legally entitled to an accommodation. Covered contractor employees must be fully vaccinated no later than December 8, 2021.” *Id.* at 5.

Per the Guidance, the vaccine mandate extends to virtually any employee of a covered contractor with any remote or tangential connection to federal contracts. The Guidance provides that “covered contractor employee” “means any full-time or part-time employee of a covered contractor working on or in connection with a covered contract *or* working at a covered contractor workplace. *This includes employees of covered contractors who are not themselves working on or in connection with a covered contract.*” *Id.* at 3 (emphasis added). A “covered contractor workplace” means a “location controlled by a covered contractor at which any employee of a covered contractor working on or in connection with a covered contract is likely to be present during the period of performance for a covered contract.” *Id.* at 4. If there is any chance that a covered employee may have contact with non-covered employees, including fleeting contact in “elevators, stairwells, ... and parking garages,” the entire “workplace”—the whole building, facility, etc.—is

covered by the mandate. *Id.* at 10. A covered contractor must review its covered employees' documentation to prove vaccination status. *Id.* at 5.

The Guidance specifically requires vaccination of employees who have natural immunity to COVID-19 from a prior infection: “[C]overed contractor employees who have had a prior COVID-19 infection are required to be vaccinated.” *Id.* at 10. It also requires vaccination of workers who work outdoors: “[T]his Guidance applies to contractor or subcontractor workplace locations that are outdoors.” *Id.* at 10. Likewise, workers who work remotely from home are also covered by the mandate: “An individual working on a covered contract from their residence is a covered contractor employee, and must comply with the vaccination requirement for covered contractor employees, even if the employee never works at either a covered contractor workplace or Federal workplace during the performance of the contract.” *Id.* at 11.

Every level of subcontractor must comply with the mandate: “The requirements in the order apply to subcontractors at all tiers, except for subcontracts solely for the provision of products. The prime contractor must flow the clause down to first-tier subcontractors; higher-tier subcontractors must flow the clause down to the next lower-tier subcontractor, to the point at which subcontract requirements are solely for the provision of products.” *Id.* at 12.

Almost any work that relates in any way to the federal contract, no matter how administrative or tangential, is considered to be “in connection with” the covered contract: “Employees who perform duties necessary to the performance of the covered contract, but who are not directly engaged in performing the specific work called for by the covered contract, such as human resources, billing, and legal review, perform work in connection with a Federal Government contract.” *Id.* at 13.

The Task Force Guidance explicitly applies to State employers, and it expressly preempts state laws and regulations: “These requirements are promulgated pursuant to Federal law and supersede any contrary State or local law or ordinance.” *Id.* at 13. The Task Force Guidance purports to prevent States and local governments from protecting their citizens from vaccine mandates, noting that it “appl[ies] in States or localities that seek to prohibit compliance with any of the workplace safety protocols set forth in this Guidance.” *Id.* at 13.

V. OMB’s Perfunctory “Notice of Determination” on the Task Force Guidance.

The same day, September 24, 2021, the Acting Director of OMB published a brief “notice of determination” in the Federal Register entitled *Determination of the Promotion of Economy and Efficiency in Federal Contracting Pursuant to Executive Order No. 14042*. 86 Fed. Reg. 53,691–92 (attached as Exhibit C). The notice, spanning about one column of one page of the Federal Register, states that, “[a]s explained in Executive Order No. 14042 ..., compliance with COVID-19-related safety protocols improves economy and efficiency by reducing absenteeism and decreasing labor costs for contractors and subcontractors working on or in connection with a Federal Government contract.” *Id.* Noting that she had been instructed to do so by Section 2(c) of EO 14042, the Acting Director stated, “Based on my review of the Safer Federal Workforce Task Force’s COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors, scheduled for issuance on September 24, 2021, ... I have determined that compliance by Federal contractors and subcontractors with the COVID–19-workplace safety protocols detailed in that guidance will improve economy and efficiency by reducing absenteeism and decreasing labor costs for contractors and subcontractors working on or in connection with a Federal Government contract.” 86 Fed. Reg. 53,692.

That was the total sum of the Acting Director’s analysis. She, like the Task Force, simply parroted the justification for the federal contractor mandate that the Executive Order provided. *See*

id. No period of notice, and no opportunity for public comment, preceded OMB’s “notice of determination.” *Id.* Nor did OMB’s “notice of determination” provide good cause for that failure, *see* 5 U.S.C. § 553(d)(3), or contain a waiver from an authorized officer indicating that “urgent and compelling circumstances ma[d]e compliance with” notice and comment and the effective period impracticable, *see* 41 U.S.C. § 1707(d).

VI. The FAR Council Drafts a Contract Clause to Adopt the Task Force Guidance.

Congress established the Federal Acquisition Regulatory Council (“FAR Council”) in 1988 “to assist in the direction and coordination of Government-wide procurement policy and Government-wide procurement regulatory activities in the Federal Government.” Office of Federal Procurement Policy Act Amendments of 1988, Pub. L. No. 100-679, § 4, 102 Stat. 4055, *later codified* at 41 U.S.C. § 1302(a). The FAR Council consists of the Office of Federal Procurement Policy Administrator, the Secretary of Defense, the Administrator of NASA, and the Administrator of GSA. 41 U.S.C. § 1302(b)(1). Subject to limited exceptions, the FAR Council has exclusive authority to issue “a single [g]overnment-wide procurement regulation, to be known as the Federal Acquisition Regulation.” *Id.* § 1303(a)(1).

As noted above, EO 14042 instructs the FAR Council to “amend the Federal Acquisition Regulation to provide for inclusion in federal procurement solicitations and contracts subject to this order” a clause stating that the contractor shall, for the duration of the contract, comply with Task Force Guidance. EO 14042 further instructs agencies to seek to implement this clause in contracts not covered by the Federal Acquisition Regulation (“FAR”). 86 Fed. Reg. 50,985–86.

On September 30, 2021, the FAR Council—purporting to comply with the executive order—issued a memorandum entitled “Issuance of Agency Deviations to Implement Executive

Order 14042” (“FAR Council Memorandum”) (attached as Exhibit D).¹ In issuing the FAR Council Memo, the FAR Council did not provide notice or opportunity for public comment.

The FAR Council Memorandum states that “[t]he purpose of this memorandum is to provide agencies that award contracts under the Federal Acquisition Regulation (FAR) with initial direction for the incorporation of a clause into their solicitations and contracts to implement guidance issued by the Safer Federal Workforce Task Force (Task Force) pursuant to Executive Order 14042.” *Id.* at 1. Again parroting the Executive Order’s justification for the mandate, the FAR Council Memorandum recites that EO 14042 “directs agencies to ensure that the parties that contract with the Federal Government provide adequate COVID-19 safeguards to their workers performing on or in connection with the contract to decrease the spread of COVID-19, reduce worker absence, lower labor costs, and improve the efficiency of contractors and subcontractors at sites where they are performing work.” *Id.*

The FAR Council Memorandum summarizes the Task Force Guidance, and then notes that Section 3(a) of EO 14042 directs the FAR Council “to develop a contract clause requiring contractors and subcontractors at any tier to comply with all guidance for contractor and subcontractor workplace locations published by the Task Force.” *Id.* at 2. Pursuant to that direction, the memorandum provides a contract clause entitled “Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors.” *Id.* at 4. The clause is short, consisting of only two substantive provisions, and requires contractors and subcontractors to comply with the Task Force Guidance (regardless of what it says, and even if it changes over time). The first provision states, *in toto*: “The Contractor shall comply with all guidance, including guidance conveyed through

¹Also available at <https://www.whitehouse.gov/wp-content/uploads/2021/09/FAR-Council-Guidance-on-Agency-Issuance-of-Deviations-to-Implement-EO-14042.pdf>.

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/>.” *Id.* at 5 The second provision states, *in toto*: “The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts at any tier that exceed the simplified acquisition threshold, as defined in Federal Acquisition Regulation 2.101 on the date of subcontract award, and are for services, including construction, performed in whole or in part within the United States or its outlying areas.” *Id.*

Both the FAR Council Memorandum and the Task Force Guidance emphasize that the Government can change the terms of the Task Force Guidance at any time, with all contractors and subcontractors subject to the new terms. The Task Force Guidance states that covered contractors must comply with “any new Guidance where the OMB Director approves the Guidance and determines that adherence to the Guidance will promote economy and efficiency in Federal contracting.” Ex. B, at 12–13. The FAR Council’s contract clause likewise states that “[t]he Contractor shall comply with all guidance, including guidance conveyed through Frequently Asked Questions, as amended during the performance of this contract...” Ex. D, at 5.

VII. The Federal Contractor Vaccine Mandate’s Disruptive Impact.

The federal contractor vaccine mandate will affect a large portion of the labor force. The U.S. Department of Labor recognizes that “workers employed by federal contractors” comprise “approximately *one-fifth of the entire U.S. labor force*.” Office of Contract Compliance Programs, Dep’t of Labor, History of Executive Order 11246 (last visited Nov. 4, 2021), <https://www.dol.gov/agencies/ofccp/about/executive-order-11246-history> (emphasis added). This includes similarly large proportions of the labor force in each of the Plaintiff States. These large proportions matter because a vaccine mandate is likely to lead to mass an exit of a significant

number of those employees. A recent survey by the Kaiser Family Foundation found that **72 percent** of unvaccinated workers say they will quit their jobs if they are subjected to such a mandate. Chris Isidore & Virginian Langmaid, *72% of unvaccinated workers vow to quit if ordered to get vaccinated*, CNN.COM (Oct. 28, 2021), <https://www.cnn.com/2021/10/28/business/covid-vaccine-workers-quit/index.html>. “If the surveyed unvaccinated workers follow through on their threats to quit, it would lead to somewhere between 5% to 9% of workers leaving their jobs, depending upon what rules they face.” *Id.*

Those numbers portend massive disruptions in the economy, with ripple effects throughout the Plaintiff States, and exacerbation of the pre-existing supply-chain crisis. The Plaintiff States and their agencies face similar disruptive consequences directly from the mandate. *See, e.g.*, Exs. F ¶¶ 7–11, J ¶¶ 3, 5, K ¶¶ 7–8, 11–13, N ¶¶ 4–8, O ¶¶ 7–11. And individual citizens by the millions will face the untenable choice between giving up their ability to make private medical decisions on the one hand, and losing their jobs on the other.

ARGUMENT

The Court considers four factors in determining whether to grant a preliminary injunction: “(1) the likelihood of the movant’s success on the merits; (2) the threat of irreparable harm to the movant in the absence of relief; (3) the balance between that harm and the harm that the relief would cause to other litigants; and (4) the public interest.” *Watkins Inc. v. Lewis*, 346 F.3d 841, 44 (8th Cir. 2003) (citing *Dataphase Sys., Inc. v. C.L. Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc)). All four factors favor Plaintiff States.

I. The Plaintiff States Are Likely To Succeed on the Merits of Their Claims.

The Plaintiff States are likely to succeed on the merits of their claims that (1) the contractor vaccine mandate exceeds OMB’s and the FAR Council’s statutory authority; (2) the contractor vaccine mandate is substantively arbitrary and capricious under the Administrative Procedure Act;

(3) the contractor vaccine mandate is procedurally invalid because it issued without any notice and comment; and (4) the contractor vaccine mandate is unconstitutional because it exceeds the limits of Congress’s enumerated powers and infringes on traditional areas of state authority.

A. The Contractor Vaccine Mandate Exceeds the President’s Statutory Authority Under the Procurement Act.

“The President’s power, if any, to issue [an executive] order must stem either from an act of Congress or the Constitution itself.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 US 579, 585 (1952). The directives in EO 14042 ostensibly stem from the President’s authority under the Federal Property and Administrative Services Act (“Procurement Act”), 40 U.S.C. § 101 *et seq.*, and the President’s ability to delegate his powers to certain federal officials, 3 U.S.C. § 301. *See* 86 Fed. Reg. 50,985 (issuing EO 14042 “[b]y the authority vested in me as President by the Constitution and the laws of the United States of America, including the [Procurement Act] and [3 U.S.C. § 301]”). But EO 14042 exceeds the President’s powers under the Procurement Act, and the President cannot delegate this power to other federal officials.

The purpose of the Procurement Act “is to provide the Federal Government with an economical and efficient system for” four enumerated procurement activities: (1) “[p]rocuring and supplying property and nonpersonal services,” (2) “[u]sing available property,” (3) “[d]isposing of surplus property,” and (4) “[r]ecords management.” 40 U.S.C. § 101(1)–(4). To fulfill those purposes, the “President may prescribe policies and directives that the President considers necessary to carry out” the Procurement Act. *Id.* § 121(a). Such “policies must be consistent with” the Procurement Act. *Id.* The federal contractor vaccine mandate is not.

1. EO 14042 exceeds the President’s power because the federal contractor vaccine mandate is a “regulation,” not a “policy or directive.”

“[P]olicies and directives” in the Procurement Act describe the President’s power to direct the exercise of procurement authority throughout the government. They do not authorize the

President to issue regulations himself. Congress knows how to confer the power to “prescribe regulations,” as it expressly authorized the GSA Administrator to do so in the same section, but it failed to give the President that same power. *Compare id.* § 121(a) (President) *with id.* § 121(c) (GSA Administrator); *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.”). Congress has given the President the power to “prescribe regulations” in other contexts, typically in the realm of foreign affairs and national defense. *See, e.g.*, 18 U.S.C. § 3496 (“The President is authorized to prescribe regulations governing the manner of executing and returning commissions by consular officers”); 32 U.S.C. § 110 (“The President shall prescribe regulations, and issue orders, necessary to organize, discipline, and govern the National Guard.”). Thus, the Procurement Act does not give the President the authority to issue regulations.

Yet that is exactly what the President did here. The government acts as a regulator when “it performs a role that is characteristically a governmental rather than a private role.” *See Building & Const. Trades Council of the Metro. Dist. v. Assoc. Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218, 229 (1993). For instance, the President acts as a regulator when he “seeks to set a broad policy governing the behavior of thousands of American companies and affecting millions of American workers” based not on his views about “procurement policy” but on his views about “labor policy.” *Chamber of Commerce of the U.S. v. Reich*, 74 F.3d 1322, 1337 (D.C. Cir. 1996) (holding that a governmental entity would be acting as a regulator if it “require[d] all construction contractors doing business with the [government] to enter into collective bargaining agreements . . . containing [NLRA] § 8(e) pre-hire agreements”).

In this case, the President is acting as a regulator because he is setting a broad policy governing the behavior of thousands of American companies and affecting millions of American workers. *See id.* He is requiring all federal contractors to agree to a particular contractual provision promising to follow Task Force Guidance, which in practice imposes a vaccine mandate on employees of federal contractors. That is regulation—pure and simple—and it is not part of the President’s Procurement Act powers.² That is doubly so since the vaccine mandate is a regulation based not on the President’s views about what is the best procurement policy, but on the President’s views about public health. *See id.* It is thus far, far afield from any power the President has under the Procurement Act.

2. The federal contractor vaccine mandate is inconsistent with the Procurement Act’s purpose and outside of its scope.

But even if EO 14042 could be considered a “policy or directive,” it would be unlawful because the federal contractor vaccine mandate is neither “necessary” nor “consistent with” the Procurement Act. 40 U.S.C. § 121(a). While the Procurement Act “does vest broad discretion in the president” to “prescribe policies and directives ‘as he shall deem necessary to effectuate the provisions’ of the Act,” it does not give the President “unlimited authority to make decisions he believes will likely result in savings to the government.” *Reich*, 74 F.3d at 1330. Rather, “[t]he procurement power *must* be exercised consistently with the structure and purposes of the statute that delegates that power.” *Id.* at 1330–31. Thus, there must be a “nexus between the [policy or directive] and likely savings to the government.” *Id.* at 1331. Additionally, presidential orders issued under the Procurement Act are invalid if in conflict with other federal laws. *See, e.g., id.* at

²Because the President does not have this power, he also does not have the authority to delegate this power to the Task Force or OMB, as he purported to do in EO 14042.

1324, 1333, 1338–39 (holding that the Procurement Act did not permit a President to issue an executive order contrary to the NLRA).

Here, the Court should find that the vaccine mandate exceeds the President’s Procurement Act powers because there is no nexus between the vaccine mandate and likely savings to the government and because the vaccine mandate conflicts with and is in tension with other federal laws. Indeed, to conclude to the contrary would conflict with the Act’s meaning.

a) There is no nexus between the vaccine mandate and likely savings to the government, and so the vaccine mandate is inconsistent with the Procurement Act’s plain text.

The vaccine mandate has no clear nexus to cost savings to the federal government. On the contrary, the vaccine mandate is likely to lead to a massive loss of federal contractor employees. According to a recent survey, **72 percent** of unvaccinated workers say that they will quit if their employers decide to mandate the vaccine. *See* Isidore & Langmaid, *supra*. Such mass resignations will impose drastic hardship on working families throughout the Plaintiff States and cause massive economic disruption for federal contractors and for the economy at large. They will inevitably cause staffing shortages for federal contractors and exacerbate supply-chain woes. As a result, costs of federal contracts would rise and efficiency would fall. Thus, the vaccine mandate is the antithesis of “economy and efficiency” and has no nexus with likely savings to the government. The mandate is thus outside the scope of the Procurement Act. *See* 40 U.S.C. § 121(a) (requiring the President’s policies and directives to be “consistent with this subtitle”).

b) Because the vaccine mandate conflicts with other federal law, the vaccine mandate cannot be within the President’s powers under the Procurement Act.

The vaccine mandate also conflicts with the Procurement Policy Act and so exceeds the President’s powers under the Procurement Act. *See* 41 U.S.C. §§ 1301-1303. Specifically, EO 14042 violates the Procurement Policy Act by delegating to OMB and the Task Force the power

to make a government-wide procurement regulation when that power belongs to the FAR Council alone.

Congress established the FAR Council in 1988 “to assist in the direction and coordination of [g]overnment-wide procurement policy and [g]overnment-wide procurement regulatory activities in the [f]ederal [g]overnment.” Office of Federal Procurement Policy Act Amendments of 1988, Pub. L. No. 100-679, § 4, 102 Stat. 4055, *later codified* at 41 U.S.C. § 1302(a).

The FAR Council is charged with “issu[ing] and maintain[ing]” a “single, [g]overnment-wide procurement regulation” known as the Federal Acquisition Regulation (“FAR”). 41 U.S.C. § 1303(a)(1). That power is exclusive to the FAR Council—no other agency may issue government-wide procurement regulations. *See id.* § 1303(a)(2) (“Other regulations relating to procurement issued by an executive agency shall be limited to . . . regulations essential to *implement* Government-wide policies and procedures within the agency[] and [] additional policies and procedures required to satisfy the *specific and unique needs of the agency*.” (emphasis added)). Yet EO 14042 does exactly that. In violation of the Procurement Policy Act, the order delegates to OMB and the Task Force the power to make a government-wide procurement regulation when that power belongs to the FAR Council alone. *See* EO 14042 § 2(a) (delegating to OMB and the Task Force the role of developing and approving the vaccine mandate for use in federal contracts). And it permits the FAR Council to circumvent traditional procedural requirements for issuing procurement regulations, *see* 41 U.S.C. § 1707(d), in favor of issuing rules through “guidance,” *see* EO 14042 § 3(a).

Moreover, EO 14042, and the FAR Guidance which implements it, allows the Task Force to change the vaccine mandate whenever it wishes, *see* EO 14042 § 2(a) (requiring compliance with the “guidance . . . published by” the Task Force); Ex. D, at 5 (requiring compliance with the

Task Force’s guidance “as amended during the performance of this contract”), without the agreement of or even notice to the FAR Council and without the notice-and-comment period required by the Procurement Policy Act, *see* 41 U.S.C. §§ 1303(a), 1707(a)–(b). To put it another way, EO 14042 and the FAR Guidance vests in the Task Force authority that, by law, belongs only to the FAR Council. Again, that circumvents the statutory scheme which Congress created in the Procurement Policy Act.

Thus, EO 14042, the OMB conclusion that it purports to authorize, and the FAR Guidance violate the Procurement Policy Act and so cannot be a lawful exercise of authority under the Procurement Act.

c) Clear-statement rules of statutory construction favor reading the Procurement Act’s presidential powers as excluding the power to unilaterally implement a vaccine mandate.

Besides the text of the Procurement Act and the fact that the vaccine mandate violates other federal law, other tools of statutory interpretation establish that the Procurement Act does not authorize the federal contractor vaccine mandate.

First, interpreting the Procurement Act to permit the President to impose a vaccine mandate would disrupt the traditional federal state-balance absent a clear statement that Congress intended to give the President public health powers through the Procurement Act. “Among the background principles of construction . . . are those grounded in the relationship between the Federal Government and the States under our Constitution.” *Bond v. United States*, 572 U.S. 844, 857–58 (2014). To protect that relationship, “‘it is incumbent upon the federal courts to be certain of Congress’ intent before finding that federal law overrides’ the ‘usual constitutional balance of federal and state powers.’” *Id.* at 858 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quoting another source)). “[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.” *United States v. Bass*, 404 U.S. 336, 349

(1971) (“[W]e will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction.”). “In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.” *Id.*

The States’ police powers are those that “state[s] did not surrender when becoming a member of the Union under the Constitution.” *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905). “[T]he police power of a state must be held to embrace . . . such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.” *Id.* This includes laws concerning compulsory vaccination. *Id.* at 12, 14, 37-38 (“The safety and the health of the people of Massachusetts are, in the first instance, for that commonwealth to guard and protect. They are matters that do not ordinarily concern the national government. So far as they can be reached by any government, they depend, primarily, upon such action as the state, in its wisdom, may take . . .”).

Interpreting the Procurement Act to permit the President to implement a vaccine mandate for one-fifth of all workers, many of whom work intrastate, would thus dramatically intrude upon the police power of the States. That implicates this clear-statement rule. *See Bond*, 572 U.S. at 858 (“We have applied this background principle when construing federal statutes that touched on several areas of traditional state responsibility.”). But there is no such clear statement. Thus, reading the Procurement Act to allow the contractor vaccine mandate would mean that the Procurement Act “displace[s] the public policy of [the States], enacted in [their] capacit[ies] as sovereign[s]” *id.* at 865 (internal quotations omitted), “[a]bsent a clear statement of that purpose.” *id.* at 866. That it cannot do.

Second, the Supreme Court requires a clear statement before presuming that Congress has invoked the outer limits of one of its enumerated powers. “Where an administrative interpretation of a statute invokes the outer limits of Congress’ power,” the Supreme Court “expect[s] a clear indication that Congress intended that result.” *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001) (“*SWANCC*”). “This requirement stems from [the Court’s] prudential desire not to needlessly reach constitutional issues and [its] assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority.” *Id.* at 172-73. The same reasoning applies to the interpretation of statutes delegating powers to the President (rather than an agency).

Here, interpreting the Procurement Act as empowering the President to enact a vaccine mandate for one-fifth of the workforce would “invoke[] the outer limits of Congress’ power” under the Spending Clause or the Commerce Clause. *See id.* at 172. Indeed, it would exceed those limits. *See infra* Part D. Because there is no clear statement permitting that reading, doing so violates this well-established principle of interpretation.

Third, the sensitive federalism issues involved here, not to mention the billions of dollars and economic effects of mandating federal contractors vaccinate their employees, demand no less than a clear statement that the executive branch can do what it did here. *See King v. Burwell*, 576 U.S. 473, 486 (2015) (noting the need for clear delegations for issues “of deep ‘economic and political significance’”) (quoting *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000))). As it stands, “the sheer scope of the ... claimed authority ... counsel[s] against” reading the Procurement Act to permit mandatory vaccination of those whose only connection to a federal contract is working

in the same location as an employee who is working directly on such a contract. *See Ala. Ass’n of Realtors v. Dep’t of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam).

Fourth, “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.” *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). “The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.” *Id.* “This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.” *Id.*

Interpreting the Procurement Act to allow the President to implement a federal contractor vaccine mandate would “raise serious constitutional problems.” *Edward J. DeBartolo*, 485 U.S. at 575. As discussed in Part D, it would violate the Constitution in at least four ways: (1) it would impose ambiguous conditions on the use of federal relief funds, in violation of the Spending Clause; (2) it would impose conditions on federal spending that are unrelated to the purposes of the federal program at issue, namely procurement; (3) it would violate the Tenth Amendment by commandeering the States’ administrative apparatus for federal purposes; and (4) it would fail to regulate commerce and instead demand action, in violation of the Commerce Clause. Therefore, this Court should construe the Procurement Act narrowly—as not permitting the vaccine mandate—to avoid those serious constitutional problems.

* * *

The upshot: nowhere does the Procurement Act permit what the Defendants attempt to do here. “It would be one thing if Congress had specifically authorized the action that [they have] taken. But that has not happened.” *Ala. Ass’n of Realtors*, 141 S. Ct. at 2486. The Procurement Act does not authorize the vaccine mandate.

B. The Contractor Vaccine Mandate Is Arbitrary and Capricious.

Second, the Plaintiff States are likely to succeed on their claim that the contractor vaccine mandate is substantively arbitrary and capricious under the Administrative Procedure Act (APA).³

1. OMB and the FAR Council are “agencies” subject to judicial review under the APA.

As an initial matter, both OMB and the FAR Council are “agencies” subject to the APA. *See* 5 U.S.C. § 702. “[T]he APA ... confers agency status on any administrative unit with substantial independent authority in the exercise of specific functions.” *Soucie v. David*, 448 F.2d 1067, 1073 (D.C. Cir. 1971). OMB is an “agency” under the APA and the *Soucie* test—as the D.C. Circuit has concluded in a closely related context. *Sierra Club v. Andrus*, 581 F.2d 895, 902 (D.C. Cir. 1974), *rev’d on other grounds*, 442 U.S. 347 (1979); *see also Meyer v. Bush*, 981 F.2d 1288, 1294 (D.C. Cir. 1993); *cf. Hyatt v. OMB*, 908 F.3d 1165, 1170–74 (9th Cir. 2018) (entertaining an APA challenge to an OMB action). And to the extent that OMB merely rubber-stamped the determinations of the Task Force, leaving the Task Force to make binding determinations about the nature and scope of the vaccine mandate, the Task Force is an “agency” as well, for the same reasons as OMB. *Soucie*, 448 F.2d at 1073.

³ Because this is a challenge to “regulation[s] governing a procurement,” the Plaintiff States properly brought this case as an APA challenge in federal district court. *Land Shark Shredding, LLC v. United States*, 842 F. App’x 589, 593 (Fed. Cir. 2021); *see also Alphapointe v. Dep’t of Dep’t of Veterans Affairs*, 416 F. Supp. 3d 1, 7 (D.D.C. 2019).

The FAR Council also meets that requirement. By law, the Council may make government-wide regulations relating to procurement and oversee procurement regulations issued by other agencies. *See* 41 U.S.C. § 1303(a)(1)–(3); *Mgmt. Ass’n for Private Photogrammetric Surveyors v. United States*, 492 F. Supp. 2d 540, 544 (E.D. Va. 2007) (calling the FAR Council “the administrative body charged with administering and overseeing the application of the Federal Acquisition Regulation”). Those powers “are central to whether an entity wields substantial independent authority” and is an agency under the APA. *Elec. Privacy Info Ctr. v. Nat’l Sec. Comm’n on Artificial Intelligence*, 466 F. Supp. 3d 100, 109 (D.D.C. 2020). Since the FAR Council possesses them, it is an agency subject to the APA.

2. The contractor vaccine mandate is a “final agency action.”

Nor can there be any dispute that OMB’s conclusion and the FAR Guidance are final agency action. To be final, an agency’s action must meet two requirements: “First, [it] must mark the consummation of the agency’s decisionmaking process ... [a]nd second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.” *Bennet v. Spear*, 520 U.S. 154, 177–78 (1997) (internal quotations omitted).

OMB’s conclusion that “compliance by Federal contractors and subcontractors with the” contractor vaccine mandate “will improve economy and efficiency,” 86 Fed. Reg. at 53,629, is the agency’s “last word” on the issue. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 478 (2001) (quoting *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 586 (1980)). So, too, is FAR’s guidance; the FAR Council “developed” (past tense) its guidance and then issued it to agencies via the guidance. Ex. D, at 2. Nothing indicates that either agency will change its mind; there is nothing “tentative or interlocutory” about their decisions. *Sisseton-Wahpeton Oyate of Lake Traverse Reservation v. U.S. Corps of Eng’rs*, 888 F.3d 906, 915 (8th Cir. 2018).

Both decisions also determine rights and obligations, and are ones “from which legal consequences will flow.” *Bennett*, 520 U.S. at 178. Specifically, the decisions “alter the legal regime” to which federal contractors, subcontractors, and agencies with whom they contract are “subject.” *Id.* By operation of EO 14042, those decisions mean that agencies “shall” require contractors and subcontractors “to comply with” with the vaccine mandate. Exec. Order No. 14,042 § 2(a); *see also* Ex. D, at 2 (noting that the clause the FAR Council provided requires contractors or subcontractors “to comply with all guidance” from the Task Force). Those certainly determine “obligations” and “compel legal consequences” and “affirmative action.” *Sisseton-Wahpeton Oyate*, 888 F.3d at 915.

3. The contractor vaccine mandate is arbitrary and capricious.

Under the APA, a court must “hold unlawful and set aside agency action” that is “arbitrary” or “capricious.” 5 U.S.C. § 706(2)(A). “The APA’s arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained.” *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). Courts must ensure “the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision.” *Id.* “[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). It must also consider the reliance interests of those affected by the regulation, including the States. *See Dep’t of Homeland Security v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1913–15 (2020). And the agency must consider less-disruptive policies in the light of those interests. *Id.* Moreover, the agency may not offer pretextual or *post hoc* explanations of its actions. *SEC v. Chenery Corp.*, 332 U.S. 194, 196–97 (1947). The contractor vaccine mandate fails to satisfy any of those criteria for reasoned decision-making.

First, the mandate is arbitrary and capricious because the agency did not “reasonably consider[] the relevant issues and reasonably explain[] the decision.” *Prometheus Radio*, 141 S. Ct. at 1158. In fact, neither OMB, nor the Task Force, nor the FAR Council provided *any* explanation for the decision to impose a vaccine mandate on one-fifth of the Nation’s workforce. As discussed above, each agency merely parroted—in virtually the same words—the Executive Order’s perfunctory statement that a contractor vaccine mandate “will decrease the spread of COVID-19, which will decrease worker absence, reduce labor costs, and improve the efficiency of contractors and subcontractors at sites where they are performing work for the Federal Government.” EO 14042 § 1. *Compare id.*, with Ex. B, at 1 (Task Force Guidance), with 86 Fed. Reg. at 53,692 (OMB Notice), with Ex. D, at 1 (FAR Council Memorandum). No agency provided any discussion of its reasoning or justification beyond that perfunctory and conclusory statement. That failure is arbitrary and capricious, *per se*. *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 mandate is arbitrary and capricious because it “failed to consider important aspects of the problem” before the agencies. *Regents of the Univ. of Calif.*, 140 S. Ct. at 1910 (quoting *Motor Vehicle Manufacturers’ Assn.*, 463 U.S. at 43); *see also Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 664, 658 (2007) (an agency decision is arbitrary and capricious if the agency “entirely failed to consider an important aspect of the problem”). Several important aspects of the problem should have been obvious to the agencies, including but not limited to: (1) the risk of negative economic impacts and economic disruption from the prospect of large-scale resignations and terminations of employees, *see, e.g., Isidore & Langmaid, supra*;

(2) the hardships to individual citizens who lose their jobs and to their families; (3) the threat of disruption to state agencies and State governments; (4) the impact on state sovereignty from preempting state statutes and regulations that prohibit vaccine mandates; (5) distinctions between workers with natural immunity, which also provides robust protection against COVID-19 infection and transmission, and those without natural immunity, *see* Ex. E., ¶¶ 8–26 (discussing the differences); (6) the fact that COVID-19 affects different people differently and transmits differently in different settings; (7) the situation of workers who work in environments with negligible risk of transmission, such as those who work at home or in outdoor environments; and many others. Other than merely announcing the policy, the Task Force Guidance, the OMB Notice, and the FAR Council Memorandum give literally no consideration to any of these important aspects of the problem. To engage in reasoned decisionmaking, they were required to at least consider these issues and explain their reasoning, but they did not do so.

Third, the mandate is arbitrary and capricious because it failed to consider less restrictive alternatives within the ambit of the federal government’s preexisting policy, which eschewed vaccine mandates altogether. “When an agency rescinds a prior policy, its reasoned analysis must consider the alternatives that are within the ambit of the existing policy.” *Regents*, 140 S. Ct. at 1913; *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009) (when changing policies, “a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy”). Many less restrictive alternatives were evident—including, for example, exempting workers with natural immunity due to prior COVID-19 infection, exempting workers who telework or work remotely, excluding workers who work in outdoor environments, and/or imposing varying requirements based on community incidence of COVID-19 transmission, among many others. The agencies gave no indication that they

considered these or any other alternatives that would have been less restrictive than the sweeping vaccine mandate adopted. In fact, they discussed no alternatives at all, but merely accepted and implemented the policy based on nothing more than EO 14042's bare assertion that it would be efficient and economical.

Fourth, the mandate is arbitrary and capricious because the agencies failed to address costs to the States, including their "legitimate reliance" on the absence of a federal mandate, which allowed them to control their own workforces and set their own policies regarding vaccine mandates. *See Regents of Univ. of Calif.*, 140 S. Ct. at 1913. Indeed, the Defendants completely ignore the costs and injuries to the States, which are a "centrally relevant factor when deciding whether to regulate." *Michigan v. EPA*, 576 U.S. 743, 752–53 (2015). Neither the Task Force Guidance, nor the OMB Notice, nor the FAR Council Memorandum reflects any 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. Indeed, not one of the Defendants considered any reliance current and future federal contractors had on the lack of mandate; that is, reliance by the parties *most directly affected* by the new rule.

Fifth, the sole justification provided for the mandate—*i.e.*, promoting economy and efficiency in federal procurement by reducing absenteeism and labor costs for federal contractors—is blatantly pretextual. The mandate did not originate from any determination by the Task Force, OMB, or the FAR Council that federal contracting faced challenges in economy and efficiency due to COVID-19-related absenteeism. On the contrary, the mandate originated in a speech by the President that said literally nothing about economy and efficiency in federal contracting, and instead focused entirely on imposing a comprehensive federal policy to mandate vaccination in as many Americans as possible. *See Biden Speech, supra*. As the White House

Chief of Staff tweeted at the time, using mandates like the federal contractor mandate was the “ultimate work-around” for the absence of any legal authority to impose a federal national vaccine mandate. Callie Patteson, *Biden Chief Apparently Admits Vaccine Mandate “Ultimate Work-Around”*, N.Y. POST (Sept. 10, 2021), <https://nypost.com/2021/09/10/ronald-klain-retweets-vaccine-mandate-ultimate-work-around/>. In other words, the vaccine mandate has nothing to do with economy and efficiency, but everything to do with federalizing the public-health response to the COVID-19 pandemic. Such pretextual reasons are manifestly insufficient under the APA. *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.]”). Indeed, the agencies’ mantra reciting the “economy and efficiency” rationale is a quintessential “*post hoc* rationalization” for the policy that the President had already chosen and imposed for unrelated reasons. *See Regents of the Univ. of California*, 140 S. Ct. at 1909 (holding that it is a “foundational principle of administrative law” to reject an agency’s “impermissible *post hoc* rationalizations” for agency action) (quoting *Michigan v. EPA*, 576 U.S. at 758).

C. The Contractor Vaccine Mandate Violates the Procurement Policy Act.

In Count 2, Plaintiff States allege that Defendants violated the Procurement Policy Act, 41 U.S.C. § 1707, by bypassing notice and comment. Compl. ¶¶ 98–104. Under that Act, Section 1707 requires that “a procurement policy, regulation, procedure, or form” must go through notice and comment if it (1) “relates to the expenditure of appropriated funds,” and (2) has either “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).

The first requirement is satisfied because federal contracts plainly involve the expenditure of appropriated funds. And the second requirement is satisfied because Defendants’ mandate—by dictating the personal vaccine choices for millions of Americans (including many who do not

even work on federal contracts)—has a significant effect beyond the internal operating procedures of the federal government. In addition, the mandate imposes significant costs and administrative effects on Plaintiff States and other contractors. Some state agencies will lose federal contracts, be forced to alter their affected programs, or both. *See* Exs. F–O (noting some agencies subject to mandate). Other state agencies will modify or renew their contracts and thus be conscripted into administering the federal government’s draconian vaccine policy. *See id.* Either way, States will face significant costs and administrative impacts.

The only remaining question in deciding whether Section 1707 applies is whether the OMB Notice and the FAR Guidance are procurement “polic[ies], regulation[s], procedure[s], or form[s].” 41 U.S.C. § 1707(a)(1). They are. As explained above, both are final agency actions and thus qualify as “regulations” under Section 1707. But even if they are not “regulations,” they are surely “policies” or “procedures.” Congress’s choice to separately use the terms “policy,” “regulation,” and “procedure” side by side indicates its intent to cover a broad class of government pronouncements (including all manner of guidance). *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.”). Black’s Law Dictionary defines “policy” to mean “[a] standard course of action that has been officially established by an organization,” and it defines “procedure” to mean “[a] specific method or course of action.” *Policy and Procedure*, BLACK’S LAW DICTIONARY (11th ed. 2019). The OMB Conclusion, by approving the Task Force Guidance, and the FAR Guidance, by implementing the Task Force Guidance, establish an official course of

action and specific methods for imposing a COVID-19 vaccine mandate through the procurement process. Thus, they constitute procurement “policies” or “procedures” under Section 1707.

Notably, Defendants’ notice-and-comment failure cannot be excused by the exception in Section 1707(d), which applies when “urgent and compelling circumstances make compliance with the requirements impracticable.” 41 U.S.C. § 1707(d). Federal officials invoke that provision only by designating the action as “temporary” and providing a 30-day comment period. 41 U.S.C. § 1707(e). Defendants have not done so here. 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. Defendants have therefore violated Section 1707 by failing to provide notice and comment.⁴

D. The Contractor Mandate Exceeds Congress’s Enumerated Powers and Unconstitutionally Infringes on the Authority of the States.

In Counts 3, 4, 11, and 12, the Plaintiff States assert that Defendants have unlawfully usurped their police powers, commandeered them to implement federal policies, violated the Tenth Amendment, and exceeded the federal spending power and other enumerated powers. Doc. 1, ¶¶ 105–12, 169–86. Plaintiffs are likely to prevail on these federalism-related arguments.

“[E]ven in a pandemic, the Constitution cannot be put away and forgotten.” *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020). The Constitution “leaves to the several States a residuary and inviolable sovereignty, reserved explicitly to the States by the Tenth Amendment.” *New York v. United States*, 505 U.S. 144, 188 (1992) (cleaned up). As that Amendment

⁴ To the extent this Court concludes that Defendants’ actions do not involve procurement or contracting, APA notice-and-comment requirements would apply. See 5 U.S.C. § 553(a)(2) (exempting from APA notice-and-comment requirements matters “relating to . . . contracts”). In that event, Plaintiffs would be likely to prevail under Counts 5 and 9, where they assert that the OMB Conclusion and the FAR Guidance contravene the APA by failing to conduct notice-and-comment rulemaking. See Compl. ¶¶ 113–20, 154.

says, “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.

“[T]he police power of a state” includes, above all, the authority to adopt regulations seeking to “protect the public health,” including the topic of mandatory vaccination. *Jacobson*, 197 U.S. at 24–25; *see also Zucht v. King*, 260 U.S. 174, 176 (1922) (“[I]t is within the police power of a *state* to provide for compulsory vaccination”) (emphasis added). The States “did not surrender” these powers “when becoming . . . member[s] of the Union.” *Jacobson*, 197 U.S. at 25. Thus, in our constitutional order, “[t]he safety and the health of the people . . . are, in the first instance, for [the States] to guard and protect.” *Id.* at 38. These matters “do not ordinarily concern the national government.” *Id.* So to the extent that health measures like vaccine mandates “can be [implemented] by any government, they depend, primarily, upon such action as the state, in its wisdom, may take.” *Id.*

By seeking to impose their vaccine mandate on millions of state and private employees who comprise roughly one-fifth of the national workforce, Defendants usurp powers that belong to the States. As far as Plaintiffs can tell, never before has the federal government attempted to mandate vaccines on state and private employees—much less millions of them. Often “the most telling indication of a severe constitutional problem is the lack of historical precedent” for it. *NFIB v. Sebelius*, 567 U.S. 519, 549 (2012) (Roberts, C.J.) (quoting another source). That is certainly true here because Defendants’ unprecedented mandate “invades the province of state sovereignty reserved by the Tenth Amendment.” *New York*, 505 U.S. at 155.

Nothing in the Constitution gives the federal government the power it seeks to exercise. While Congress has the authority to contract under the Spending Clause, U.S. Const. art. I, § 8, cl. 1, that power does not support Defendants’ mandate for three reasons.

First, Defendants’ mandate fails to “unambiguously” establish the contractual terms. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). In fact, the new contract provision that Defendants demand requires contractors, including States, to “comply with all guidance ... as amended during the performance” of the contract “published by the ... Task Force.” Ex. D, at 5. Imposing such open-ended contractual requirements defies the clarity that the Spending Clause requires. *See NFIB*, 567 U.S. at 584 (“[T]he spending power ... does not include surprising participating States with post-acceptance ... conditions.”).

Second, Defendants’ mandate is so broad that much of it is not “related to the federal interest in particular national projects or programs.” *Van Wyhe v. Reisch*, 581 F.3d 639, 650 (8th Cir. 2009). Reaching far beyond employees working on federal contracts, the mandate covers employees who merely support employees working on federal contracts (such as by working on human resource issues) or who might simply encounter employees working on federal contracts in a common area at work. Ex. B, at 10–11. The breadth of that demand far exceeds any reasonable connection to a federal interest in federal programs.

Third, the federal government cannot use the spending power to “commandeer[] a State’s ... administrative apparatus for federal purposes,” *NFIB*, 567 U.S. at 577 (Roberts, C.J.), or “conscript state [agencies] into the national bureaucratic army,” *id.* at 585. Yet that is exactly what Defendants are doing. The mandate applies to contracts between the federal government and state agencies, and Defendants compel those agencies to implement the federal government’s vaccination policy far beyond the confines of federal contracts to state employees who do not work

on any such contracts. State agencies will now become administrators of federal COVID-19 vaccine mandates. *See Printz v. United States*, 521 U.S. 898, 914 (1997).

It is not reasonable or even possible for the States to immediately forego all their federal contracts, which span many of Plaintiffs’ state agencies. Compl. ¶ 87. The mandate covers “extensions or renewals” or “options” on “existing contracts.” Ex. D, at 2. And the Task Force’s Guidance “strongly encourage[s]” federal agencies to add the mandate to “existing contracts and contract-like instruments” even before renewals occur. Ex. B, at 5. Indeed, many of Plaintiffs’ agencies have already begun receiving requests to modify existing contracts, and many have been given short time periods in which to respond. *See* Exs. G–L, O. Because many of these contracts are vital to the Plaintiffs, ending them would force the Plaintiffs to abruptly stop or alter important governmental programs, which would be difficult and painful to do. Affording States only a matter of weeks to choose between implementing an unlawful vaccine mandate or relinquishing longstanding federal contracts essential to existing state programs is an obvious attempt to coerce. Defendants’ unlawful actions will thus directly commandeer States into administering federal vaccination policy in violation of the Spending Clause.

Just as the Spending Clause does not authorize Defendants’ mandate, neither does the Commerce Clause. Art. I, § 8, cl. 3. The mandate does not “regulate Commerce.” *Id.* Rather, it demands action—in the form of compulsory vaccines—from millions of people. *NFIB*, 567 U.S. at 555 (“The Framers gave Congress the power to *regulate* commerce, not to *compel* it”). But the Commerce Clause is not a license to act “whenever enough [people] are not doing something the [federal] Government would have them do.” *Id.* at 553. Moreover, Defendants’ mandate does not merely require *activities* in the workplace; it intrudes upon a deeply *personal* health decision—whether to get vaccinated—that transcends commerce and work issues. “Any police power to

regulate individuals as such, as opposed to their activities, remains vested in the States” and has not been given to the federal government. *Id.* at 557. Defendants have thus exceeded their authority by attempting to impose their mandate.

Protecting federalism is no empty gesture. “[A] healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.” *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). Here, Defendants are usurping the States’ power in an overbearing quest to mandate COVID-19 vaccines throughout the nation. Vindicating the Plaintiffs’ federalism claims will “secure[] to citizens the liberties”—namely, the ability to make important health decisions for themselves—“that derive from the diffusion of sovereign power.” *New York*, 505 U.S. at 181.

II. The Balancing of Harms and the Public Interest Support an Injunction.

The remaining *Dataphase* factors include “(2) the threat of irreparable harm to the movant in the absence of relief; (3) the balance between that harm and the harm that the relief would cause to other litigants; and (4) the public interest.” *Watkins, Inc.*, 346 F.3d at 44. Those factors also favor the States.

A. Absent an Injunction, Plaintiff States Will Suffer Irreparable Harm to Their Sovereign, Quasi-Sovereign, and Proprietary Interests.

The States will face great irreparable harm if the federal contractor mandate is not enjoined. *Id.* This harm includes injuries to their sovereign, quasi-sovereign, and proprietary interests. These injuries not only establish irreparable harm but also demonstrate that the States have standing to bring their claims.

First, the States face direct sovereign injuries from the federal contractor mandate. As noted above, President Biden announced in his speech a clear intention to supersede and preempt any State policies that differ from his preferred federal policies, vowing that if any States disagree

with his federal policy, “I’ll use my power as President to get them out of the way.” Biden Speech, *supra*. Consistent with this avowal, the Task Force Guidance expressly preempts any state or local policy that differs from or opposes the federal contractor mandate: “These requirements are promulgated pursuant to Federal law and supersede any contrary State or local law or ordinance.” Ex. B, at 13. Therefore, if it is allowed to go into effect, the contractor mandate will expressly supersede state statutes, executive orders, regulations, and other policies that oppose vaccine mandates or provide State-level protection to individuals to make their own choices about vaccination. *See id.*

This includes numerous statutes and other state-level policies of the Plaintiff States. For example, Missouri has a statute that prohibits public health orders, including vaccine mandates, if they are not approved by the governing bodies of political subdivisions, Mo. Rev. Stat. § 67.265, which may be partially preempted if the vaccine mandate goes into effect. In addition, Missouri has a very robust state Religious Freedom Restoration Act, Mo. Rev. Stat. § 1.302, which the contractor vaccine mandate preempts by authorizing employers to determine the scope of religious exemptions to the mandate. *See* Ex. B, at 5, 9–10.

Other Plaintiff States face similar interference with the implementation of state law. For example, Alaska’s state constitution recognizes a fundamental right to privacy which includes the right to make decisions about medical treatment. *See Huffman v. State*, 204 P.3d 339 (Alaska 2009) (holding held that an individual’s freedom to make medical decisions for themselves is a fundamental right protected under Article I, Section 22 of the Alaska Constitution). The contractor vaccine mandate also ostensibly preempts an Alaska statute that broadly protects all Alaskans’ rights to object to COVID-19 vaccines “based on religious, medical, or *other* grounds,” and that forbids any person from “requir[ing] an individual to provide justification or documentation to

support the individual’s decision to decline a COVID-19 vaccine.” 2021 Alaska Sess. Laws ch. 2, § 17 (emphasis added). Similarly, the contractor vaccine mandate ostensibly preempts Arkansas statutes, including Ark. Code 20-7-143, which is currently in effect and prohibits public entities from requiring vaccines, and Ark. Code 11-5-118, which will go into effect in January and requires private employers (including contractors) give employees a testing option in lieu of vaccination. The contractor vaccine mandate also ostensibly preempts a recently enacted Montana statute that generally forbids employers in that State “to refuse employment to a person, to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment based on the person’s vaccination status.” Mont. Code Ann. § 49-2-312(1)(b).

Preempting, and thus effectively invalidating, duly enacted State statutes inflicts *per se* irreparable injury on the States as sovereigns. “Prohibiting the State from enforcing a statute properly passed ... would irreparably harm the State.” *Org. for Black Struggle v. Ashcroft*, 978 F.3d 603, 609 (8th Cir. 2020); *see Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018) (“[T]he inability to enforce its duly enacted plan clearly inflicts irreparable harm on the State.”); *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (“Any time” a State is blocked “from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.”) (citing *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). When the State is blocked from implementing its statutes, “the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its law.” *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013); *Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997). The vaccine mandate injures the Plaintiff States’ sovereign interest in exercising their own

police power. And it does so in an area—public health—where the traditional authority of the States is paramount and the federal Government possesses no enumerated power.

Second, the States face significant injuries to their quasi-sovereign or *parens patriae* interests in protecting the rights of substantial segments of their population. As noted above, “workers employed by federal contractors” comprise “approximately one-fifth of the entire U.S. labor force.” Office of Compliance Contract Programs, *supra*. This includes millions of workers in the Plaintiff States. *See id.* As the Supreme Court has recognized, the States have “a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general.” *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607 (1982). The State’s interest applies when a policy affects a “sufficiently substantial segment of its population,” especially where an alleged injury to the health and welfare of [the States’] citizens ... is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers.” *Id.* As noted above, several States have enacted statutes to protect their citizens from vaccine mandates. The States have a quasi-sovereign interest in preventing the manifest irreparable injury to their millions of citizens who face a Hobson’s choice between making their own decisions or losing their jobs. The imposition of such a choice on millions of citizens of the Plaintiff States, “for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Third, the States face irreparable injury to their proprietary interests. As Justice Scalia has observed, “a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs.” *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220–21 (1994) (Scalia, J., concurring). The States will incur direct pocketbook injuries because the Task Force

Guidance directs employees to obtain documentation of vaccination from state and local public-health agencies. *See* Ex. B, at 9.

In addition, the States face economic disruption from widespread resignations due to the unpopular vaccine mandates, which will exacerbate the supply-chain crisis, disrupt their economies, and interfere with their revenue collection efforts. As noted above, 72 percent of unvaccinated workers indicate that they will give up their jobs rather than complying with a vaccine mandate. *See* Kaiser Family Foundation Survey (Oct. 28, 2021), <https://www.kff.org/coronavirus-covid-19/press-release/1-in-4-workers-say-their-employer-required-them-to-get-a-covid-19-vaccine-up-since-june-5-of-unvaccinated-adults-say-they-left-a-job-due-to-a-vaccine-requirement/>. In addition, the States *qua* federal contractors and employers face disruption in their day-to-day operations as they are confronted with the prospect of losing significant numbers of employees. In Missouri, for example, it is widely anticipated that vaccine mandates will result in widespread resignations and critical staffing shortages in the health-care sector,⁵ and Missouri's agencies anticipate similar disruption in their own workforces. *See* Exs. F, N–O. Other Plaintiff States face similar issue. *See, e.g.*, Exs. J–L. If allowed to go into effect, many States and their agencies will experience staffing shortages and disruption of services from the vaccine mandate—which will injure their sovereign and proprietary interests.

⁵ *See, e.g., 'Dangling by a thread': Nursing home industry warns of staff exodus over vaccine mandates*, MO. INDEP. (Sept. 15, 2021), at <https://missouriindependent.com/2021/09/15/dangling-by-a-thread-nursing-home-industry-warns-of-staff-exodus-over-vaccine-mandates/>; *Missouri Health Care Association says vaccine mandate will worsen staffing shortage*, FOX 2 NEWS (Sept. 14, 2021), at <https://fox2now.com/news/missouri/missouri-health-care-association-says-vaccine-mandate-will-worsen-staffing-shortage/>; *Missouri hospital fears staff may quit over Biden vaccine mandate*, KAN. CITY STAR (Oct. 14, 2021), at <https://www.kansascity.com/news/coronavirus/article254948037.html>; *see also, e.g., As Vaccine Deadlines Approach, Hospitals Fear Staffing Shortages Will Occur*, NPR.org (Sept. 27, 2021), at <https://www.npr.org/sections/coronavirus-live-updates/2021/09/27/1041047608/vaccine-deadlines-hospitals-fear-staffing-shortages> (detailing similar concerns nationwide).

B. Blocking the Enforcement of the Unlawful and Unconstitutional Mandate Will Inflict No Cognizable Harm on the Federal Government.

On the flip side, preventing the enforcement of an unlawful mandate will inflict no cognizable injury on the federal Government. The Government has no valid interest in violating the law by “the perpetuation of unlawful agency action.” *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) (“There is generally no public interest in the perpetuation of unlawful agency action.”); *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013) (recognizing that government officials “do[] not have an interest in the enforcement of an unconstitutional law”); *Make Liberty Win v. Ziegler*, 478 F.Supp.3d 805, 812 n.6 (W.D. Mo. 2020) (holding that “a governmental entity ‘has no legitimate interest in enforcing an unconstitutional ordinance’”) (quoting *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006)).

C. The Public Interest Strongly Favors an Injunction.

Finally, the public interest strongly favors an injunction against the enforcement of the Administration’s unlawful and unconstitutional mandate. When the party opposing relief is the Government, the third factor “merge[s]” with the public-interest factor. *Nken v. Holder*, 556 U.S. 418, 436 (2009). Here, where the Government faces no cognizable harm from an injunction, the public interest favors its entry. Indeed, “our system does not permit agencies to act unlawfully even in pursuit of desirable ends.” *Ala. Ass’n of Realtors*, 141 S. Ct. at 2490; see *League of Women Voters*, 838 F.3d at 12 (“There is generally no public interest in the perpetuation of unlawful agency action.”).

The public interest also strongly favors vindicating the traditional balance of power between the federal government and the States, which Defendants’ unlawful mandate threatens to disrupt. The allocation of governmental powers within the federal system undergirds the

Constitution’s charter for responsive, accountable, and limited government. “The federal system rests on what might at first seem a counterintuitive insight, that ‘freedom is enhanced by the creation of two governments, not one.’” *Bond v. United States*, 564 U.S. 211, 220-21 (2011) (quoting *Alden v. Maine*, 527 U.S. 706, 758 (1999)). “[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power.” *Id.* at 221 (quoting *New York*, 505 U.S. at 181). “Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions.” *Id.* Moreover, “federalism enhances the opportunity of all citizens to participate in representative government.” *FERC v. Mississippi*, 456 U.S. 742, 789 (1982) (O’Connor, J., concurring in part and dissenting in part). By preserving room for experimentation in the States, federalism also supports policy innovation that can address many of society’s most pressing problems. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 310-11 (1932) (Brandeis, J., dissenting). “Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.” *Gregory*, 501 U.S. at 458.

The federal contractor vaccine mandate directly implicates those principles of federalism. It involves unprecedented federal overreach in purporting to dictate the private medical decisions of millions of Americans—in an area that falls within the States’ traditional zone of authority. It deliberately seeks to displace state authority and replace it with federal power in an area where the federal government has no enumerated power or mandate in the Constitution to act. In America, the public interest favors federalism, and it favors freedom. The Court should enjoin Defendants’ unlawful mandate.

CONCLUSION

The Court should grant Plaintiffs' motion for a preliminary injunction, and enter an injunction preventing Defendants from taking any action to implement or enforce the unlawful federal contractor vaccine mandate.

Dated: November 4, 2021

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CERTIFICATE OF SERVICE

I hereby certify that, on November 4, 2021, a true and correct copy of the foregoing and any attachments were filed electronically through the Court's CM/ECF system, to be served on counsel for all parties by operation of the Court's electronic filing system and to be served on those parties that have not appeared who will be served in accordance with the Federal Rules of Civil Procedure by mail or other means agreed to by the party.

/s/ Justin D. Smith

EXHIBIT

A

Presidential Documents

Executive Order 14042 of September 9, 2021

Ensuring Adequate COVID Safety Protocols for Federal Contractors

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 *et seq.*, and section 301 of title 3, United States Code, and in order to promote economy and efficiency in procurement by contracting with sources that provide adequate COVID-19 safeguards for their workforce, it is hereby ordered as follows:

Section 1. Policy. This order promotes economy and efficiency in Federal procurement by ensuring that the parties that contract with the Federal Government provide adequate COVID-19 safeguards to their workers performing on or in connection with a Federal Government contract or contract-like instrument as described in section 5(a) of this order. These safeguards will decrease the spread of COVID-19, which will decrease worker absence, reduce labor costs, and improve the efficiency of contractors and subcontractors at sites where they are performing work for the Federal Government. Accordingly, ensuring that Federal contractors and subcontractors are adequately protected from COVID-19 will bolster economy and efficiency in Federal procurement.

Sec. 2. Providing for Adequate COVID-19 Safety Protocols for Federal Contractors and Subcontractors. (a) Executive departments and agencies, including independent establishments subject to the Federal Property and Administrative Services Act, 40 U.S.C. 102(4)(A) (agencies), shall, to the extent permitted by law, ensure that contracts and contract-like instruments (as described in section 5(a) of this order) include a clause that the contractor and any subcontractors (at any tier) shall incorporate into lower-tier subcontracts. This clause shall specify 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 Guidance or Guidance), provided that the Director of the Office of Management and Budget (Director) approves the Task Force Guidance and determines that the Guidance, if adhered to by contractors or subcontractors, will promote economy and efficiency in Federal contracting. This clause shall apply to any workplace locations (as specified by the Task Force Guidance) in which an individual is working on or in connection with a Federal Government contract or contract-like instrument (as described in section 5(a) of this order).

(b) By September 24, 2021, the Safer Federal Workforce Task Force (Task Force) shall, as part of its issuance of Task Force Guidance, provide definitions of relevant terms for contractors and subcontractors, explanations of protocols required of contractors and subcontractors to comply with workplace safety guidance, and any exceptions to Task Force Guidance that apply to contractor and subcontractor workplace locations and individuals in those locations working on or in connection with a Federal Government contract or contract-like instrument (as described in section 5(a) of this order).

(c) Prior to the Task Force publishing new Guidance related to COVID-19 for contractor or subcontractor workplace locations, including the Guidance developed pursuant to subsection (b) of this section, the Director shall, as an exercise of the delegation of my authority under the Federal Property

and Administrative Services Act, *see* 3 U.S.C. 301, determine whether such Guidance will promote economy and efficiency in Federal contracting if adhered to by Government contractors and subcontractors. Upon an affirmative determination by the Director, the Director's approval of the Guidance, and subsequent issuance of such Guidance by the Task Force, contractors and subcontractors working on or in connection with a Federal Government contract or contract-like instrument (as described in section 5(a) of this order), shall adhere to the requirements of the newly published Guidance, in accordance with the clause described in subsection (a) of this section. The Director shall publish such determination in the *Federal Register*.

(d) Nothing in this order shall excuse noncompliance with any applicable State law or municipal ordinance establishing more protective safety protocols than those established under this order or with any more protective Federal law, regulation, or agency instructions for contractor or subcontractor employees working at a Federal building or a federally controlled workplace.

(e) For purposes of this order, the term "contract or contract-like instrument" shall have the meaning set forth in the Department of Labor's proposed rule, "Increasing the Minimum Wage for Federal Contractors," 86 FR 38816, 38887 (July 22, 2021). If the Department of Labor issues a final rule relating to that proposed rule, that term shall have the meaning set forth in that final rule.

Sec. 3. Regulations and Implementation. (a) The Federal Acquisition Regulatory Council, to the extent permitted by law, shall amend the Federal Acquisition Regulation to provide for inclusion in Federal procurement solicitations and contracts subject to this order the clause described in section 2(a) of this order, and shall, by October 8, 2021, take initial steps to implement appropriate policy direction to acquisition offices for use of the clause by recommending that agencies exercise their authority under subpart 1.4 of the Federal Acquisition Regulation.

(b) By October 8, 2021, agencies shall take steps, to the extent permitted by law, to exercise any applicable authority to ensure that contracts and contract-like instruments as described in section 5(a) of this order that are not subject to the Federal Acquisition Regulation and that are entered into on or after October 15, 2021, consistent with the effective date of such agency action, include the clause described in section 2(a) of this order.

Sec. 4. Severability. If any provision of this order, or the application of any provision of this order to any person or circumstance, is held to be invalid, the remainder of this order and its application to any other person or circumstance shall not be affected thereby.

Sec. 5. Applicability. (a) This order shall apply to any new contract; new contract-like instrument; new solicitation for a contract or contract-like instrument; extension or renewal of an existing contract or contract-like instrument; and exercise of an option on an existing contract or contract-like instrument, if:

- (i) it is a procurement contract or contract-like instrument for services, construction, or a leasehold interest in real property;
 - (ii) it is a contract or contract-like instrument for services covered by the Service Contract Act, 41 U.S.C. 6701 *et seq.*;
 - (iii) it is a contract or contract-like instrument for concessions, including any concessions contract excluded by Department of Labor regulations at 29 CFR 4.133(b); or
 - (iv) it is a contract or contract-like instrument entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public;
- (b) This order shall not apply to:
- (i) grants;

(ii) contracts, contract-like instruments, or agreements with Indian Tribes under the Indian Self-Determination and Education Assistance Act (Public Law 93–638), as amended;

(iii) contracts or subcontracts whose value is equal to or less than the simplified acquisition threshold, as that term is defined in section 2.101 of the Federal Acquisition Regulation;

(iv) employees who perform work outside the United States or its outlying areas, as those terms are defined in section 2.101 of the Federal Acquisition Regulation; or

(v) subcontracts solely for the provision of products.

Sec. 6. *Effective Date.* (a) Except as provided in subsection (b) of this section, this order is effective immediately and shall apply to new contracts; new contract-like instruments; new solicitations for contracts or contract-like instruments; extensions or renewals of existing contracts or contract-like instruments; and exercises of options on existing contracts or contract-like instruments, as described in section 5(a) of this order, where the relevant contract or contract-like instrument will be entered into, the relevant contract or contract-like instrument will be extended or renewed, or the relevant option will be exercised, on or after:

(i) October 15, 2021, consistent with the effective date for the action taken by the Federal Acquisition Regulatory Council pursuant to section 3(a) of this order; or

(ii) for contracts and contract-like instruments that are not subject to the Federal Acquisition Regulation and where an agency action is taken pursuant to section 3(b) of this order, October 15, 2021, consistent with the effective date for such action.

(b) As an exception to subsection (a) of this section, where agencies have issued a solicitation before the effective date for the relevant action taken pursuant to section 3 of this order and entered into a new contract or contract-like instrument resulting from such solicitation within 30 days of such effective date, such agencies are strongly encouraged to ensure that the safety protocols specified in section 2 of this order are applied in the new contract or contract-like instrument. But if that contract or contract-like instrument term is subsequently extended or renewed, or an option is subsequently exercised under that contract or contract-like instrument, the safety protocols specified in section 2 of this order shall apply to that extension, renewal, or option.

(c) For all existing contracts and contract-like instruments, solicitations issued between the date of this order and the effective dates set forth in this section, and contracts and contract-like instruments entered into between the date of this order and the effective dates set forth in this section, agencies are strongly encouraged, to the extent permitted by law, to ensure that the safety protocols required under those contracts and contract-like instruments are consistent with the requirements specified in section 2 of this order.

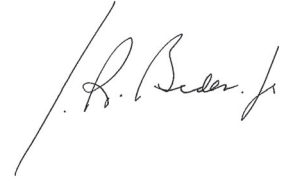
Sec. 7. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

A handwritten signature in black ink, appearing to read "J. R. Biden Jr.", is positioned in the upper right quadrant of the page.

THE WHITE HOUSE,
September 9, 2021.

EXHIBIT

B

Safer Federal Workforce Task Force
COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors
Issued September 24, 2021

Introduction

On September 9, President Biden announced his [Path Out of the Pandemic: COVID-19 Action Plan](#). One of the main goals of this science-based plan is to get more people vaccinated. As part of that plan, the President signed Executive Order 14042, [Ensuring Adequate COVID Safety Protocols for Federal Contractors](#), (“the order”) which 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 (“the clause”) that the contractor and any subcontractors (at any tier) shall incorporate into lower-tier subcontracts. This clause shall specify 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”), provided that the Director of the Office of Management and Budget (“OMB”) approves the Task Force Guidance (the or this “Guidance”) and determines that the Guidance, if adhered to by covered contractors, will promote economy and efficiency in Federal contracting.

The actions directed by the order will ensure that parties who contract with the Federal Government provide COVID-19 safeguards in workplaces with individuals working on or in connection with a Federal Government contract or contract-like instrument. These workplace safety protocols will apply to all covered contractor employees, including contractor or subcontractor employees in covered contractor workplaces who are not working on a Federal Government contract or contract-like instrument. These safeguards will decrease the spread of SARS-CoV-2, the virus that causes COVID-19, which will decrease worker absence, reduce labor costs, and improve the efficiency of contractors and subcontractors performing work for the Federal Government.

Pursuant to this Guidance, and in addition to any requirements or workplace safety protocols that are applicable because a contractor or subcontractor employee is present at a Federal workplace, Federal contractors and subcontractors with a covered contract will be required to conform to the following workplace safety protocols:

1. COVID-19 vaccination of covered contractor employees, except in limited circumstances where an employee is legally entitled to an accommodation;
2. Compliance by individuals, including covered contractor employees and visitors, with the Guidance related to masking and physical distancing while in covered contractor workplaces; and
3. Designation by covered contractors of a person or persons to coordinate COVID-19 workplace safety efforts at covered contractor workplaces.

The order also sets out a process for OMB and the Safer Federal Workforce Task Force to update the Guidance for covered contractors, which the Task Force will consider doing based on future changes to Centers for Disease Control and Prevention (“CDC”) COVID-19 guidance and as warranted by the circumstances of the pandemic and public health conditions. It also sets out a process for the Federal Acquisition Regulatory Council (“FAR Council”) to implement such protocols and guidance for covered Federal procurement solicitations and contracts subject to the Federal Acquisition Regulation (“FAR”) and for agencies that are responsible for covered contracts and contract-like instruments not subject to the FAR to take prompt action to ensure that those covered contracts and contract-like instruments include the clause, consistent with the order.

Covered contractors shall adhere to the requirements of this Guidance. The Director of OMB has, as authorized by Executive Order 14042, approved this Guidance and has, an exercise of the delegation of authority (see 3 U.S.C. § 301) under the Federal Property and Administrative Services Act determined that this Guidance will promote economy and efficiency in Federal contracting if adhered to by Government contractors and subcontractors. The Director has published such determination in the Federal Register.

Definitions

Community transmission – means the level of community transmission as set forth in the [CDC COVID-19 Data Tracker County View](#).

Contract and contract-like instrument – has the meaning set forth in the Department of Labor’s proposed rule, “Increasing the Minimum Wage for Federal Contractors,” [86 Fed. Reg. 38,816, 38,887](#) (July 22, 2021). If the Department of Labor issues a final rule relating to that proposed rule, this term shall have the meaning set forth in that final rule.

That proposed rule defines a contract or contract-like instrument as an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law. This definition includes, but is not limited to, a mutually binding legal relationship obligating one party to furnish services (including construction) and another party to pay for them. The term contract includes all contracts and any subcontracts of any tier thereunder, whether negotiated or advertised, including any procurement actions, lease agreements, cooperative agreements, provider agreements, intergovernmental service agreements, service agreements, licenses, permits, or any other type of agreement, regardless of nomenclature, type, or particular form, and whether entered into verbally or in writing. The term contract shall be interpreted broadly as to include, but not be limited to, any contract within the definition provided in the FAR at 48 CFR chapter 1 or applicable Federal statutes. This definition includes, but is not limited to, any contract that may be covered under any Federal procurement statute. Contracts may be the result of competitive bidding or awarded to a single source under applicable authority to do so. In addition to bilateral instruments, contracts include, but are not limited to, awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; exercised contract options; and bilateral contract modifications. The term contract includes contracts covered by the Service Contract Act, contracts covered by the Davis-Bacon Act, concessions contracts not otherwise subject to the Service Contract Act, and contracts in connection with Federal property or land and related to offering services for Federal employees, their dependents, or the general public.

Contractor or subcontractor workplace location – means a location where covered contract employees work, including a covered contractor workplace or Federal workplace.

Covered contract – means any contract or contract-like instrument that includes the clause described in Section 2(a) of the order.

Covered contractor – means a prime contractor or subcontractor at any tier who is party to a covered contract.

Covered contractor employee – means any full-time or part-time employee of a covered contractor working on or in connection with a covered contract or working at a covered

contractor workplace. This includes employees of covered contractors who are not themselves working on or in connection with a covered contract.

Covered contractor workplace – means a location controlled by a covered contractor at which any employee of a covered contractor working on or in connection with a covered contract is likely to be present during the period of performance for a covered contract. A covered contractor workplace does not include a covered contractor employee’s residence.

Federal workplace – means any place, site, installation, building, room, or facility in which any Federal executive department or agency conducts official business, or is within an executive department or agency’s jurisdiction, custody, or control.

Fully vaccinated – People are considered [fully vaccinated](#) for COVID-19 two weeks after they have received the second dose in a two-dose series, or two weeks after they have received a single-dose vaccine. There is currently no post-vaccination time limit on fully vaccinated status; should such a limit be determined by the Centers for Disease Control and Prevention, that limit will be considered by the Task Force and OMB for possible updating of this Guidance.

For purposes of this Guidance, people are considered fully vaccinated if they have received COVID-19 vaccines currently approved or authorized for emergency use by the U.S. Food and Drug Administration (Pfizer-BioNTech, Moderna, and Johnson & Johnson [J&J]/Janssen COVID-19 vaccines) or COVID-19 vaccines that have been listed for emergency use by the World Health Organization (e.g., AstraZeneca/Oxford). More information is available at [Interim Clinical Considerations for Use of COVID-19 Vaccines | CDC](#).

Clinical trial participants from a U.S. site who are documented to have received the full series of an “active” (not placebo) COVID-19 vaccine candidate, for which vaccine efficacy has been independently confirmed (e.g., by a data and safety monitoring board), can be considered fully vaccinated two weeks after they have completed the vaccine series. Currently, the Novavax COVID-19 vaccine meets these criteria. More information is available at the CDC website [here](#).

Mask – means any mask that is consistent with CDC recommendations as set forth in [Types of Masks and Respirators | CDC](#). This may include the following: disposable masks, masks that fit properly (snugly around the nose and chin with no large gaps around the sides of the face), masks made with breathable fabric (such as cotton), masks made with tightly woven fabric (i.e., fabrics that do not let light pass through when held up to a light source), masks with two or three layers, masks with inner filter pockets, and filtering facepiece respirators that are approved by the National Institute for Occupational Safety and Health or consistent with international standards. The following do not constitute masks for purposes of this Guidance: masks with exhalation valves, vents, or other openings; face shields only (without mask); or masks with single-layer fabric or thin fabric that does not block light.

Guidance

Covered contractors are responsible for ensuring that covered contractor employees comply with the workplace safety protocols detailed below. Covered contractor employees must also comply with agency COVID-19 workplace safety requirements while in Federal workplaces.

Consistent with applicable law, agencies are strongly encouraged to incorporate a clause requiring compliance with this Guidance into contracts that are not covered or directly addressed by the order because the contract is under the Simplified Acquisition Threshold as defined in section 2.101 of the FAR or is a contract or subcontract for the manufacturing of products. Agencies are also strongly encouraged to incorporate a clause requiring compliance with this Guidance into existing contracts and contract-like instruments prior to the date upon which the order requires inclusion of the clause.

1. Vaccination of covered contractor employees, except in limited circumstances where an employee is legally entitled to an accommodation

Covered contractors must ensure that all covered contractor employees are fully vaccinated for COVID-19, unless the employee is legally entitled to an accommodation. Covered contractor employees must be fully vaccinated no later than December 8, 2021. After that date, all covered contractor employees must be fully vaccinated by the first day of the period of performance on a newly awarded covered contract, and by the first day of the period of performance on an exercised option or extended or renewed contract when the clause has been incorporated into the covered contract.

A covered contractor may be required to provide an accommodation to covered contractor employees who communicate to the covered contractor that they are not vaccinated against COVID-19 because of a disability (which would include medical conditions) or because of a sincerely held religious belief, practice, or observance. A covered contractor should review and consider what, if any, accommodation it must offer. Requests for “medical accommodation” or “medical exceptions” should be treated as requests for a disability accommodation.

Should a Federal agency have an urgent, mission-critical need for a covered contractor to have covered contractor employees begin work on a covered contract or at a covered workplace before becoming fully vaccinated, the agency head may approve an exception for the covered contractor—in the case of such limited exceptions, the covered contractor must ensure these covered contractor employees are fully vaccinated within 60 days of beginning work on a covered contract or at a covered workplace. The covered contractor must further ensure that such employees comply with masking and physical distancing requirements for not fully vaccinated individuals in covered workplaces prior to being fully vaccinated.

The covered contractor must review its covered employees’ documentation to prove vaccination status. Covered contractors must require covered contractor employees to show or provide their

employer with one of the following documents: a copy of the record of immunization from a health care provider or pharmacy, a copy of the COVID-19 Vaccination Record Card (CDC Form MLS-319813_r, published on September 3, 2020), a copy of medical records documenting the vaccination, a copy of immunization records from a public health or State immunization information system, or a copy of any other official documentation verifying vaccination with information on the vaccine name, date(s) of administration, and the name of health care professional or clinic site administering vaccine. Covered contractors may allow covered contractor employees to show or provide to their employer a digital copy of such records, including, for example, a digital photograph, scanned image, or PDF of such a record.

The covered contractor shall ensure compliance with the requirements in this Guidance related to the showing or provision of proper vaccination documentation.

Covered contractors are strongly encouraged to incorporate similar vaccination requirements into their non-covered contracts and agreements with non-covered contractors whose employees perform work at covered contractor workplaces but who do not work on or in connection with a Federal contract, such as those contracts and agreements related to the provision of food services, onsite security, or groundskeeping services at covered contractor workplaces.

2. Requirements related to masking and physical distancing while in covered contractor workplaces

Covered contractors must ensure that all individuals, including covered contractor employees and visitors, comply with published CDC guidance for masking and physical distancing at a covered contractor workplace, as discussed further in this Guidance.

In addition to the guidance set forth below, CDC's guidance for mask wearing and physical distancing in specific settings, including healthcare, transportation, correctional and detention facilities, and schools, must be followed, as applicable.

In areas of high or substantial community transmission, fully vaccinated people must wear a mask in indoor settings, except for limited exceptions discussed in this Guidance. In areas of low or moderate community transmission, fully vaccinated people do not need to wear a mask. Fully vaccinated individuals do not need to physically distance regardless of the level of transmission in the area.

Individuals who are not fully vaccinated must wear a mask indoors and in certain outdoor settings (see below) regardless of the level of community transmission in the area. To the extent practicable, individuals who are not fully vaccinated should maintain a distance of at least six feet from others at all times, including in offices, conference rooms, and all other communal and work spaces.

Covered contractors must require individuals in covered contractor workplaces who are required to wear a mask to:

- Wear appropriate masks consistently and correctly (over mouth and nose).
- Wear appropriate masks in any common areas or shared workspaces (including open floorplan office space, cubicle embankments, and conference rooms).
- For individuals who are not fully vaccinated, wear a mask in crowded outdoor settings or during outdoor activities that involve sustained close contact with other people who are not fully vaccinated, consistent with CDC guidance.

A covered contractor may be required to provide an accommodation to covered contractor employees who communicate to the covered contractor that they cannot wear a mask because of a disability (which would include medical conditions) or because of a sincerely held religious belief, practice, or observance. A covered contractor should review and consider what, if any, accommodation it must offer.

Covered contractors may provide for exceptions to mask wearing and/or physical distancing requirements consistent with CDC guidelines, for example, when an individual is alone in an office with floor to ceiling walls and a closed door, or for a limited time when eating or drinking and maintaining appropriate distancing. Covered contractors may also provide exceptions for covered contractor employees engaging in activities in which a mask may get wet; high intensity activities where covered contractor employees are unable to wear a mask because of difficulty breathing; or activities for which wearing a mask would create a risk to workplace health, safety, or job duty as determined by a [workplace risk assessment](#). Any such exceptions must be approved in writing by a duly authorized representative of the covered contractor to ensure compliance with this Guidance at covered contractor workplaces, as discussed further below.

Masked individuals may be asked to lower their masks briefly for identification purposes in compliance with safety and security requirements.

Covered contractors must check the [CDC COVID-19 Data Tracker County View website](#) for community transmission information in all areas where they have a covered contractor workplace at least weekly to determine proper workplace safety protocols. When the level of community transmission in the area of a covered contractor workplace increases from low or moderate to substantial or high, contractors and subcontractors should put in place more protective workplace safety protocols consistent with published guidelines. However, when the level of community transmission in the area of a covered contractor workplace is reduced from high or substantial to moderate or low, the level of community transmission must remain at that lower level for at least two consecutive weeks before the covered contractor utilizes those protocols recommended for areas of moderate or low community transmission.

3. *Designation by covered contractors of a person or persons to coordinate COVID-19 workplace safety efforts at covered contractor workplaces.*

Covered contractors shall designate a person or persons to coordinate implementation of and compliance with this Guidance and the workplace safety protocols detailed herein at covered contractor workplaces. The designated person or persons may be the same individual(s) responsible for implementing any additional COVID-19 workplace safety protocols required by local, State, or Federal law, and their responsibilities to coordinate COVID-19 workplace safety protocols may comprise some or all of their regular duties.

The designated individual (or individuals) must ensure that information on required COVID-19 workplace safety protocols is provided to covered contractor employees and all other individuals likely to be present at covered contractor workplaces, including by communicating the required workplace safety protocols and related policies by email, websites, memoranda, flyers, or other means and posting signage at covered contractor workplaces that sets forth the requirements and workplace safety protocols in this Guidance in a readily understandable manner. This includes communicating the COVID-19 workplace safety protocols and requirements related to masking and physical distancing to visitors and all other individuals present at covered contractor workplaces. The designated individual (or individuals) must also ensure that covered contractor employees comply with the requirements in this guidance related to the showing or provision of proper vaccination documentation.

Frequently Asked Questions

Vaccination and Safety Protocols

Q1: How do covered contractors determine vaccination status of visitors to covered contractor workplaces?

A: Covered contractors should post signage at entrances to covered contractor workplaces providing information on safety protocols for fully vaccinated and not fully vaccinated individuals, including the protocols defined in the masking and physical distancing section above, and instruct individuals to follow the appropriate workplace safety protocols while at the covered contractor workplace. Covered contractors may take other reasonable steps, such as by communicating workplace safety protocols to visitors prior to their arrival at a covered contractor workplace or requiring all visitors to follow masking and physical distancing protocols for not fully vaccinated individuals.

Q2: Do covered contractors need to provide onsite vaccinations to their employees?

A: Covered contractors should ensure their employees are aware of [convenient opportunities to be vaccinated](#). Although covered contractors may choose to provide vaccinations at their facilities or workplaces, given the widespread availability of vaccinations, covered contractors are not required to do so.

Q3: What should a contractor employee do if a covered contractor employee has lost or does not have a copy of required vaccination documentation?

A: If covered contractor employees need new vaccination cards or copies of other documentation proof of vaccination, they should contact the vaccination provider site where they received their vaccine. Their provider should be able to provide them with new cards or documentation with up-to-date information about the vaccinations they have received. If the location where the covered contractor employees received their COVID-19 vaccine is no longer operating, the covered contractor employees should contact their State or local health department's [immunization information system \(IIS\)](#) for assistance. Covered contractor employees should [contact their State or local health department](#) if they have additional questions about vaccination cards or vaccination records.

An attestation of vaccination by the covered contractor employee is not an acceptable substitute for documentation of proof of vaccination.

Q4: Who is responsible for determining if a covered contractor employee must be provided an accommodation because of a disability or because of a sincerely held religious belief, practice, or observance?

A: A covered contractor may be required to provide an accommodation to contractor employees who communicate to the covered contractor that they are not vaccinated for COVID-19, or that they cannot wear a mask, because of a disability (which would include medical conditions) or because of a sincerely held religious belief, practice, or observance. A covered contractor should review and consider what, if any, accommodation it must offer. The contractor is responsible for considering, and dispositioning, such requests for accommodations regardless of the covered contractor employee's place of performance. If the agency that is the party to the covered contract is a "joint employer" for purposes of compliance with the Rehabilitation Act and Title VII of the Civil Rights Act, both the agency and the covered contractor should review and consider what, if any, accommodation they must offer.

Q5: Are covered contractor employees who have a prior COVID-19 infection required to be vaccinated?

A: Yes, covered contractor employees who have had a prior COVID-19 infection are required to be vaccinated. More information from CDC can be found [here](#).

Q6: Can a covered contractor accept a recent antibody test from a covered contractor employee to prove vaccination status?

A: No. A covered contractor cannot accept a recent antibody test from a covered contractor employee to prove vaccination status.

Workplaces

Q7: Does this Guidance apply to outdoor contractor or subcontractor workplace locations?

A: Yes, this Guidance applies to contractor or subcontractor workplace locations that are outdoors.

Q8: If a covered contractor employee is likely to be present during the period of performance for a covered contract on only one floor or a separate area of a building, site, or facility controlled by a covered contractor, do other areas of the building, site, or facility controlled by a covered contractor constitute a covered contractor workplace?

A: Yes, unless a covered contractor can affirmatively determine that none of its employees on another floor or in separate areas of the building will come into contact with a covered contractor employee during the period of performance of a covered contract. This would include affirmatively determining that there will be no interactions between covered contractor employees and non-covered contractor employees in those locations during the period of performance on a covered contract, including interactions through use of common areas such as lobbies, security clearance areas, elevators, stairwells, meeting rooms, kitchens, dining areas, and parking garages.

Q9: If a covered contractor employee performs their duties in or at only one building, site, or facility on a campus controlled by a covered contractor with multiple buildings, sites, or facilities, are the other buildings, sites, or facility controlled by a covered contractor considered a covered contractor workplace?

A: Yes, unless a covered contractor can affirmatively determine that none of its employees in or at one building, site, or facility will come into contact with a covered contractor employee during the period of performance of a covered contract. This would include affirmatively determining that there will be no interactions between covered contractor employees and non-covered contractor employees in those locations during the period of performance on a covered contract, including interactions through use of common areas such as lobbies, security clearance areas, elevators, stairwells, meeting rooms, kitchens, dining areas, and parking garages.

Q10: Are the workplace safety protocols enumerated above the same irrespective of whether the work is performed at a covered contractor workplace or at a Federal workplace?

A: Yes. The Guidance applies to all covered contractor employees and to all contractor or subcontractor workplace locations. While at a Federal workplace, covered contractor employees must also comply with any additional agency workplace safety requirements for that workplace. Because covered contractor employees working on a covered contract need to be fully vaccinated after December 8, 2021, covered contractor employees who work only at a Federal workplace need to be fully vaccinated by that date as well, unless legally entitled to an accommodation.

Q11: How does this Guidance apply to covered contractor employees who are authorized under the covered contract to perform work remotely from their residence?

A: An individual working on a covered contract from their residence is a covered contractor employee, and must comply with the vaccination requirement for covered contractor employees, even if the employee never works at either a covered contractor workplace or Federal workplace during the performance of the contract. A covered contractor employee's residence is not a covered contractor workplace, so while in the residence the individual need not comply with requirements for covered contractor workplaces, including those related to masking and physical distancing, even while working on a covered contract.

Scope and Applicability

Q12: By when must the requirements of the order be reflected in contracts?

A: Section 6 of the order lays out a phase-in of the requirements for covered contracts as follows:

- *Contracts awarded prior to October 15 where performance is ongoing* – the requirements must be incorporated at the point at which an option is exercised or an extension is made.
- *New contracts* – the requirements must be incorporated into contracts awarded on or after November 14. Between October 15 and November 14, agencies must include the clause in the solicitation and are encouraged to include the clause in contracts awarded during this time period but are not required to do so unless the solicitation for such contract was issued on or after October 15.

Q13: Must the order’s requirements be flowed down to all lower-tier subcontractors and, if so, who is responsible for flowing the clause down?

A: Yes. The requirements in the order apply to subcontractors at all tiers, except for subcontracts solely for the provision of products. The prime contractor must flow the clause down to first-tier subcontractors; higher-tier subcontractors must flow the clause down to the next lower-tier subcontractor, to the point at which subcontract requirements are solely for the provision of products.

Q14: Does the Guidance apply to small businesses?

A: Yes, the requirement to comply with this Guidance applies equally to covered contractors regardless of whether they are a small business. This broad application of COVID-19 guidance will more effectively decrease the spread of COVID-19, which, in turn, will decrease worker absence, reduce labor costs, and improve the efficiency of contractors and subcontractors at workplaces where they are performing work for the Federal Government.

Q15: What steps are being taken to promote consistent application of the order’s requirements across agencies?

A: The FAR Council will conduct a rulemaking to amend the FAR to include a clause that requires covered contractors performing under FAR-based contracts to comply with this Guidance for contractor and subcontractor workplace locations. Prior to rulemaking, by October 8, 2021, the FAR Council will develop a clause and recommend that agencies exercise their authority to deviate from the FAR using the procedures set forth in subpart 1.4. Agencies responsible for contracts and contract-like instruments that are not subject to the FAR, such as concession contracts, will be responsible for developing appropriate guidance by October 8, 2021 to incorporate requirements into their covered instruments entered into on or after October 15, 2021.

Q16: If the Safer Federal Workforce Task Force updates this Guidance to add new requirements, do those requirements apply to existing contracts?

A: Yes. Covered contractors are required to, for the duration of the contract, comply with all Task Force Guidance for contractor or subcontractor workplace locations, including any new

Guidance where the OMB Director approves the Guidance and determines that adherence to the Guidance will promote economy and efficiency in Federal contracting. The Task Force and OMB plan to ensure any workplace safety protocols reflect what is necessary to decrease the spread of COVID-19.

Q17: What constitutes work performed “in connection with” a covered contract?

A: Employees who perform duties necessary to the performance of the covered contract, but who are not directly engaged in performing the specific work called for by the covered contract, such as human resources, billing, and legal review, perform work in connection with a Federal Government contract.

Q18: Do the workplace safety protocols in the Guidance apply to covered contractor employees who perform work outside the United States?

A: No. The workplace safety protocols in the Guidance do not apply to covered contractor employees who only perform work outside the United States or its outlying areas, as those terms are defined in section 2.101 of the FAR.

Compliance

Q19: Does this clause apply in States or localities that seek to prohibit compliance with any of the workplace safety protocols set forth in this Guidance?

A: Yes. These requirements are promulgated pursuant to Federal law and supersede any contrary State or local law or ordinance. Additionally, nothing in this Guidance shall excuse noncompliance with any applicable State law or municipal ordinance establishing more protective workplace safety protocols than those established under this Guidance.

Q20: Can a covered contractor comply with workplace safety requirements from the Occupational Safety and Health Administration, including pursuant to any current or forthcoming Emergency Temporary Standard related to COVID-19, instead of the requirements of this Guidance?

A: No. Covered contractors must comply with the requirements set forth in this Guidance regardless of whether they are subject to other workplace safety standards.

Q21: What is the prime contractor’s responsibility for verifying that subcontractors are adhering to the mandate?

A: The prime contractor is responsible for ensuring that the required clause is incorporated into its first-tier subcontracts in accordance with the implementation schedule set forth in section 6 of the order. When the clause is incorporated into a subcontract, a subcontractor is required to

comply with this Guidance and the workplace safety protocols detailed herein. Additionally, first-tier subcontractors are expected to flow the clause down to their lower-tier subcontractors in similar fashion so that accountability for compliance is fully established throughout the Federal contract supply chain for covered subcontractor employees and workplaces at all tiers through application of the clause.

EXHIBIT C

proposed information request may be obtained by contacting the office listed below in the **FOR FURTHER INFORMATION CONTACT** section of this Notice.

DATES: Written comments must be submitted to the office listed in the **ADDRESSES** section below on or before November 29, 2021.

ADDRESSES: You may submit comments identified by Control Number 1235–0024, by either one of the following methods: *Email: WHDPRAComments@dol.gov; Mail, Hand Delivery, Courier:* Division of Regulations, Legislation, and Interpretation, Wage and Hour, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW, Washington, DC 20210.

Instructions: Please submit one copy of your comments by only one method. All submissions received must include the agency name and Control Number identified above for this information collection. Because we continue to experience delays in receiving mail in the Washington, DC area, commenters are strongly encouraged to transmit their comments electronically via email or to submit them by mail early. Comments, including any personal information provided, become a matter of public record. They will also be summarized and/or included in the request for Office of Management and Budget (OMB) approval of the information collection request.

FOR FURTHER INFORMATION CONTACT: Robert Waterman, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW, Washington, DC 20210; telephone: (202) 693–0406 (this is not a toll-free number). Copies of this notice may be obtained in alternative formats (Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, large print, braille, audiotape, compact disc, or other accessible format), upon request, by calling (202) 693–0023 (not a toll-free number). TTY/TTD callers may dial toll-free (877) 889–5627 to obtain information or request materials in alternative formats.

SUPPLEMENTARY INFORMATION:

I. *Background:* The Wage and Hour Division (WHD) of the Department of Labor administers the Fair Labor Standards Act (FLSA), 29 U.S.C. 201, *et seq.* Section 3(l) of the Act establishes a minimum age of 16 years for most non-agricultural employment, but allows the employment of 14- and 15-year olds in occupations other than manufacturing and mining if the Secretary of Labor determines such employment is confined to: (1) Periods

that will not interfere with the minor's schooling; and (2) conditions that will not interfere with the minor's health and well-being. FLSA section 11(c) requires all covered employers to make, keep, and preserve records of their employees' wages, hours, and other conditions of employment. Section 11(c) authorizes the Secretary of Labor to prescribe the recordkeeping and reporting requirements for these records. The regulations set forth reporting requirements that include a Work Study Program application and written participation agreement. In order to use the child labor work study provisions, § 570.37(b) requires a local public or private school system to file with the Wage and Hour Division Administrator an application for approval of a Work Study Program as one that does not interfere with the schooling or health and well-being of the minors involved. The regulations also require preparation of a written participation agreement for each student participating in a Work Study Program and that the teacher-coordinator, employer, and student each sign the agreement.

II. *Review Focus:* The Department of Labor is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Enhance the quality, utility, and clarity of the information to be collected;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submissions of responses.

III. *Current Actions:* The Department of Labor seeks approval for an extension of this information collection in order to ensure effective administration of Work Study programs.

Type of Review: Extension.

Agency: Wage and Hour Division.

Title: Work Study Program of the Child Labor Regulations.

OMB Control Number: 1235–0024.

Affected Public: Business or other for-profit, Not-for-profit institutions, Farms,

Federal, State, Local, or Tribal Government.

Total Respondents: WSP Applications: 10; Written Participation Agreements: 500.

Total Annual Responses: WSP Applications: 10.

Written Participation Agreements: 1,000.

Estimated Total Burden Hours: 1,529.

Estimated Time per Response: WSP Application: 121 minutes; Written Participation Agreements: 31 minutes.

Frequency: On occasion.

Total Burden Cost (capital/startup): \$0.

Dated: September 20, 2021.

Amy DeBisschop,

Director, Division of Regulations, Legislation, and Interpretation.

[FR Doc. 2021–20956 Filed 9–27–21; 8:45 am]

BILLING CODE 4510–27–P

OFFICE OF MANAGEMENT AND BUDGET

Determination of the Promotion of Economy and Efficiency in Federal Contracting Pursuant to Executive Order No. 14042

AGENCY: Executive Office of the President, Office of Management and Budget.

ACTION: Notice of determination.

SUMMARY: The Director of the Office of Management and Budget determines that compliance by Federal contractors and subcontractors with the COVID–19 workplace safety protocols detailed in the Safer Federal Workforce Task Force guidance issued on September 24, 2021 will improve economy and efficiency by reducing absenteeism and decreasing labor costs for contractors and subcontractors working on or in connection with a Federal Government contract.

DATES: September 24, 2021.

ADDRESSES: The Safer Federal Workforce Task Force Guidance for Federal Contractors and Subcontractors on COVID–19 Workplace Safety is available at: <https://www.saferfederalworkforce.gov/new/>.

FOR FURTHER INFORMATION CONTACT: Cristin Dorgelo, 725 17th Street N, Email address: Cristin.a.dorgelo@omb.eop.gov, telephone number: (202) 456–4066. Because of delays in the receipt of regular mail related to security screening, respondents are encouraged to use electronic communications.

SUPPLEMENTARY INFORMATION: As explained in Executive Order No. 14042

on *Ensuring Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors*, compliance with COVID-19-related safety protocols improves economy and efficiency by reducing absenteeism and decreasing labor costs for contractors and subcontractors working on or in connection with a Federal Government contract. Section 2(c) of E.O. 14042 requires that, before Federal contractors and subcontractors must adhere to any guidance from the Safer Federal Workforce Task Force pursuant to Executive Order No. 14042, the Director of the Office of Management and Budget must determine that such guidance will promote economy and efficiency in Federal contracting if adhered to by Government contractors and subcontractors. Based on my review of the Safer Federal Workforce Task Force's COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors, scheduled for issuance on September 24, 2021, and exercising the President's authority under the Federal Property and Administrative Services Act (see 3 U.S.C. 3011) delegated to me through Executive Order No. 14042, I have determined that compliance by Federal contractors and subcontractors with the COVID-19-workplace safety protocols detailed in that guidance will improve economy and efficiency by reducing absenteeism and decreasing labor costs for contractors and subcontractors working on or in connection with a Federal Government contract.

Shalanda Young,

Acting Director, Office of Management and Budget.

[FR Doc. 2021-21184 Filed 9-24-21; 4:15 pm]

BILLING CODE 3110-01-P

NATIONAL CAPITAL PLANNING COMMISSION

Senior Executive Service; Performance Review Board; Members

AGENCY: National Capital Planning Commission.

ACTION: Notice of members of senior executive service performance review board.

SUMMARY: This notice announces the membership of the National Capital Planning Commission Senior Executive Service Performance Review Board in accordance with section 4314(c) of Title 5, U.S.C. and 5 CFR 430.311.

FOR FURTHER INFORMATION CONTACT:

Debra L. Dickson, Director of Administration, National Capital

Planning Commission, 401 Ninth Street NW, Suite 500, Washington, DC 20004, (202) 482-7229.

SUPPLEMENTARY INFORMATION: The following persons have been appointed to serve as members of the Performance Review Board for the National Capital Planning Commission from October 1, 2021, to September 30, 2023: Paige Cottingham-Streater, Executive Director, Japan U.S. Friendship Commission; John Farrell, Executive Director, U.S. Arctic Research Commission; and Christopher J. Roscetti, Technical Director, Defense Nuclear Facilities Safety Board.

Dated: September 22, 2021.

Debra L. Dickson,

Director of Administration, National Capital Planning Commission.

[FR Doc. 2021-20961 Filed 9-27-21; 8:45 am]

BILLING CODE P

NATIONAL CREDIT UNION ADMINISTRATION

[NCUA 2021-0102]

RIN 3133-AF39

Request for Information and Comment on Digital Assets and Related Technologies

AGENCY: National Credit Union Administration (NCUA).

ACTION: Request for information and comment; extension of comment period.

SUMMARY: On July 27, 2021, the NCUA Board (Board) published in the **Federal Register** a document entitled "Request for Information and Comment on Digital Assets and Related Technologies" (RFI) and invited comments from interested parties regarding the current and potential impact of activities connected to digital assets and related technologies on federally insured credit unions (FICUs), related entities, and the NCUA. The Board noted that it was broadly interested in receiving input on commenters' views in this area, including current and potential uses in the credit union system, and the risks associated with them. To allow interested persons more time to consider and submit their comments, the Board has decided to extend the comment period for an additional 30 days.

DATES: The comment period for the RFI published July 27, 2021, at 86 FR 40213, is extended. Responses to the RFI must now be received on or before October 27, 2021.

ADDRESSES: You may submit comments by any one of the following methods

(Please send comments by one method only):

- **Federal eRulemaking Portal:** <http://www.regulations.gov>. Follow the instructions for submitting comments for NCUA Docket 2021-0102.

- **Fax:** (703) 518-6319. Include "[Your name] Comments on 'Request for Information and Comment on Digital Assets and Related Technologies.'"

- **Mail:** Address to Melane Conyers-Ausbrooks, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428.

- **Hand Delivery/Courier:** Same as mailing address.

Public Inspection: You may view all public comments on the Federal eRulemaking Portal at <http://www.regulations.gov> as submitted, except for those we cannot post for technical reasons. NCUA will not edit or remove any identifying or contact information from the public comments submitted. Due to social distancing measures in effect, the usual opportunity to inspect paper copies of comments in the NCUA's law library is not currently available. After social distancing measures are relaxed, visitors may make an appointment to review paper copies by calling (703) 518-6540 or emailing OGCMail@ncua.gov.

FOR FURTHER INFORMATION CONTACT:

Policy and Analysis: Scott Borger, Senior Financial Modeler and Todd Sims, National Payment Systems Officer, Office of National Examinations and Supervision, (703) 518-6640; **Legal:** Thomas Zells, Senior Staff Attorney, Office of General Counsel, (703) 518-6540; or by mail at National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314.

SUPPLEMENTARY INFORMATION: On July 27, 2021, the Board published in the **Federal Register** an RFI inviting comments from interested parties regarding the current and potential impact of activities connected to digital assets and related technologies on FICUs, related entities, and the NCUA.¹ The Board published the RFI with the aim of engaging the broad credit union industry and other stakeholders and learning how emerging DLT and DeFi applications are viewed and used. The RFI emphasized that the NCUA hopes to learn how the credit union community is using these emerging technologies and gain additional feedback as to the role the NCUA can play in safeguarding the financial system and consumers in the context of these emerging technologies. In order to continue to

¹ 86 FR 40213 (July 27, 2021).

EXHIBIT D

September 30, 2021

MEMORANDUM FOR CHIEF ACQUISITION OFFICERS
SENIOR PROCUREMENT EXECUTIVES
DEFENSE ACQUISITION REGULATIONS COUNCIL
CIVILIAN AGENCY ACQUISITION COUNCIL

FROM:

Lesley A. Field LESLEY FIELD Digitally signed by LESLEY FIELD
Date: 2021.09.30 16:48:42 -04'00'
Acting Administrator
for Federal Procurement Policy
Office of Management and Budget

John M. Tenaglia TENAGLIA.JOHN.M.115494592
6
Digitally signed by
TENAGLIA.JOHN.M.1154945926
Date: 2021.09.30 17:04:52 -04'00'
Principal Director, Defense Pricing and Contracting
Department of Defense

Jeffrey A. Koses DocuSigned by:
Jeffrey A. Koses
21BD80B9E8AC4A0...
Senior Procurement Executive &
Deputy Chief Acquisition Officer
Office of Acquisition Policy
General Services Administration

Karla Smith Jackson Karla Jackson Digitally signed by Karla Jackson
Date: 2021.09.30 16:53:01 -04'00'
Senior Procurement Executive
Assistant Administrator for Procurement
National Aeronautics and Space Administration

SUBJECT: Issuance of Agency Deviations to Implement Executive Order 14042

The purpose of this memorandum is to provide agencies that award contracts under the Federal Acquisition Regulation (FAR) with initial direction for the incorporation of a clause into their solicitations and contracts to implement guidance issued by the Safer Federal Workforce Task Force (Task Force) pursuant to [Executive Order 14042](#) ("the order").

Background

The order directs agencies to ensure that the parties that contract with the Federal Government provide adequate COVID-19 safeguards to their workers performing on or in connection with the contract to decrease the spread of COVID-19, reduce worker absence, lower labor costs, and improve the efficiency of contractors and subcontractors at sites where they are performing work.

On September 24, 2021, the Task Force issued guidance to implement the order, [COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors](#). The Task Force guidance requires:

- All covered contractor employees to be fully vaccinated for COVID-19 by December 8, 2021, except in limited circumstances where an employee is legally entitled to an accommodation;
- All individuals, including covered contractor employees and visitors, to comply with published Centers for Disease Control and Prevention guidance for masking and physical distancing at a covered contractor workplace, as discussed in the Task Force guidance; and
- Covered contractors to designate a person or persons to coordinate implementation of and compliance with the Task Force guidance and the required workplace safety protocols at covered contractor workplaces.

Section 3(a) of the order directs the Federal Acquisition Regulatory Council (FAR Council) to develop a contract clause requiring contractors and subcontractors at any tier to comply with all guidance for contractor or subcontractor workplace locations published by the Task Force and to provide initial policy direction to acquisition offices for use of the clause by recommending that agencies exercise their authority under FAR subpart 1.4., Deviations from the FAR.

Guidance

The FAR Council has developed the attached clause pursuant to section 3(a) of the order to support agencies in meeting the applicability requirements and deadlines set forth in the order. Contracting officers should follow the direction for use of the clause set forth in the deviations issued by their respective agencies.

Agencies are reminded of the following points as they develop and issue their deviations:

1. Applicability and effective dates. In accordance with section 5 of the order, agencies are required to include an implementing clause in solicitations and contracts for services, including construction, in accordance with the following dates specified in section 6 of the order:

- new contracts awarded on or after November 14 from solicitations issued before October 15 (this includes new orders awarded on or after November 14 from solicitations issued before October 15 under existing indefinite-delivery contracts);
- new solicitations issued on or after October 15 and contracts awarded pursuant to those solicitations (this includes new solicitations issued on or after October 15 for orders awarded pursuant to those solicitations under existing indefinite-delivery contracts);
- extensions or renewals of existing contracts and orders awarded on or after October 15, 2021; and
- options on existing contracts and orders exercised on or after October 15, 2021.

To maximize the goal of getting more people vaccinated and decrease the spread of COVID-19, the Task Force strongly encourages agencies to apply the requirements of its guidance broadly, consistent with applicable law, by including the clause in:

- contracts that have been or will be awarded prior to November 14 on solicitations issued before October 15; and
- contracts that are not covered or directly addressed by the order because the contract or subcontract is under the simplified acquisition threshold or is a contract or subcontract for the manufacturing of products.

2. Exclusions. The clause shall not be applied to:

- contracts and subcontracts with Indian Tribes under the Indian Self-Determination and Education Assistance Act (the exclusion would not apply to a procurement contract or subcontract under the FAR to an Indian-owned or tribally-owned business entity); or
- solicitations and contracts if performance is outside the United States or its outlying areas (the exclusion is limited to employees who are performing work only outside the U.S. or its outlying areas).

3. Timing of deviations. Agencies should act expeditiously to issue their deviations so that their contracting officers may begin to apply the clause on or before October 15, as explained above. Agencies should review, and update as necessary, any relevant guidance previously provided to contractors to ensure consistency with the deviated FAR text.

4. Civilian agency coordination of deviations. Civilian 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 (CAAC) required by FAR 1.404(a)(1). However, if a civilian agency intends to use clause text different than the deviated clause text provided, the agency must consult with the CAAC Chair, William Clark, who will consult with OMB and the Task Force to ensure consistency with Administration policy. Any such request must be emailed to william.clark@gsa.gov.

Once processed, agencies are requested to share the deviation widely among their workforces to ensure full awareness of, and compliance with, the order.

Civilian agencies should furnish a copy of their approved class deviations (including direction to the workforce, prescription for use of clause, and clause text) to the FAR Secretariat, General Services Administration, by emailing the deviation to GSARegSec@gsa.gov. Agencies must submit their class deviations no later than October 15, 2021.

5. Length of deviation. The FAR Council has opened a case (FAR Case 2021-021, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors) to make appropriate amendments in the FAR to reflect the requirements of the order. Agencies are encouraged to make their deviations effective until the FAR is amended or the deviation is otherwise rescinded by the agency.

Attachment

FAR Deviation Clause

Executive Order 14042

Ensuring Adequate COVID Safety Protocols for Federal Contractors

Baseline is FAC 2021-07, published in the Federal Register on August 11, 2021.

September 24, 2021

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Subpart 52.2—Text of Provisions and Clauses

[52.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors.

ENSURING ADEQUATE COVID-19 SAFETY PROTOCOLS FOR FEDERAL CONTRACTORS (OCT 2021) (DEVIATION)

(a) *Definition.* As used in this clause -

***United States or its outlying areas* means—**

- (1) The fifty States;**
- (2) The District of Columbia;**
- (3) The commonwealths of Puerto Rico and the Northern Mariana Islands;**
- (4) The territories of American Samoa, Guam, and the United States Virgin Islands;**
and
- (5) The minor outlying islands of Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Islands, Navassa Island, Palmyra Atoll, and Wake Atoll.**

(b) *Authority.* This clause implements Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, dated September 9, 2021 (published in the Federal Register on September 14, 2021, 86 FR 50985).

(c) *Compliance.* The Contractor shall comply with all guidance, including guidance conveyed through Frequently Asked Questions, as amended during the performance of this contract, for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (Task Force Guidance) at <https://www.saferfederalworkforce.gov/contractors/>

(d) *Subcontracts.* The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts at any tier that exceed the simplified acquisition threshold, as defined in Federal Acquisition Regulation 2.101 on the date of subcontract award, and are for services, including construction, performed in whole or in part within the United States or its outlying areas.

(End of clause)]

EXHIBIT

E

DECLARATION OF DR. JAYANTA BHATTACHARYA

I, Dr. Jayanta Bhattacharya, declare as follows:

1. I am an adult of sound mind and make this statement voluntarily, based upon my knowledge, education, and experience.

EXPERIENCE & CREDENTIALS

2. I am a former Professor of Medicine and current Professor of Health Policy at Stanford University School of Medicine and a research associate at the National Bureau of Economic Research. I am also Director of Stanford's Center for Demography and Economics of Health and Aging. I hold an M.D. and Ph.D. from Stanford University. I have published 154 scholarly articles in peer-reviewed journals in the fields of medicine, economics, health policy, epidemiology, statistics, law, and public health, among others. My research has been cited in the peer-reviewed scientific literature more than 11,800 times. My curriculum vitae is attached to this declaration as Exhibit A.
3. I have dedicated my professional career to the analysis of health policy, including infectious disease epidemiology and policy, and the safety and efficacy of medical interventions. I have studied extensively and commented publicly on the necessity and safety of vaccine requirements for those who have contracted and recovered from COVID-19 (individuals who have "natural immunity"). I am intimately familiar with the emergent scientific and medical literature on this topic and pertinent government policy responses to the issue both in the United States and abroad.
4. My assessment of vaccine immunity is based on studies related to the efficacy and safety of the one vaccine to receive full approval from the Food and Drug Administration (FDA) and the two vaccines for which the FDA has granted Emergency Use Authorization (EUA) for use in the United States. These include two mRNA-technology vaccines (manufactured

by Pfizer-BioNTech and Moderna) and an adenovirus-vector vaccine technology (manufactured by Johnson & Johnson). Of those, the Pfizer vaccine, also known as Comirnaty, has full FDA approval.

5. I have not and will not receive any financial or other compensation to prepare this Declaration or to testify in this case. Nor have I received compensation for preparing declarations or reports or for testifying in *any* other case related to the COVID-19 pandemic or any personal or research funding from any pharmaceutical company. My participation here has been motivated solely by my commitment to public health, just as my involvement in other cases has been.
6. I have been asked to provide my opinion on several matters:
 - Whether, based on the current medical and scientific knowledge, immunity after COVID recovery (sometimes referred to as natural immunity) is categorically inferior to vaccine immunity to prevent reinfection and transmission of the SARS-CoV-2 virus;
 - Whether, based on the existing medical and scientific understanding of SARS-CoV-2 transmission and recovery, there is any categorical distinction between natural immunity and vaccine immunity.
7. I can summarize my opinions briefly. The scientific evidence strongly indicates that the recovery from COVID disease provides strong and lasting protection against severe disease if reinfected, at least as good and likely better than the protection offered by the COVID vaccines. While the COVID vaccines are effective at protecting vaccinated individuals against severe disease, they provide only short-lasting and limited protection versus infection and disease transmission. Requiring vaccines for COVID recovered patients thus

provides only a limited benefit while exposing them to the risks associated with the vaccination.

OPINIONS

I. Natural Immunity Provides Durable Protection Against Reinfection and Against Severe Outcomes If Reinfected; COVID-19 Vaccines Provide Limited Protection Against Infection but Durable Protection Against Severe Outcomes if Infected.

8. Both vaccine-mediated immunity and natural immunity after recovery from COVID infection provide extensive protection against severe disease from subsequent SARS-CoV-2 infection. There is no reason to presume that vaccine immunity provides a higher level of protection than natural immunity. Since vaccines arrived one year after the disease, there is stronger evidence for long-lasting immunity from natural infection than from the vaccines.
9. Both types of immunity are based on the same basic immunological mechanism—stimulating the immune system to generate an antibody response. In clinical trials, the efficacy of those vaccines was initially tested by comparing the antibody levels in the blood of vaccinated individuals to those who had natural immunity. Later Phase III studies of the vaccines established 94%+ clinical efficacy of the mRNA vaccines against severe COVID illness.^{1,2} A Phase III trial showed 85% efficacy for the Johnson & Johnson adenovirus-

¹ Baden, L. R., El Sahly, H. M., Essink, B., Kotloff, K., Frey, S., Novak, R., Diemert, D., Spector, S. A., Rouphael, N., Creech, C. B., McGettigan, J., Khetan, S., Segall, N., Solis, J., Brosz, A., Fierro, C., Schwartz, H., Neuzil, K., Corey, L., Zaks, T. for the COVE Study Group (2021). Efficacy and Safety of the mRNA-1273 SARS-CoV-2 Vaccine. *The New England Journal of Medicine*, 384(5), 403-416. doi: 10.1056/NEJMoa2035389

² Polack, F. P., Thomas, S. J., Kitchin, N., Absalon, J., Gurtman, A., Lockhart, S., Perez, J. L., Pérez Marc, G., Moreira, E. D., Zerbini, C., Bailey, R., Swanson, K. A., Roychoudhury, S., Koury, K., Li, P., Kalina, W. V., Cooper, D., Frenck, R. W. Jr., Hammitt, L. L., Gruber, W. C. (2020). Safety and Efficacy of the BNT162b2 mRNA Covid-19 Vaccine. *The New England Journal of Medicine*, 387(27), 2603-2615. doi: 10.1056/NEJMoa2034577

based vaccine against severe disease.³

10. Immunologists have identified many immunological mechanisms of immune protection after recovery from infections. Studies have demonstrated prolonged immunity with respect to memory T and B cells,⁴ bone marrow plasma cells,⁵ spike-specific neutralizing antibodies,⁶ and IgG+ memory B cells⁷ following naturally acquired immunity.

³ Sadoff, J., Gray, G., Vandebosch, A., Cárdenas, V., Shukarev, G., Grinsztejn, B., Goepfert, P. A., Truysers, C., Fennema, H., Spiessens, B., Offergeld, K., Scheper, G., Taylor, K. L., Robb, M. L., Treanor, J., Barouch, D. H., Stoddard, J., Ryser, M. F., Marovich, M. A., Douoguih, M. for the ENSEMBLE Study Group. (2021). Safety and Efficacy of Single-Dose Ad26.COV2.S Vaccine against Covid-19. *The New England Journal of Medicine*, 384(23), 2187-2201. doi: 10.1056/NEJMoa2101544

⁴ Dan, J. M., Mateus, J., Kato, Y., Hastie, K. M., Yu, E. D., Faliti, C. E., Grifoni, A., Ramirez, S. I., Haupt, S., Frazier, A., Nakao, C., Rayaprolu, V., Rawlings, S. A., Peters, B., Krammer, F., Simon, V., Saphire, E. O., Smith, D. M., Weiskopf, D., Crotty, S. (2021). Immunological memory to SARS-CoV-2 assessed for up to 8 months after infection. *Science*, 371, 1-13. doi: 10.1126/science.abf4063 (finding that memory T and B cells were present up to eight months after infection, noting that “durable immunity against secondary COVID-19 disease is a possibility in most individuals”).

⁵ Turner, J. S., Kim, W., Kalaidina, E., Goss, C. W., Rauseo, A. M., Schmitz, A. J., Hansen, L., Haile, A., Klebert, M. K., Pusic, I., O’Halloran, J. A., Presti, R. M. & Ellebedy, A. H. (2021). SARS-CoV-2 infection induces long-lived bone marrow plasma cells in humans. *Nature*, 595(7867), 421-425. doi: 10.1038/s41586-021-03647-4 (study analyzing bone marrow plasma cells of recovered COVID-19 patients reported durable evidence of antibodies for at least 11 months after infection, describing “robust antigen-specific, long-lived humoral immune response in humans”); Callaway, E. (2021, May 26). Had COVID? You’ll probably make antibodies for a lifetime. *Nature*. <https://www.nature.com/articles/d41586-021-01442-9#:~:text=Many%20people%20who%20have%20been,recovered%20from%20COVID%2D191> (“The study provides evidence that immunity triggered by SARS-CoV-2 infection will be extraordinarily long-lasting” and “people who recover from mild COVID-19 have bone-marrow cells that can churn out antibodies for decades”).

⁶ Ripperger, T. J., Uhrlaub, J. E., Watanabe, M., Wong, R., Castaneda, Y., Pizzato, H. A., Thompson, M. R., Bradshaw, C., Weinkauf, C. C., Bime, C., Erickson, H. L., Knox, K., Bixby, B., Parthasarathy, S., Chaudhary, S., Natt, B., Cristan, E., El Aini, T., Rischard, F., Bhattacharya, D. (2020). Orthogonal SARS-CoV-2 serological assays enable surveillance of low-prevalence communities and reveal durable humor immunity. *Immunity*, 53(5), 925-933. doi: 10.1016/j.immuni.2020.10.004 (study finding that spike and neutralizing antibodies remained detectable 5-7 months after recovering from infection).

⁷ Cohen, K. W., Linderman, S. L., Moodie, Z., Czartoski, J., Lai, L., Mantus, G., Norwood, C., Nyhoff, L. E., Edara, V. V., Floyd, K., De Rosa, S. C., Ahmed, H., Whaley, R., Patel, S. N.,

11. Multiple extensive, peer-reviewed studies comparing natural and vaccine immunity have now been published. These studies overwhelmingly conclude that natural immunity provides equivalent or greater protection against severe infection than immunity generated by mRNA vaccines (Pfizer and Moderna).
12. Specifically, studies confirm the efficacy of natural immunity against reinfection of COVID-19⁸ and show that the vast majority of reinfections are less severe than first-time

Prigmore, B., Lemos, M. P., Davis, C. W., Furth, S., O’Keefe, J., McElrath, M. J. (2021). Longitudinal analysis shows durable and broad immune memory after SARS-CoV-2 infection with persisting antibody responses and memory B and T cells. *medRxiv*, Preprint. (study of 254 recovered COVID patients over 8 months “found a predominant broad-based immune memory response” and “sustained IgG+ memory B cell response, which bodes well for rapid antibody response upon virus re-exposure.” “Taken together, these results suggest that broad and effective immunity may persist long-term in recovered COVID-19 patients”).

⁸ Shrestha, N. K., Burke, P. C., Nowacki, A. S., Terpeluk, P. & Gordon, S. M. (2021). Necessity of COVID-19 vaccination in previously infected individuals. *medRxiv*, Preprint. doi: 10.1101/2021.06.01.21258176 (“not one of the 1359 previously infected subjects who remained unvaccinated had a SARS-CoV-2 infection over the duration of the study” and concluded that those with natural immunity are “unlikely to benefit from COVID-19 vaccination”); Perez, G., Banon, T., Gazit, S., Moshe, S. B., Wortsman, J., Grupel, D., Peretz, A., Tov, A. B., Chodick, G., Mizrahi-Reuveni, M., & Patalon, T. (2021). A 1 to 1000 SARS-CoV-2 reinfection proportion in members of a large healthcare provider in Israel: A preliminary report. *medRxiv*, Preprint. doi: 10.1101/2021.03.06.21253051 (Israeli study finding that approximately 1/1000 of participants were reinfected); Bertollini, R., Chemaitelly, H., Yassine, H. M., Al-Thani, M. H., Al-Khal, A., & Abu-Raddad, L. J. (2021). Associations of vaccination and of prior infection with positive PCR test results for SARS-CoV-2 in airline passengers arriving in Qatar. *JAMA*, 326(2), 185-188. doi: 10.1001/jama.2021.9970 (study of international airline passengers arriving in Qatar found no statistically significant difference in risk of reinfection between those who had been vaccinated and those who had previously been infected); Pilz, S., Chakeri, A., Ioannidis, J. P. A., Richter, L., Theiler-Schwetz, V., Trummer, C., Krause, R., Allerberger, F. (2021). SARS-CoV-2 re-infection risk in Austria. *European Journal of Clinical Investigation*, 51(4), 1-7. doi: 10.1111/eci.13520 (previous SARS-CoV-2 infection reduced the odds of re-infection by 91% compared to first infection in the remaining general population); Breathnach, A. S., Duncan, C. J. A., El Bouzidi, K., Hanrath, A. T., Payne, B. A. I., Randell, P. A., Habibi, M. S., Riley, P. A., Planche, T. D., Busby, J. S., Sudhanva, M., Pallett, S. J. C. & Kelleher, W. P. (2021). Prior COVID-19 protects against reinfection, even in the absence of detectable antibodies. *The Journal of Infection*, 83(2), 237-279. doi: 10.1016/j.jinf.2021.05.024 (0.86% of previously infected population in London became reinfected); Tarke, A., Sidney, J., Methot, N., Yu, E. D., Zhang, Y., Dan, J. M., Goodwin, B., Rubiro, P., Sutherland, A., Wang, E., Frazier, A., Ramirez, S. I., Rawlings, S. A., Smith, D. M., da Silva Antunes, R., Peters, B., Scheuermann, R. H., Weiskopf, D., Crotty, S., Grifoni, A. &

infections.⁹ For example, an Israeli study of approximately 6.4 million individuals demonstrated that natural immunity provided equivalent if not better protection than vaccine immunity in preventing COVID-19 infection, morbidity, and mortality.¹⁰ Of the 187,549 unvaccinated persons with natural immunity in the study, only 894 (0.48%) were reinfected; 38 (0.02%) were hospitalized, 16 (0.008%) were hospitalized with severe disease, and only one died, an individual over 80 years of age. Another study, analyzing

Sette, A. (2021). Impact of SARS-CoV-2 variants on the total CD4⁺ and CD8⁺ T cell reactivity in infected or vaccinated individuals, *Cell Reports Medicine* 2(7), 100355 (an examination of the comparative efficacy of T cell responses to existing variants from patients with natural immunity compared to those who received an mRNA vaccine found that the T cell responses of both recovered COVID patients and vaccines were effective at neutralizing mutations found in SARS-CoV-2 variants).

⁹ Abu-Raddad, L. J., Chemaitelly, H., Coyle, P., Malek, J. A., Ahmed, A. A., Mohamoud, Y. A., Younuskunju, S., Ayoub, H. H., Kanaani, Z. A., Kuwari, E. A., Butt, A. A., Jeremijenko, A., Kaleeckal, A. H., Latif, A. N., Shaik, R. M., Rahim, H. F. A., Nasrallah, G. K., Yassine, H. M., Al Kuwari, M. G., Al Romaihi, H. E., Al-Thani, M. H., Al Khal, A., Bertollini, R. (2021). SARS-CoV-2 antibody-positivity protects against reinfection for at least seven months with 95% efficacy. *EClinicalMedicine*, 35, 1-12. doi: 10.1016/j.eclim.2021.100861 (finding that of 129 reinfections from a cohort of 43,044, only one reinfection was severe, two were moderate, and none were critical or fatal); Hall, V. J., Foulkes, S., Charlett, A., Atti, A., Monk, E. J. M., Simmons, R., Wellington, E., Cole, M. J., Saei, A., Oguti, B., Munro, K., Wallace, S., Kirwan, P. D., Shrotri, M., Vusirikala, A., Rokadiya, S., Kall, M., Zambon, M., Ramsay, M., Hopkins, S. (2021). SARS-CoV-2 infection rates of antibody-positive compared with antibody-negative health-care workers in England: a large, multicentre, prospective cohort study. *The Lancet*, 397(10283), 1459-1469. doi: 10.1016/S0140-6736(21)00675-9 (finding “a 93% lower risk of COVID-19 symptomatic infection... [which] show[s] equal or higher protection from natural infection, both for symptomatic and asymptomatic infection”); Hanrath, A. T., Payne, B., A., I., & Duncan, C. J. A. (2021). Prior SARS-CoV-2 infection is associated with protection against symptomatic reinfection. *The Journal of Infection*, 82(4), e29-e30. doi: 10.1016/j.jinf.2020.12.023 (examined reinfection rates in a cohort of healthcare workers and found “no symptomatic reinfections” among those examined and that protection lasted for at least 6 months).

¹⁰ Goldberg, Y., Mandel, M., Woodbridge, Y., Fluss, R., Novikov, I., Yaari, R., Ziv, A., Freedman, L., & Huppert, A. (2021). Protection of previous SARS-CoV-2 infection is similar to that of BNT162b2 vaccine protection: A three-month nationwide experience from Israel. *medRxiv*, Preprint. doi: 10.1101/2021.04.20.21255670

data from Italy found that only 0.31% of COVID-recovered patients experienced a reinfection within a year after the initial infection.¹¹

13. Variants do not escape the immunity provided by prior infection with the pre-variant virus or vaccination.^{12, 13, 14} This is true of the delta variant as well. In a study of a large population of patients in Israel, *vaccinated* people who had not been previously infected had 13 times higher odds of experiencing a breakthrough infection with the Delta variant than patients who had recovered from COVID but were never vaccinated.¹⁵ They had 27 times higher odds of experiencing subsequent symptomatic COVID disease and 7 times higher odds of hospitalization. The design of this Israeli study was particularly strong – it tracked large cohorts of people over time from the time of vaccination or initial infection, and thus carefully distinguished the effect of time since initial exposure or vaccination in

¹¹ Vitale, J., Mumoli, N., Clerici, P., de Paschale, M., Evangelista, I., Cei, M. & Mazzone, A. (2021). Assessment of SARS-CoV-2 reinfection 1 year after primary infection in a population in Lombardy, Italy. *JAMA Internal Medicine*, 181(10), 1407-1409. doi: 10.1001/jamainternmed.2021.2959

¹² Tarke, A., Sidney, J., Methot, N., Yu, E. D., Zhang, Y., Dan, J. M., Goodwin, B., Rubiro, P., Sutherland, A., Wang, E., Frazier, A., Ramirez, S. I., Rawlings, S. A., Smith, D. M., da Silva Antunes, R., Peters, B., Scheuermann, R. H., Weiskopf, D., Crotty, S., Grifoni, A. & Sette, A. (2021). Impact of SARS-CoV-2 variants on the total CD4⁺ and CD8⁺ T cell reactivity in infected or vaccinated individuals, *Cell Reports Medicine* 2, 100355.

¹³ Wu, K., Werner, A. P., Moliva, J. I., Koch, M., Choi, A., Stewart-Jones, G. B. E., Bennett, H., Boyoglu-Barnum, S., Shi, W., Graham, B. S., Carfi, A., Corbett, K. S., Seder, R. A. & Edwards, D. K. (2021). mRNA-1273 vaccine induces neutralizing antibodies against spike mutants from global SARS-CoV-2 variants. *bioRxiv*, Preprint. doi: 10.1101/2021.01.25.427948

¹⁴ Redd, A. D., Nardin, A., Kared, H., Bloch, E. M., Pekosz, A., Laeyendecker, O., Abel, B., Fehlings, M., Quinn, T. C. & Tobian, A. A. (2021). CD8⁺ T-cell responses in COVID-19 convalescent individuals target conserved epitopes from multiple prominent SARS-CoV-2 circulating variants. *Open Forum Infectious Diseases* 8(7), ofab143.

¹⁵ Gazit, S., Shlezinger, R., Perez, G., Lotan, R., Peretz, A., Ben-Tov, A., Cohen, D., Muhsen, K., Chodick, G. & Patalon, T. (2021). Comparing SARS-CoV-2 natural immunity to vaccine-induced immunity: Reinfections versus breakthrough infections. *medRxiv*, Preprint. doi: 10.1101/2021.08.24.21262415

estimating its effect. This is important because both vaccine-mediated and infection-mediated protection against subsequent infection diminish with time.

14. In summary, the overwhelming conclusion of the pertinent scientific literature is that natural immunity is at least as effective against subsequent reinfection as even the most effective vaccines.

15. Furthermore, based on such evidence, many scientists have concluded that natural protection against severe disease after COVID recovery is likely to be long-lasting. A survey article published on June 30, 2021, in the *British Medical Journal* concluded, “[t]here is reason to think that immunity could last for several months or a couple of years, at least, given what we know about other viruses and what we have seen so far in terms of antibodies in patients with COVID-19 and in people who have been vaccinated.”¹⁶

16. These findings of highly durable natural immunity should not be surprising, as they hold for SARS-CoV-1 (the virus that causes SARS) and other respiratory viruses. According to a paper published in *Nature* in August 2020, 23 patients who had recovered from SARS-CoV-1 still possess CD4 and CD8 T cells 17 years after infection during the 2003 epidemic.¹⁷ A *Nature* paper from 2008 found that 32 people born in 1915 or earlier still retained some level of immunity against the 1918 flu strain—some 90 years later.¹⁸

¹⁶ Baraniuk, C. (2021). How long does covid-19 immunity last? *The British Medical Journal*, 373, 1-3. doi: 10.1136/bmj.n1605.

¹⁷ Le Bert, N., Tan, A. T., Kunasegaran, K., Tham, C. Y. L., Hafezi, M., Chia, A., Chng, M. H. Y., Lin, M., Tan, N., Linster, M., Chia, W. N., Chen, M. I. C., Wang, L. F., Ooi, E. E., Kalimuddin, S., Tambyah, P. A., Low, J. G. H., Tan, Y. J. & Bertoletti, A. (2020). SARS-CoV-2-specific T cell immunity in cases of COVID-19 and SARS, and uninfected control. *Nature*, 584, 457-462. doi: 10.1038/s41586-020-2550-z

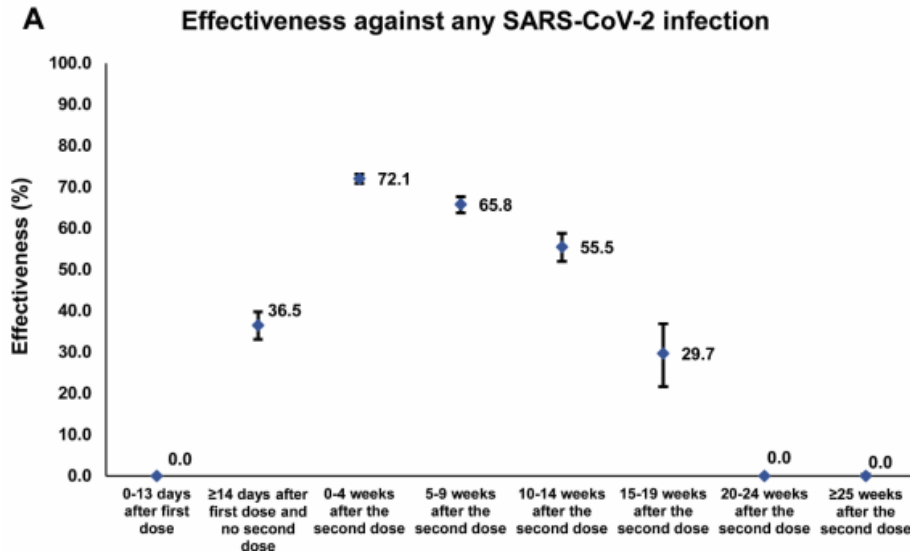
¹⁸ Yu, X., Tsibane, T., McGraw, P. A., House, F. S., Keefer, C. J., Hicar, M. D., Tumpey, T. M., Pappas, C., Perrone, L. A., Martinez, O., Stevens, J., Wilson, I. A., Aguilar, P. V., Altschuler,

17. In contrast to the concrete findings regarding the robust durability of natural immunity, it is yet unclear in the scientific literature how long-lasting vaccine-induced immunity will be. Notably, the researchers argue that they can best surmise the predicted durability of vaccine immunity by looking at the expected durability of natural immunity.¹⁹
18. A recent study from Qatar by Chemaitelly and colleagues, which tracked 927,321 individuals for six months after vaccination concluded that the Pfizer vaccine’s “induced protection against infection appears to wane rapidly after its peak right after the second dose, but it persists at a robust level against hospitalization and death for at least six months following the second dose.”²⁰
19. The key figures from the Qatari study are reproduced immediately below. Panel A shows that vaccine mediated protection against infection peaks at 72.1% zero to four weeks after the second dose, and then declines to 0%, 20 weeks after the second dose. According to this result, vaccines only protect against infection (and therefore disease spread) for a short period of time after the second dose of the mRNA vaccines.

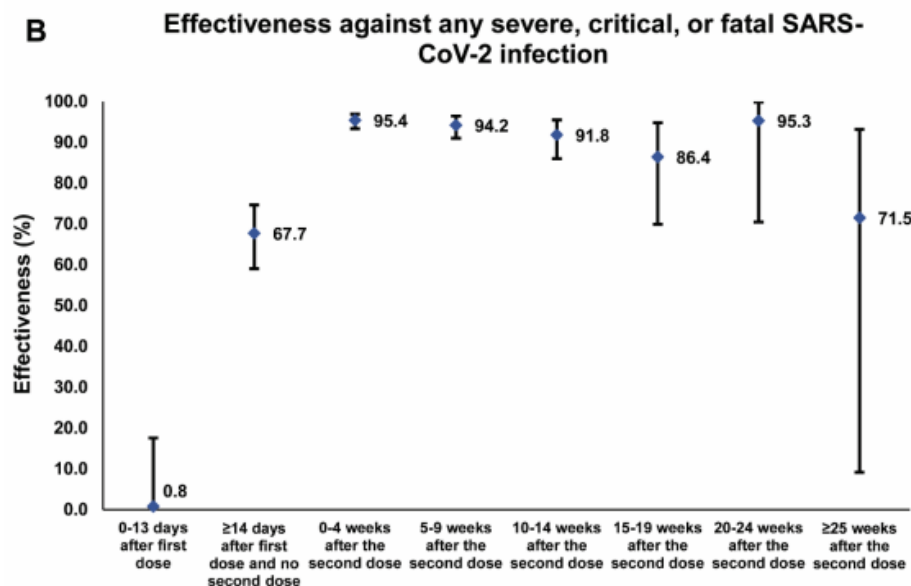
E. L., Basler, C. F., & Crowe Jr., J. E. (2008). Neutralizing antibodies derived from the B cells of 1918 influenza pandemic survivors. *Nature*, 455, 532-536. doi: 10.1038/nature07231

¹⁹ Ledford, H. (2021). Six months of COVID vaccines: What 1.7 billion doses have taught scientists. *Nature*, 594(7862), 164-167. doi: 10.1038/d41586-021-01505-x (study notes that “Six months is not much time to collect data on how durable vaccine responses will be. . . . In the meantime some researchers are looking to natural immunity as a guide.”).

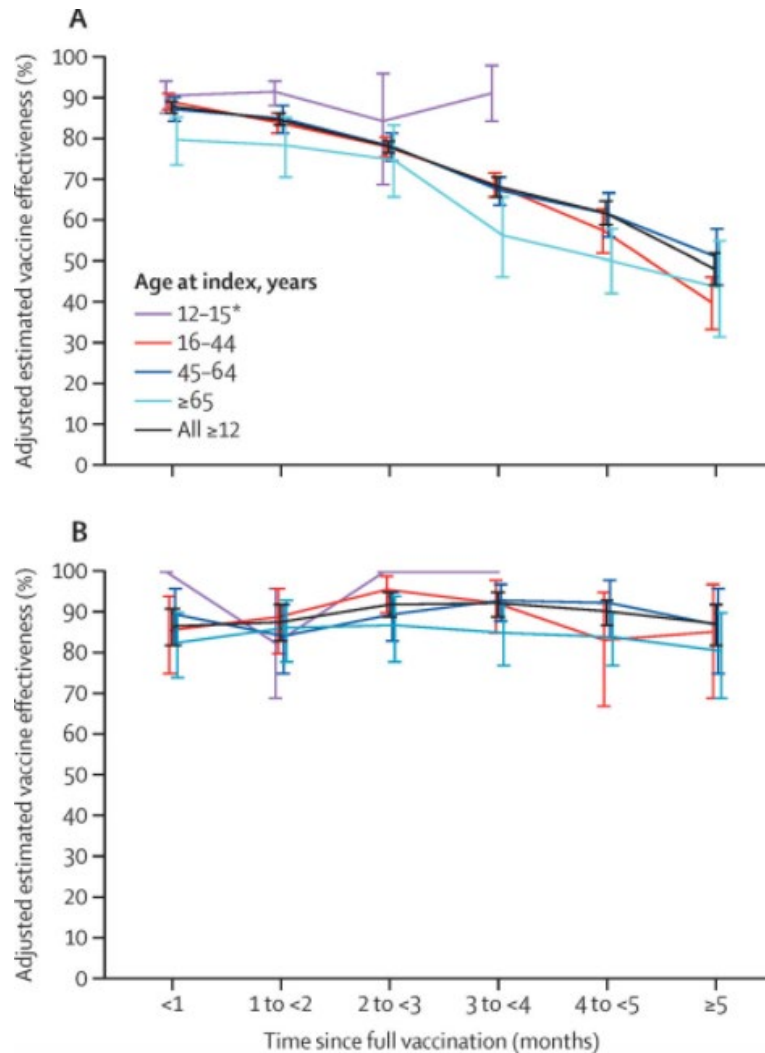
²⁰ Chemaitelly, H., Tang, P., Hasan, M. R., Al Mukdad, S., Yassine, H. M., Benslimane, F. M., Khatib, H. A. A., Coyle, P., Ayoub, H. H., Kanaani, Z. A., Kuwari, E. A., Jeremijenko, A., Kaleeckal, A. H., Latif, A. N., Shaik, R. M., Rahim, H. F. A., Nasrallah, G. K., Kuwari, M. G. A., Romaini, H. E. A., Abu-Raddad, L. J. (2021). Waning of BNT162b2 vaccine protection against SARS-CoV-2 infection in Qatar. *medRxiv*, Preprint. doi: 10.1101/2021.08.25.21262584



20. On the other hand, Panel B shows that protection versus severe disease is long lasting after vaccination—even though the person will no longer be fully protected against infection and, presumably, disease spread. At 20-24 weeks after the second dose, the vaccine remains 95.3% efficacious versus severe disease. While it appears to dip after 25 weeks to 71.5% efficacy, the confidence interval is so wide that it is consistent with no decrease whatsoever even after 25 weeks.



21. The Qatari study is no outlier. A large study in California tracked the infection rates for nearly 5 million patients vaccinated with two doses of the Pfizer mRNA vaccine. The study tracked both SARS-CoV-2 infections as well as COVID-19 related hospitalizations. The figure immediately below plots the trend in vaccine efficacy over time for different age groups in the population cohort. **Panel**

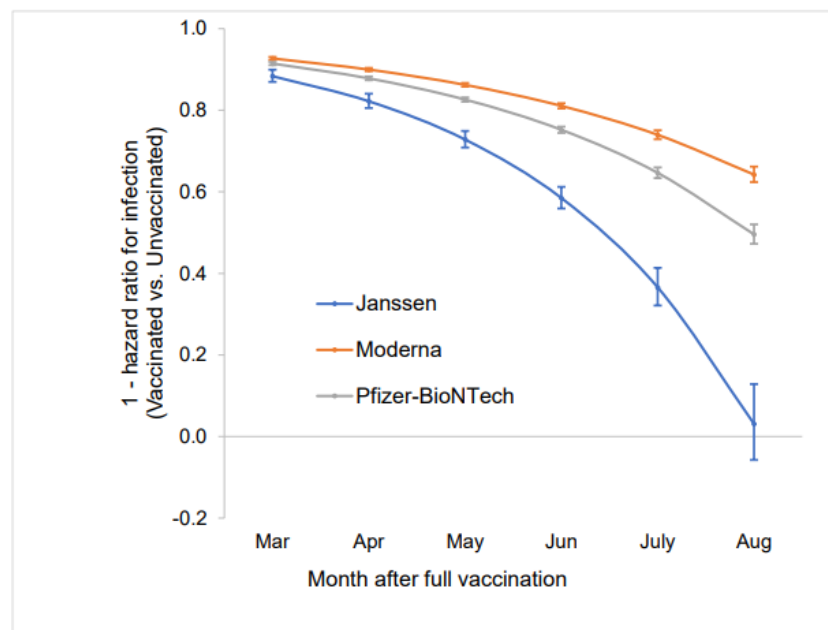


A on the right plots effectiveness versus SARS-CoV-2 *infections*.²¹ Though the drop in effectiveness is not as steep as in the Qatari study, there is nevertheless a sharp drop. While in the first month, vaccine effectiveness is near 90% for all age-groups, by month 5, it drops to nearly 50% for all the groups. By contrast, **Panel B** plots vaccine efficacy versus

²¹ Tartof SY, Slezak JM, Fischer H, Hong V, Ackerson BK, Ranasinghe ON, Frankland TB, Ogun OA, Zamparo JM, Gray S, Valluri SR, Pan K, Angulo FJ, Jodar L, McLaughlin JM. Effectiveness of mRNA BNT162b2 COVID-19 vaccine up to 6 months in a large integrated health system in the USA: a retrospective cohort study. *Lancet*. 2021 Oct 16;398(10309):1407-1416. doi: 10.1016/S0140-6736(21)02183-8. Epub 2021 Oct 4. PMID: 34619098; PMCID: PMC8489881.

hospitalizations. It remains high with no decline over time –near 90% throughout the period. The vaccine provides durable private protection versus severe disease, but declining protection versus infection (and hence transmission).

22. Another recent study tracked 620,000 vaccinated US veterans to measure breakthrough infections for the three vaccines in common use in the US.²² Like the other studies, the authors of the study found a sharp decline in vaccine effectiveness versus infection. Five months after vaccination, the effectiveness of the J&J vaccine dropped from ~90% to less than 10%; the Pfizer vaccine dropped from ~90% to ~50%; and the Moderna dropped from ~90% to ~65%. The figure on this page tracks the decline in effectiveness of the vaccines against infection over time documented in this study. This study corroborates yet another study that documented declining vaccine efficacy in the first three months after vaccination



²² Cohn BA, Cirillo PM, Murphy CC, et al. Breakthrough SARS-CoV-2 Infections in 620,000 U.S. Veterans, February 1, 2021 to August 13, 2021. medRxiv. October 14, 2021. <https://doi.org/10.1101/2021.10.13.21264966>;

against disease transmission in the era of the Delta variant.²³

23. Yet another study conducted in Wisconsin confirmed that vaccinated individuals can shed infectious SARS-CoV-2 viral particles.²⁴ The authors analyzed nasopharyngeal samples to check whether patients showed evidence of infectious viral particles. They found that vaccinated individuals were at least as likely as unvaccinated individuals to be shedding live virus. They concluded:

Combined with other studies these data indicate that vaccinated and unvaccinated individuals infected with the Delta variant might transmit infection. Importantly, we show that infectious SARS-CoV-2 is frequently found even in vaccinated persons.

24. Indeed, the CDC recognizes the importance of natural immunity in its updated science brief analyzing the difference in immunity from infection-induced and vaccine-induced immunity.²⁵ The CDC noted that “confirmed SARS-CoV-2 infection decreased risk of subsequent infection by 80–93% for at least 6–9 months,” with some studies showing “slightly higher protective effects (89-93%).” It also noted that “researchers have predicted that the immune response following infection would continue to provide at least 50% protection against reinfection for 1–2 years following initial infection with SARS-CoV-2 or vaccination. This would be similar to what is observed with seasonal coronaviruses.”

²³ Eyre, D. W., Taylor, D., Purver, M., Chapman, D., Fowler, T., Pouwels, K. B., Walker, A. S. & Peto, T. E. A. (2021). The impact of SARS-CoV-2 vaccination on Alpha & Delta variant transmission. *medRxiv*, Preprint. doi: 10.1101/2021.09.28.21264260

²⁴ Riemersma, K. K., Grogan, B. E., Kita-Yarbro, A., Halfmann, P. J., Segaloff, H. E., Kocharian, A., Florek, K. R., Westergaard, R., Bateman, A., Jeppson, G. E., Kawaoka, Y., O'Connor, D. H., Friedrich, T. C., & Grande, K. M. (2021). Shedding of infectious SARS-CoV-2 despite vaccination. *medRxiv*, Preprint. doi: 10.1101/2021.07.31.21261387

²⁵ CDC, Science Brief: SARS-CoV-2 Infection-Induced and Vaccine-Induced Immunity (updated Oct. 29, 2021), https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/vaccine-induced-immunity.html#anchor_1635539757101

25. The CDC science brief does claim that vaccine-induced immunity is stronger than immunity from natural infection.²⁶ The study the CDC relies on to support this claim is not determinative for several reasons.²⁷ First, its result is contrary to the weight of other evidence, as set forth above. Second, the study compared hospitalization of those infected—and had natural immunity—90-225 days after their infection while against those who had completed their RNA vaccine regime 45-213 days before reinfection. Because immunity—regardless of how gained—waned over time, the failure to adequately compare like periods means that the study’s conclusions are biased in favor of vaccine-induced immunity. Indeed, the study admits this weakness. Third, the study design itself does not permit it to address the critical question of interest – whether COVID-recovery without vaccination or vaccination without COVID-recovery provides stronger protection against COVID-related hospitalization. The study analyzes only patients who are already in the hospital. To obtain an accurate answer to the question of interest, it would need to include and analyze patients before entering the hospital. As it is, the study implicitly and incorrectly assumes that the set of hospitalized patients with COVID-like symptoms is representative of the population at large, which is untrue.

26. In summary, the evidence to date strongly suggests that while vaccines—like natural immunity—protect against severe disease, they, unlike natural immunity, provide only short-lasting protection against subsequent infection and disease spread. In short, there is

²⁶ *Id.*

²⁷ Bozio CH, Grannis SJ, Naleway AL, et al. Laboratory-Confirmed COVID-19 Among Adults Hospitalized with COVID-19–Like Illness with Infection-Induced or mRNA Vaccine-Induced SARS-CoV-2 Immunity — Nine States, January–September 2021. *MMWR Morb Mortal Wkly Rep.* ePub: 29 October 2021.

no medical or scientific reason to believe that vaccine immunity will prove longer-lasting immunity than natural immunity, much less more durable immunity.

II. The CDC's Recommendation for Vaccination of Recovered COVID Patients Applies with Equal Force to Those Who Have Been Previously Vaccinated, Whose Protection Against Infection Wanes Within a Few Months After Vaccination.

27. The CDC, in the Frequently Asked Questions (FAQ) section of its website encouraging vaccination, provides the following advice to previously recovered patients:²⁸

Yes, you should be vaccinated regardless of whether you already had COVID-19. That's because experts do not yet know how long you are protected from getting sick again after recovering from COVID-19. Even if you have already recovered from COVID-19, it is possible—although rare—that you could be infected with the virus that causes COVID-19 again. Studies have shown that vaccination provides a strong boost in protection in people who have recovered from COVID-19. Learn more about why getting vaccinated is a safer way to build protection than getting infected.

28. The text of this advice by the CDC does not address any of the scientific evidence included here about the lack of necessity for recovered COVID patients to be vaccinated. While it is true that I do not know how long natural immunity after recovery lasts, the immunological evidence to date suggests that protection against disease will last for years.²⁹ Uncertainty over the longevity of immunity after recovery is a specious reason for not exempting COVID-recovered patients from vaccination mandates, since the same can be said about vaccine mediated immunity. I do not know how long it will last either, and there is no reason to believe it provides longer lasting or more complete immunity than recovery from COVID.

29. Similarly, just as reinfections are possible though rare after COVID recovery, breakthrough infections are possible after vaccination, as the CDC's team investigating vaccine

²⁸ Centers for Disease Control and Prevention. (2021, September 28). Frequently asked questions about COVID-19 vaccination. Retrieved October 1, 2019 from <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/faq.html>

²⁹ Patel, N. V. (2021, January 6). *Covid-19 immunity likely lasts for years*. MIT Technology Review. <https://www.technologyreview.com/2021/01/06/1015822/covid-19-immunity-likely-lasts-for-years/>

breakthrough infections itself recognizes.³⁰ On the same CDC FAQ webpage I cite above,³¹ the CDC writes about vaccine-mediated immunity, “We don’t know how long protection lasts for those who are vaccinated.”

30. The CDC’s main concern in this FAQ seems to be to help people understand that it is safer to attain immunity against SARS-CoV-2 infection via vaccination rather than via infection. This is a point not in dispute. Rather, the question is whether someone who *already* has been infected and recovered will benefit on net from the additional protection provided by vaccination. On this point, the CDC’s statement in the FAQ is irrelevant. Here again, the possibility of reinfection does not alter the conclusion that, especially for those who have already recovered from COVID, accommodations can be allowed without threatening public safety.

³⁰ CDC COVID-19 Vaccine Breakthrough Case Investigations Team. (2021). COVID-19 Vaccine Breakthrough Infections Reported to CDC — United States, January 1–April 30, 2021. *Morbidity and Mortality Weekly Report (MMWR)*, 70(21), 792-793. doi: <http://dx.doi.org/10.15585/mmwr.mm7021e3>

³¹ Centers for Disease Control and Prevention. (2021, September 28). Frequently asked questions about COVID-19 vaccination. Retrieved October 1, 2021 from <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/faq.html>

III. Conclusion

31. Based on the scientific evidence to date, those who have recovered from a SARS-CoV-2 infection possess immunity as robust and durable (or more) as that acquired through vaccination. The existing clinical literature overwhelmingly indicates that the protection afforded to the individual and community from natural immunity is as effective and durable as the efficacy levels of the most effective vaccines to date.
32. Based on my analysis of the existing medical and scientific literature, any policy regarding vaccination that does not recognize natural immunity is irrational, arbitrary, and counterproductive to community health.³²
33. Indeed, now that every American adult, teenager, and child five and above has free access to the vaccines, the case for a vaccine mandate is weaker than it once was. Since the successful vaccination campaign already protects the vulnerable population, the unvaccinated—especially recovered COVID patients—pose a vanishingly small threat to the vaccinated. They are protected by an effective vaccine that dramatically reduces the likelihood of hospitalization or death after infections to near zero. At the same time, natural immunity provides benefits that are at least as strong and may well be stronger than those from vaccines.
34. In conclusion, the emerging evidence from the medical literature finds that COVID-recovered patients have robust and long lasting immunity against SARS-CoV-2 reinfection and that this immunity against infection is better than vaccinated patients who have never had COVID.

³² Bhattacharya, J., Gupta, S. & Kulldorff, M. (2021, June 4). *The beauty of vaccines and natural immunity*. Smerconish Newsletter. <https://www.smerconish.com/exclusive-content/the-beauty-of-vaccines-and-natural-immunity>

35. I declare under penalty of perjury under the laws of the United States of America that, to the best of my knowledge, the foregoing is true and correct.

Respectfully submitted,

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke at the end.

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EXHIBIT

A

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Health economics, health policy, and outcomes research

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Stanford University	A.M., A.B.	1990
Stanford University School of Medicine	M.D.	1997
Stanford University Department of Economics	Ph.D.	2000

B. EMPLOYMENT HISTORY:

2001 – present	Professor (Assistant to Full), Stanford University School of Medicine, Department of Economics (by courtesy)
2013 – present	Senior Fellow, Stanford Institute for Economic Policy Research
2007 – present	Research Associate, Sphere Institute / Acumen LLC
2002 – present	FRF to Research Associate, National Bureau of Economic Research
2014 – 2021	Senior Fellow Stanford Freeman Spogli Institute
2001 – 2020	Professor (Assistant to Full) Department of Health Research and Policy (by courtesy)
2006 – 2008	Research Fellow, Hoover Institution
1998 – 2001	Economist (Associate to Full), RAND Corporation
1998 – 2001	Visiting Assistant Professor, UCLA Department of Economics

C. SCHOLARLY PUBLICATIONS:PEER-REVIEWED ARTICLES (154 total)

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40. **Bhattacharya J** and Makridis C “Facts – not fear – will stop the pandemic” [The Hill](#), Dec. 3, 2020.
41. **Bhattacharya J** and Gupta S. “How to End the Lockdowns Next Month” [Wall Street Journal](#), Dec. 17, 2020.
42. Agarwal S and **Bhattacharya J**. “Majority Indians have natural immunity. Vaccinating entire population can cause great harm” [The Print](#). January 11, 2021
43. Nicholson T and **Bhattacharya J**. “Appropriate Use of PCR Needed for a Focused Response to the Pandemic” [The Hill](#). January 29, 2021.
44. **Bhattacharya J** and Kulldorff M. “Facebook is Silencing Debate on Lockdown.” [Spiked Online](#). February 15, 2021.
45. **Bhattacharya J** and Kulldorff M. “California’s Failed Response to Covid” [Eureka](#). March 12, 2021
46. Kulldorff M and **Bhattacharya J**. “One of the Lockdowns’ Greatest Casualties Could be Science.” [The Federalist](#). March 18, 2021
47. **Bhattacharya J** and Kulldorff M. “Vaccine Passports Prolong Lockdowns” [Wall Street Journal](#). April 6, 2021.

JAY BHATTACHARYA, M.D., Ph.D.

September 2021

48. **Bhattacharya J.** "Masks for Children, Muzzles for Covid-19 News." [Wall Street Journal](#). April 13, 2021.
49. **Bhattacharya J** and Kulldorff M. "Lockdown proponents can't escape the blame for the biggest public health fiasco in history" [The Telegraph](#). April 24, 2021
50. **Bhattacharya J** and Licon JA. "The High Costs of Lockdowns: An Interview with Dr. Bhattacharya" [Eudaimonia Junction](#). April 26, 2021.
51. **Bhattacharya J.** "Editor's Note: Public Health Loses its Innocence." [Collateral Global](#). May 4, 2021.
52. **Bhattacharya J.** "How the West Can Help India" [Spectator](#). May 6, 2021
53. **Bhattacharya J** and Giubilini A. "Immunity Passports: A Debate Between Jay Bhattacharya and Alberto Giubilini" [Lockdown Sceptics](#). May 7, 2021.
54. **Bhattacharya J.** "Editor's Note: Children Are A Casualty of Lockdown." [Collateral Global](#). May 11, 2021.
55. Kopinska JA, Atella V, **Bhattacharya J**, Miller G (2021) The Changing Relationship between Bodyweight and Longevity in High- and Low- Income Countries. National Bureau of Economic Research Working Paper #28813. <https://www.nber.org/papers/w28813>
56. Toubat O, Berg AH, Sobhani K, Mulligan K, Hori AM, **Bhattacharya J**, Sood N (2021) Manufacturer Signal-to-Cutoff Threshold Underestimates Cumulative Incidence of SARS-CoV-2 Infection: Evidence from the Los Angeles Firefighters Study. *medRxiv*. doi: <https://doi.org/10.1101/2021.04.20.21255829>.
57. Bendavid E, Oh C, **Bhattacharya J**, Ioannidis JPA. Response to Letters Re: 'Assessing mandatory stay- At- Home and business closure effects on the spread of COVID- 19'. *European Journal of Clinical Investigation*. 2021 Mar:e13553. DOI: 10.1111/eci.13553.
58. **Bhattacharya J.** "What Does Lockdown and Focused Protection Mean in Nursing Homes?" [Collateral Global](#). May 18, 2021.
59. **Bhattacharya J.** "Cancer and Lockdown" [Collateral Global](#). May 25, 2021.
60. Kulldorff M and **Bhattacharya J** "It's mad that 'herd immunity' was ever a taboo phrase" [The Telegraph](#), May 27, 2021
61. **Bhattacharya J**, Gupta S, Kulldorff M, "The Beauty of Vaccines and Natural Immunity" [Smerconish](#). June 4, 2021
62. **Bhattacharya J** "Stanford professor challenges SJ Merc's "Coronavirus Lessons Learned" assertions" [Opportunity Now](#). June 4, 2021
63. **Bhattacharya J** "On the Catastrophic Misapplication of the Precautionary Principle" [Collateral Global](#). June 14, 2021
64. Kulldorff M and **Bhattacharya J** "The Ill-Advised Push to Vaccinate the Young" [The Hill](#), June 17, 2021
65. Sood N and **Bhattacharya J** "Mandatory Masking of School Children is a Bad Idea" [Orange County Register](#), July 13, 2021.
66. Green T and Bhattacharya J "Lockdowns are Killers in the Global South" [UnHerd](#). July 22, 2021.
67. Kulldorff M and **Bhattacharya J** "The Smear Campaign Against the Great Barrington Declaration" [Spiked](#). Aug. 2, 2021

JAY BHATTACHARYA, M.D., Ph.D.

September 2021

68. **Bhattacharya J** and Boudreaux D “Eradication of COVID is a Dangerous and Expensive Fantasy” [Wall Street Journal](#). Aug. 4, 2021

BOOKS AND REPORTS (8 total)

1. Yoshikawa A, **Bhattacharya J**, Vogt WB eds. Health Economics of Japan: Patients, Doctors, and Hospitals Under a Universal Health Insurance System, Tokyo: University of Tokyo Press, (1996).
2. Goldman DP, Hurd M, Shekelle PG, Newberry SJ, Panis CWA, Shang B, **Bhattacharya J**, Joyce GF, Lakdawalla D. Health Status and Medical Treatment of the Future Elderly: Final Report, TR-169-CMS, Santa Monica, CA: RAND (2004).
3. **Bhattacharya J**, Currie J, Haider SJ, Variyam J. Evaluating the Impact of School Nutrition Programs: Final Report. E-FAN-04-008, Washington D.C.: Economic Research Service, USDA (2004).
4. **Bhattacharya J**, Hyde T, Tu P. Health Economics, London: Palgrave-MacMillan, (2013).
5. MaCurdy T, **Bhattacharya J**, Perlroth D, Shafrin J, Au-Yeung A, Bashour H, Chicklis C, Cronen K, Lipton B, Saneinejad S, Shrestha E, Zaidi S. Geographic Variation in Spending, Utilization, and Quality: Medicare and Medicaid Beneficiaries. Acumen Report to the Institute of Medicine Committee Study of Geographic Variation in Health Care Spending and Promotion of High-Value Health Care, Washington, DC: Institute of Medicine (2013)
6. MaCurdy T, **Bhattacharya J**, Shafrin J, Chicklis C, Cronen K, Friley J, Lipton B, Rogers D, Zaidi S. IOM Study of Geographic Variation: Growth Analysis. Acumen Report to the Institute of Medicine Committee Study of Geographic Variation in Health Care Spending and Promotion of High-Value Health Care, Washington, DC: Institute of Medicine (2013)
7. **Bhattacharya J**, Chandra A, Chernew M, Goldman D, Jena A, Lakdawalla D, Malani A, Philipson T. Best of Both Worlds: Uniting Universal Coverage and Personal Choice in Health Care, American Enterprise Institute (AEI) White Paper, Washington DC: AEI Press (2013)
8. **Bhattacharya J**, Vail D, Moore D, Vogt W, Choradia N, Do R, Erickson K, Feinberg L, Isara F, Lin E, Narayanan V, Vaikath M, MaCurdy T. Medicare Current State and Future Trends Environment Scan. Center for Medicare and Medicaid Services (CMS) White Paper (2019)

BOOK CHAPTERS (15 total)

JAY BHATTACHARYA, M.D., Ph.D.

September 2021

1. **Bhattacharya J**, Garber AM, MaCurdy T. "Cause-Specific Mortality Among Medicare Enrollees," in Inquires in the Economics of Aging, D Wise (ed.), Chicago, IL: University of Chicago Press. (1997).
2. MaCurdy T, Nechyba T, **Bhattacharya J**. "Ch. 2: An Economic Model of the Fiscal Impacts of Immigration," The Immigration Debate: Studies on the Economic, Demographic, and Fiscal Effects of Immigration, J Smith (ed.), National Academy of Sciences Commission on Behavioral and Social Sciences and Education: Washington D.C., (1998).
3. **Bhattacharya J**, Currie J. "Youths and Nutritional Risk: Malnourished or Misnourished?" in Risky Behavior Among Youths, J Gruber (ed.), (2001).
4. Yoshikawa A. and **Bhattacharya J**. "Japanese Health Care" in World Health Systems: Challenges and Perspectives, Bruce Fried and Laura M. Gaydos (eds.), Chicago, IL: Health Administration Press (2002).
5. **Bhattacharya J**, Cutler D, Goldman DP, Hurd MD, Joyce GF, Lakdawalla DN, Panis CWA, and Shang B, "Disability Forecasts and Future Medicare Costs" Frontiers in Health Policy Research, Vol. 6, Alan Garber and David Cutler (eds.) Boston, MA: MIT Press (2003).
6. **Bhattacharya J**, Choudhry K, and Lakdawalla D. (2007) "Chronic Disease and Trends in Severe Disability in Working Age Populations" Proceedings from the Institute of Medicine workshop, 'Disability in America: An Update,' Institute of Medicine: Washington, D.C.
7. **Bhattacharya J**, Garber AM, MaCurdy T. "Trends in Prescription Drug Use by the Disabled Elderly" in Developments in the Economics of Aging, D. Wise (ed), Chicago, IL, University of Chicago Press (2009).
8. **Bhattacharya J** and Richmond P "On Work and Health Among the American Poor" in Pathways to Self-Sufficiency: Getting Ahead in an Era Beyond Welfare Reform John Karl Scholz and Carolyn Heinrich (eds), New York, NY, Russell Sage Foundation (2009).
9. **Bhattacharya J**, Garber A, MaCurdy T "The Narrowing Dispersion of Medicare Expenditures 1997-2005" in Research Findings in the Economics of Aging, D. Wise (ed.), Chicago, IL, University of Chicago Press (2010)
10. **Bhattacharya J**, Bundorf MK, Pace N, and Sood N "Does Health Insurance Make You Fat?" in Economic Aspects of Obesity Michael Grossman and Naci Mocan (eds.), Chicago, IL, University of Chicago Press (2010)
11. **Bhattacharya J**, Garber A, Miller M, and Perlroth D "The Value of Progress against Cancer in the Elderly" Investigations in the Economics of Aging, David Wise (ed), Chicago, IL, University of Chicago Press (2012)
12. Yoshikawa A. and **Bhattacharya J**. "Japanese Health Care" in World Health Systems: Challenges and Perspectives, 2nd edition, Bruce Fried and Laura M. Gaydos (eds.), Chicago, IL: Health Administration Press (2012).
13. Hanson, J., Chandra, A., Moss, E., **Bhattacharya, J**. Wolfe, B., Pollak, S.D.. Brain Development and Poverty: Preliminary Findings. In Biological Consequences of

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Socioeconomic Inequalities. B. Wolfe, T. Seeman, and W. Evans (Eds). NY: Sage. (2012)

14. **Bhattacharya J** "The Diffusion of New Medical Technologies: The Case of Drug-Eluting Stents (A Discussion of Chandra, Malenka, and Skinner)" In Explorations in the Economics of Aging, David Wise (ed.), Chicago, IL, University of Chicago Press (2014).
15. MaCurdy T and **Bhattacharya J** "Challenges in Controlling Medicare Spending: Treating Highly Complex Patients" in Insights in the Economics of Aging, David Wise (ed.) Chicago, IL, University of Chicago Press (2015).

ABSTRACTS (3)

1. Su CK and **Bhattacharya J**. Longitudinal Hospitalization Costs and Outcomes in the Treatment of the Medicare Breast Cancer Patient. *International Journal of Radiation Oncology Biology Physics* (1996); 36(S1): 282. [abstract]
2. Nguyen C, Hernandez-Boussard T., Davies S, **Bhattacharya J**, Khosla R, Curtin C. *Cleft Palate Surgery: Variables of Quality and Patient Safety*. Presented at the 69th Annual American Cleft-Palate Craniofacial Association (2012). [abstract]
3. Patel MI, Ramirez D, Agajanian R, Bhattacharya J, Milstein A, Bundorf MK. "The effect of a lay health worker-led symptom assessment intervention for patients on patient-reported outcomes, healthcare use, and total costs." *Journal of Clinical Oncology* 36(15 Suppl):6502 [abstract]

D. PUBLIC AND PROFESSIONAL SERVICE:

JOURNAL EDITING

Journal of Human Capital, Associate Editor (2015-present)

American Journal of Managed Care, Guest Editor (2016)

Journal of Human Resources, Associate Editor (2011-13)

Forum for Health Economics & Policy, Editorial Board Member (2001-2012)

Economics Bulletin, Associate Editor (2004-2009)

SERVICE ON SCIENTIFIC REVIEW AND ADVISORY COMMITTEES (Selected)

- Standing member of the Health Services Organization and Delivery (HSOD) NIH review panel, 2012-2016
- NIH reviewer (various panels, too numerous to list) 2003-present
- NIH Review Panel Chair: 2018 (P01 review), 2020 (DP1 review).
- Invited Reviewer for the European Research Council, ERC Advanced Grant 2015 RFP
- NIH Stage 2 Challenge Grant Review Panel, July 2009
- Appointed a member of an Institute of Medicine (IOM) panel on the regulation of work hours by resident physicians, 2007-8.
- Standing member of the NIH Social Science and Population Studies Review Panel, Fall 2004-Fall 2008

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- Invited Reviewer for National Academy of Sciences report on Food Insecurity and Hunger, November 2005.
- Invited Reviewer for the National Academy of Sciences report on the Nutrition Data Infrastructure, December 2004
- Invited Reviewer for the National Institute on Health (NIH) Health Services Organization and Delivery Review Panel, June 2004, Alexandria, VA.
- Invited Reviewer for the Food Assistance and Nutrition Research Program US Department of Agriculture Economic Research Service Research Proposal Review Panel, June 2004, Stanford, CA.
- Invited Reviewer for the National Institute on Health (NIH) Social Science and Population Studies Review Panel, February 2004, Alexandria, VA.
- Invited Reviewer for the National Institute on Health (NIH) Social Sciences and Population Studies Review Panel, November 2003, Bethesda, MD.
- Invited Reviewer for the National Institute on Health (NIH) Social Science, Nursing, Epidemiology, and Methods (3) Review Panel, June 2003, Bethesda, MD.
- Invited Reviewer for the Food Assistance and Nutrition Research Program US Department of Agriculture Economic Research Service Research Proposal Review Panel, August 2002.
- Research Advisory Panel on Canadian Disability Measurement, Canadian Human Resources Development Applied Research Branch, June 2001 in Ottawa, Canada.
- Invited Reviewer for the National Institute of Occupational Safety and Health R18 Demonstration Project Grants Review panel in July 2000, Washington D.C.
- Research Advisory Panel on Japanese Health Policy Research. May 1997 at the Center for Global Partnership, New York, NY.

TESTIMONY TO GOVERNMENTAL PANELS AND AGENCIES (9)

- US Senate Dec. 2020 hearing of the Subcommittee on Homeland Security and Governmental Affairs. Testimony provided on COVID-19 mortality risk, collateral harms from lockdown policies, and the incentives of private corporations and the government to invest in research on low-cost treatments for COVID-19 disease
- “Roundtable on Safe Reopening of Florida” led by Florida Gov. Ron DeSantis. September 2020.
- “Evaluation of the Safety and Efficacy of COVID-19 Vaccine Candidates” July 2020 hearing of the House Oversight Briefing to the Economic and Consumer Policy Subcommittee.
- US Senate May 2020 virtual roundtable. Safely Restarting Youth Baseball and Softball Leagues, invited testimony
- “Population Aging and Financing Long Term Care in Japan” March 2013 seminar at the Japanese Ministry of Health.
- “Implementing the ACA in California” March 2011 testimony to California Legislature Select Committee on Health Care Costs.
- “Designing an Optimal Data Infrastructure for Nutrition Research” June 2004 testimony to the National Academy of Sciences commission on “Enhancing the Data Infrastructure

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in Support of Food and Nutrition Programs, Research, and Decision Making,”
Washington D.C.

- “Measuring the Effect of Overtime Reform” October 1998 testimony to the California Assembly Select Committee on the Middle Class, Los Angeles, CA.
- “Switching to Weekly Overtime in California.” April 1997 testimony to the California Industrial Welfare Commission, Los Angeles, CA.

REFeree FOR RESEARCH JOURNALS

American Economic Review; American Journal of Health Promotion; American Journal of Managed Care; Education Next; Health Economics Letters; Health Services Research; Health Services and Outcomes Research Methodology; Industrial and Labor Relations Review; Journal of Agricultural Economics; Journal of the American Medical Association; Journal of Health Economics; Journal of Health Policy, Politics, and Law; Journal of Human Resources; Journal of Political Economy; Labour Economics; Medical Care; Medical Decision Making; Review of Economics and Statistics; Scandinavian Journal of Economics; Social Science and Medicine; Forum for Health Economics and Policy; Pediatrics; British Medical Journal

Trainee	Current Position
Peter Groeneveld, MD, MS	Associate Professor of Medicine, University of Pennsylvania
Jessica Haberer, MD, MS	Assistant Professor of Medicine, Harvard Medical School
Melinda Henne, MD, MS	Director of Health Services Research, Bethesda Naval Hospital
Byung-Kwang Yoo, MD, PhD	Associate Professor, Public Health, UC Davis
Hau Liu, MD, MS, MBA	Chief Medical Officer at Shanghai United Family Hospital
Eran Bendavid, MD, MS	Assistant Professor, General Medicine Disciplines, Stanford University
Kaleb Michaud, MS, PhD	Associate Professor of Medicine, Rheumatology and Immunology, University of Nebraska Medical Center
Kanaka Shetty, MD	Natural Scientist, RAND Corporation
Christine Pal Chee, PhD	Associate Director of the Health Economics Resource Center, Palo Alto VA
Matthew Miller, MD	VP Clinical Strategy and Head of Innovation, Landmark Health
Vincent Liu, MD	Research Scientist, Kaiser Permanente Northern California Division of Research
Daniella Perlroth, MD	Chief Data Scientist, Lyra Health
Crystal Smith-Spangler, MD	Internist, Palo Alto Medical Foundation
Barrett Levesque, MD MS	Assistant Professor of Clinical Medicine, UC San Diego Health System
Torrey Simons, MD	Clinical Instructor, Department of Medicine, Stanford University
Nayer Khazeni, MD	Assistant Professor of Medicine (Pulmonary and Critical Care Medicine), Stanford University
Monica Bhargava, MD MS	Assistant Clinical Professor, UCSF School of Medicine
Dhruv Kazi, MD	Assistant Professor, UCSF School of Medicine
Zach Kastenber, MD	Resident, Department of Surgery, Stanford University
Kit Delgado, MD	Assistant Professor, Department of Emergency Medicine and Faculty Fellow, University of Pennsylvania
Suzann Pershing, MD	Chief of Ophthalmology for the VA Palo Alto Health Care System
KT Park, MD	Assistant Professor, Department of Medicine, Stanford University
Jeremy Goldhaber-Fiebert, PhD	Associate Professor, Department of Medicine, Stanford University
Sanjay Basu, MD	Assistant Professor, Department of Medicine, Stanford University
Marcella Alsan, MD, PhD	Assistant Professor, Department of Medicine (CHP/PCOR), Stanford Univ.
David Chan, MD, PhD	Assistant Professor, Department of Medicine (CHP/PCOR), Stanford Univ.
Karen Eggleston, PhD	Senior Fellow, Freeman Spogli Institute, Stanford University
Kevin Erickson, MD	Assistant Professor, Department of Nephrology, Baylor College of Medicine
Ilana Richman, MD	VA Fellow at CHP/PCOR, Stanford University

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Alexander Sandhu, MD	VA Fellow at CHP/PCOR, Stanford University
Michael Hurley	Medical Student, Stanford University
Manali Patel, MD	Instructor, Department of Medicine (Oncology), Stanford University
Dan Austin, MD	Resident Physician, Department of Anesthesia, UCSF School of Medicine
Anna Luan, MD	Resident Physician, Department of Medicine, Stanford University
Louse Wang	Medical Student, Stanford University
Christine Nguyen, MD	Resident Physician, Department of Medicine, Harvard Medical School
Josh Mooney, MD	Instructor, Department of Medicine (Pulmonary and Critical Care Medicine), Stanford University
Eugene Lin, MD	Fellow, Department of Medicine (Nephrology), Stanford University
Eric Sun, MD	Assistant Professor, Department of Anesthesia, Stanford University
Sejal Hathi	Medical Student, Stanford University
Ibrahim Hakim	Medical Student, Stanford University
Archana Nair	Medical Student, Stanford University
Trishna Narula	Medical Student, Stanford University
Daniel Vail	Medical Student, Stanford University
Tej Azad	Medical Student, Stanford University
Jessica Yu, MD	Fellow, Department of Medicine (Gastroenterology), Stanford University
Daniel Vail	Medical Student, Stanford University
Alex Sandhu, MD	Fellow, Department of Medicine (Cardiology), Stanford University
Matthew Muffly, MD	Clinical Assistant Professor, Dept. of Anesthesia, Stanford University

Dissertation Committee Memberships

Ron Borzekowski	Ph.D. in Economics	Stanford University	2002
Jason Brown	Ph.D. in Economics	Stanford University	2002
Dana Rapaport	Ph.D. in Economics	Stanford University	2003
Ed Johnson	Ph.D. in Economics	Stanford University	2003
Joanna Campbell	Ph.D. in Economics	Stanford University	2003
Neeraj Sood*	Ph.D. in Public Policy	RAND Graduate School	2003
James Pearce	Ph.D. in Economics	Stanford University	2004
Mikko Packalen	Ph.D. in Economics	Stanford University	2005
Kaleb Michaud*	Ph.D. in Physics	Stanford University	2006
Kyna Fong	Ph.D. in Economics	Stanford University	2007
Natalie Chun	Ph.D. in Economics	Stanford University	2008
Sriniketh Nagavarapu	Ph.D. in Economics	Stanford University	2008
Sean Young	Ph.D. in Psychology	Stanford University	2008
Andrew Jaciw	Ph.D. in Education	Stanford University	2010
Chirag Patel	Ph.D. in Bioinformatics	Stanford University	2010
Raphael Godefroy	Ph.D. in Economics	Stanford University	2010
Neal Mahoney	Ph.D. in Economics	Stanford University	2011
Alex Wong	Ph.D. in Economics	Stanford University	2012
Kelvin Tan	Ph.D. in Management Science	Stanford University	2012
Animesh Mukherjee	Masters in Liberal Arts Program	Stanford University	2012
Jeanne Hurley	Masters in Liberal Arts Program	Stanford University	2012
Patricia Foo	Ph.D. in Economics	Stanford University	2013
Michael Dworsky	Ph.D. in Economics	Stanford University	2013
Allison Holliday King	Masters in Liberal Arts Program	Stanford University	2013
Vilsa Curto	Ph.D. in Economics	Stanford University	2015
Rita Hamad	Ph.D. in Epidemiology	Stanford University	2016
Atul Gupta	Ph.D. in Economics	Stanford University	2017
Yiwei Chen	Ph.D. in Economics	Stanford University	2019
Yiqun Chen	Ph.D. in Health Policy	Stanford University	2020
Min Kim	Ph.D. in Economics	Iowa State Univ.	2021
Bryan Tysinger	Ph.D. in Public Policy	RAND Graduate School	2021

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E. GRANTS AND PATENTS

PATENT (2)

1. "Environmental Biomarkers for the Diagnosis and Prognosis for Type 2 Diabetes Mellitus" with Atul Butte and Chirag Patel (2011), US Patent (pending).
2. "Health Cost and Flexible Spending Account Calculator" with Schoenbaum M, Spranca M, and Sood N (2008), U.S. Patent No. 7,426,474.

GRANTS AND SUBCONTRACTS (42)

CURRENT (6)

2019-2020	Funder: Acumen, LLC. Title: Quality Reporting Program Support for the Long-Term Care Hospital, Inpatient Rehabilitation Facility, Skilled Nursing Facility QRPs and Nursing Home Compare Role: PI
2018-2020	Funder: Acumen, LLC. Title: Surveillance Activities of Biologics Role: PI
2018-2020	Funder: France-Stanford Center for Interdisciplinary Studies Title: A Nutritional Account of Global Trade: Determinants and Health Implications Role: PI
2017-2023	Funder: National Institutes of Health Title: The Epidemiology and Economics of Chronic Back Pain Role: Investigator (PI: Sun)
2017-2021	Funder: National Institutes of Health Title: Big Data Analysis of HIV Risk and Epidemiology in Sub-Saharan Africa Role: Investigator (PI: Bendavid)
2016-2020	Funder: Acumen, LLC. Title: MACRA Episode Groups and Resource Use Measures II Role: PI

PREVIOUS (36)

2016-2018	Funder: University of Kentucky Title: Food acquisition and health outcomes among new SNAP recipients since the Great Recession Role: PI
2015-2019	Funder: Alfred P. Sloan Foundation

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	Title: Public versus Private Provision of Health Insurance
	Role: PI
2015-2019	Funder: Natural Science Foundation
	Title: Health Insurance Competition and Healthcare Costs
	Role: Investigator (PI: Levin)
2014-2015	Funder: The Centers for Medicare and Medicaid Services
	Title: Effect of Social Isolation and Loneliness on Healthcare Utilization
	Role: PI
2014-2015	Funder: AARP
	Title: The Effect of Social Isolation and Loneliness on Healthcare Utilization and Spending among Medicare Beneficiaries
	Role: PI
2013-2019	Funder: National Bureau of Economic Research
	Title: Innovations in an Aging Society
	Role: PI
2013-2014	Funder: Robert Wood Johnson Foundation
	Title: Improving Health eating among Children through Changes in Supplemental Nutrition Assistance Program (SNAP)
	Role: Investigator (PI: Basu)
2011-2016	Funder: National Institutes of Health (R37)
	Title: Estimating the Potential Medicare Savings from Comparative Effectiveness Research
	Role: PI Subaward (PI: Garber)
2011-2016	Funder: National Institute of Aging (P01)
	Title: Improving Health and Health Care for Minority and Aging Populations
	Role: PI Subcontract (PI: Wise)

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2010-2018	Funder: National Institutes of Health Title: Clinic, Family & Community Collaboration to Treat Overweight and Obese Children Role: Investigator (PI: Robinson)
2010-2014	Funder: Agency for Health, Research and Quality (R01) Title: The Effects of Private Health Insurance in Publicly Funded Programs Role: Investigator (PI: Bundorf)
2010-2013	Funder: Agency for Healthcare Research and Quality Title: G-code" Reimbursement and Outcomes in Hemodialysis Role: Investigator (PI: Erickson)
2010-2013	Funder: University of Southern California Title: The California Medicare Research and Policy Center Role: PI
2010-2012	Funder: University of Georgia Title: Natural Experiments and RCT Generalizability: The Woman's Health Initiative Role: PI
2010-2011	Funder: National Bureau of Economic Research Title: Racial Disparities in Health Care and Health Among the Elderly Role: PI
2009-2020	Funder: National Institute of Aging (P30) Title: Center on the Demography and Economics of Health and Aging Role: PI (2011-2020)
2009-2011	Funder: Rand Corporation Title: Natural Experiments and RCT Generalizability: The Woman's Health Initiative Role: PI
2008-2013	Funder: American Heart Association Title: AHA-PRT Outcomes Research Center Role: Investigator (PI: Hlatky)
2007-2009	Funder: National Institute of Aging (R01) Title: The Economics of Obesity Role: PI
2007-2009	Funder: Veterans Administration, Health Services Research and Development Service Title: Quality of Practices for Lung Cancer Diagnosis and Staging Role: Investigator
2007-2008	Funder: Stanford Center for Demography and Economics of Health and Aging Title: The HIV Epidemic in Africa and the Orphaned Elderly

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	Role: PI
2007	Funder: University of Southern California Title: The Changes in Health Care Financing and Organization Initiative
	Role: PI
2006-2010	Funder: National Institute of Aging (K02) Title: Health Insurance Provision for Vulnerable Populations
	Role: PI
2006-2010	Funder: Columbia University/Yale University Title: Dummy Endogenous Variables in Threshold Crossing Models, with Applications to Health Economics
	Role: PI
2006-2007	Funder: Stanford Center for Demography and Economics of Health and Aging Title: Obesity, Wages, and Health Insurance
	Role: PI
2005-2009	Funder: National Institute of Aging (P01 Subproject) Title: Medical Care for the Disabled Elderly
	Role: Investigator (PI: Garber)
2005-2008	Funder: National Institute of Aging (R01) Title: Whom Does Medicare Benefit?
	Role: PI Subcontract (PI: Lakdawalla)
2002	Funder: Stanford Center for Demography and Economics of Health and Aging Title: Explaining Changes in Disability Prevalence Among Younger and Older American Populations
	Role: PI
2001-2003	Funder: Agency for Healthcare Research and Quality (R01) Title: State and Federal Policy and Outcomes for HIV+ Adults
	Role: PI Subcontract (PI: Goldman)
2001-2002	Funder: National Institute of Aging (R03) Title: The Economics of Viatical Settlements
	Role: PI
2001-2002	Funder: Robert Wood Johnson Foundation Title: The Effects of Medicare Eligibility on Participation in Social Security Disability Insurance
	Role: PI Subcontract (PI: Schoenbaum)
2001-2002	Funder: USDA Title: Evaluating the Impact of School Breakfast and Lunch
	Role: Investigator
2001-2002	Funder: Northwestern/Univ. of Chicago Joint Center on Poverty Title: The Allocation of Nutrition with Poor American Families
	Role: PI Subcontract (PI: Haider)
2000-2002	Funder: National Institute on Alcohol Abuse & Alcoholism (R03) Title: The Demand for Alcohol Treatment Services
	Role: PI
2000-2001	Funder: USDA Title: How Should We Measure Hunger?

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Role: PI Subcontract (PI: Haider)

F. SCHOLARSHIPS AND HONORS

- Phi Beta Kappa Honor Society, 1988
- Distinction and Departmental Honors in Economics, Stanford University, 1990
- Michael Forman Fellowship in Economics, Stanford University, 1991-1992
- Agency for Health Care Policy and Research Fellowship 1993-1995
- Outstanding Teaching Assistant Award, Stanford University, Economics, 1994
- Center for Economic Policy Research, Olin Dissertation Fellowship, 1997-1998
- Distinguished Award for Exceptional Contributions to Education in Medicine, Stanford University, 2005, 2007, and 2013.
- Dennis Aigner Award for the best applied paper published in the *Journal of Econometrics*, 2013

EXHIBIT

F

DECLARATION OF RYAN RAPP,
UNIVERSITY OF MISSOURI SYSTEM

I, Ryan Rapp, being first duly sworn upon my oath, do hereby state as follows:

1. I am the Executive Vice President for Finance and Operations of the University of Missouri System. I am also a resident of Missouri and over the age of majority. I have personal knowledge of the facts in this declaration, and those facts are true and correct to the best of my knowledge.

2. The University of Missouri System (“the University”) includes four universities, a health system and an extension division, along with numerous research parks, business incubators, health centers and affiliates.

3. In the performance of its statutory duties, the University participates with the federal government on a variety of programs, including as a contractor to the federal government, and receives federal funds for the completion of certain responsibilities.

4. The University of Missouri is a contractor with numerous federal agencies in numerous contracts anticipated to fall within the scope of the federal contractor COVID-19 vaccination mandate under Executive Order 14042. Such contracts are conservatively estimated to exceed 230 in number, with annual revenues to the University exceeding \$20 million in the 2020/21 fiscal year, and an estimated total, multi-year value exceeding \$76 million. Depending on how federal agencies interpret and apply the scope of Executive Order 14042 and

associated federal guidance, and on the extent to which agencies deploy contract clauses requiring compliance with COVID-19 vaccination requirements, the number and value of contracts affected by such requirements could be substantially greater. The amount of many of the contracts exceed the simplified acquisition threshold defined in Section 2.101 of the Federal Acquisition Regulation.

5. It is conservatively estimated that in excess of 9,000 employees have salaries supported directly by funding from the contracts noted in paragraph 4 or included within the University's facilities and administration costs ("F&A") on such contracts. Depending on how federal agencies interpret and apply the scope of Executive Order 14042 and associated federal guidance, and on the extent to which agencies deploy contract clauses requiring compliance with COVID-19 vaccination requirements, the number of such employees could be substantially greater.

6. Considering the scope of COVID-19 employee vaccination requirements identified in "COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors" issued by the Safer Federal Workforce Task Force in connection with Executive Order 14042, compliance with federal contracts incorporating clauses establishing such vaccination requirements ultimately place the University in the position of having to require COVID-19 vaccination for all or virtually all of its employees. Not counting student employees, who also would be affected by the vaccination requirements, the

University has in excess of 22,000 employees.

7. Based on the general percentage of Missourians who have chosen not to take a COVID-19 vaccine, it can reasonably be anticipated that COVID-19 vaccination requirements established in connection with federal contracts would lead a significant number of employees to resign or be terminated.

8. Some number of employees terminated by the University for refusal to comply with COVID-19 vaccination requirements established in connection with federal contracts would likely apply for unemployment benefits. Assuming such benefits were granted, this would impose a significant additional financial cost to the University.

9. Implementing compliance with federal contract clauses establishing COVID-19 vaccination requirements can reasonably be anticipated to result in significant additional costs to the University in performance of those contracts and more broadly in conducting its operations. Such significant additional costs would include, but not be limited to, resources spent on managing verification of vaccination status, review of accommodation requests, implementing accommodations, and potentially in ensuring separation of covered and non-covered employees.

10. The recruitment of qualified employees is a significant consideration by the University. It reasonably can be anticipated that COVID-19 vaccination requirements established in connection with federal contracts would limit the number of potential applicants.

11. It reasonably can be anticipated that such issues of resignations, terminations, and recruitment will interfere with the University's ability to administer services pursuant to its constitutional and statutory mission.

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

Executed on this 4th day of November, 2021.

A handwritten signature in black ink, appearing to read "Ryan Rapp", is written over a horizontal line.

Ryan Rapp
Executive Vice President for Finance and Operations
University of Missouri System

EXHIBIT G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

STATE OF MISSOURI et al.,

Plaintiffs,

v.

JOSEPH R. BIDEN, JR., et al.,

Defendants.

Case No. 4:21-CV-01300

**DECLARATION OF
KRAIG PAULSEN**

I, Kraig Paulsen, declare under penalty of perjury that I have personal knowledge of the following:

1. I am a resident of Iowa and over the age of majority.
2. I serve as the Interim Director of the Iowa Department of Management, an officer of the State of Iowa appointed by Iowa Governor Kim Reynolds. My duties as Interim Director under chapter 8 of the Iowa Code include leading the Department of Management, managing the budget for the government of the State of Iowa, and effectively controlling the financial operations of the government of the State of Iowa.
3. Agencies of the State of Iowa, including the Iowa Alcoholic Beverages Division, Iowa Workforce Development, Iowa Department for the Blind, Iowa Department of Corrections, Judicial District Departments of Correctional Services, and state universities governed by the Iowa Board of Regents currently have federal and contracts and subcontracts.
4. The Regents institutions alone—the University of Iowa, Iowa State University, and University of Northern Iowa—have more than \$1.3 billion in such

contracts. For context, the entire Regents annual budget in the current fiscal year, including other institutions and the University of Iowa Hospitals and Clinics, is only \$6.4 billion.

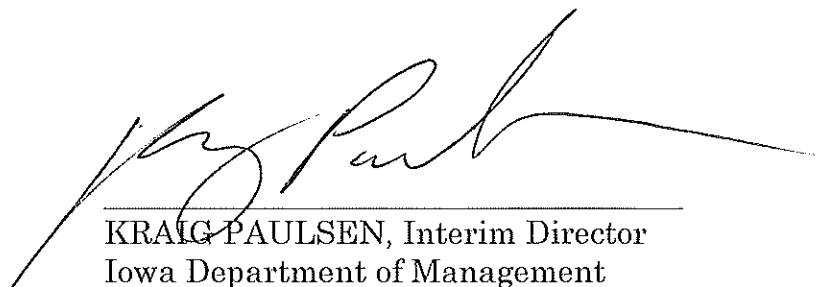
5. Already, at least six modifications of federal contracts have been presented to the University of Iowa adding language mandating the University to comply with the Contractor Vaccine Mandate. The University signed these contracts between October 14, 2021, and October 28, 2021, because it concluded that it could not put at risk the more than \$91 million value of the contracts.

6. In addition, a \$292 million federal contract covering the Ames Laboratory at Iowa State University was unilaterally modified by the United States Department of Energy to incorporate the Contractor Vaccine Mandate.

7. Many other Iowa state agencies also receive federal funds or have related agreements with federal agencies. It is unclear which, if any, of these agencies may also be asked or forced to adopt the Contractor Vaccine Mandate.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on November 4, 2021.



KRAIG PAULSEN, Interim Director
Iowa Department of Management

EXHIBIT

H

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

STATE OF MISSOURI, et al.,

Plaintiffs,

v.

JOSEPH R. BIDEN, JR., et al.,

Defendants.

No. 4:21-cv-01300

DECLARATION OF PATRICK HACKLEY

1. My name is Patrick Hackley. I am the Director of the Division of Forests and Lands of the New Hampshire Department of Natural and Cultural Resources (the “Department”). I am also a resident of New Hampshire and over the age of majority. I have personal knowledge of the facts in this declaration, and those facts are true and correct to the best of my knowledge.

2. I submit this declaration in conjunction with Plaintiffs’ Motion for Preliminary Injunction.

3. The Department recently received a Notice to Lessor from the USDA, Forest Service dated October 19, 2021. The subject of the notice is “Lease Contract Modification – New Clause for Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors.” Attached hereto as **Exhibit A** is a true and correct copy of that Notice to Lessor.

4. A lease amendment was enclosed with the Notice of Lessor. A true and correct copy of that lease amendment is attached hereto as **Exhibit B**.

5. The Notice to Lessor strongly encourages the Department to accept this lease contract modification and states that the modification is mandatory before the USDA, Forest Service will be able to renew the contract.

6. The Notice to Lessor also requests that the Department sign and return the lease contract modification no later than November 14, 2021.

7. The Notice to Lessor refers to the lease agreement between the Department and the USDA, Forest Service for communications equipment and antenna space in designated areas at Mount Washington in Mount Washington State Park for a five (5) year period from October 1, 2017 through September 30, 2022. Attached thereto as **Exhibit C** is a true and correct copy of the fully executed lease agreement.

8. Payment on the agreement is monthly pursuant to a State issued invoice. See Exhibit C, Pg. 3 of 12.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on this the 4th day of November, 2021.

/s/ Patrick Hackley

Patrick Hackley

Director of the Division of Forests and Lands
of the New Hampshire Department of Natural
and Cultural Resources

EXHIBIT

A



Forest Service

Washington Office

1400 Independence Avenue, SW
Washington, D.C. 20250

File Code: 6400

Date: 10/19/2021

Subject: Lease Contract Modification - New Clause for Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors

NOTICE TO LESSOR,

The USDA, Forest Service (FS) appreciates the hard work and dedication of our contractors and the health and safety of our employees, contractors and their families is our top priority. In order to ensure the health and safety of the Federal workforce and contractor community, the President signed [*Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors*](#). The requirements in the Executive Order are being implemented via a FAR deviation. The clause in the FAR deviation will be incorporated into FS contracts via a bilateral modification.

We strongly encourage you to accept this contract modification. The modification is **mandatory** before we will be able to renew, extend the period of performance of your contract, or exercise an option.

Based on the urgency of this issue, please return the signed amendment as soon as possible, but no later than **November 14, 2021**. Once it is received the Lease Contracting Specialist will sign for the Government and return a fully executed amendment for your records.

For more information, please visit the GSA COVID website <https://gsa.gov/covid19> and The Safer Federal Workforce Task Force website <https://www.saferfederalworkforce.gov/>

Sincerely,

ADAM
FISCHER

Digitally signed by ADAM
FISCHER
Date: 2021.10.19
10:47:12 -05'00'

Adam Fischer

Leasing Contracting Officer

Enclosure: Lease Amendment



EXHIBIT

B

UNITED STATES DEPARTMENT OF AGRICULTURE FOREST SERVICE	LEASE AMENDMENT No. 1256A118L2202PLA004
LEASE AMENDMENT	LEASE CONTRACT No. 1256A118L2202
ADDRESS OF PREMISES Lat: 44.270183 Long: -71.303931	

THIS AMENDMENT is made and entered into between New Hampshire Department of Natural and Cultural Resources

whose address is: 172 Pembroke Rd., Concord, NH 03302

hereinafter called the Lessor, and the **UNITED STATES OF AMERICA**, hereinafter called the Government:

WHEREAS the parties hereto desire to amend the above Lease to add FAR Clause 52.223-99, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors (OCT 2021) (DEVIATION).

NOW THEREFORE, these parties for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, covenant and agree that the said Lease is amended, effective 10/19/2021 as follows:

52.223-99 ENSURING ADEQUATE COVID-19 SAFETY PROTOCOLS FOR FEDERAL CONTRACTORS (OCT 2021) (DEVIATION)

(a) *Definition.* As used in this clause -

United States or its outlying areas means—

- (1) The fifty States;
- (2) The District of Columbia;
- (3) The commonwealths of Puerto Rico and the Northern Mariana Islands;
- (4) The territories of American Samoa, Guam, and the United States Virgin Islands; and
- (5) The minor outlying islands of Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Islands, Navassa Island, Palmyra Atoll, and Wake Atoll.

This Lease Amendment contains 2 pages.

All other terms and conditions of the lease shall remain in force and effect.

IN WITNESS WHEREOF, the parties subscribed their names as of the below date.

FOR THE LESSOR:

FOR THE GOVERNMENT:

Signature: _____
 Name: _____
 Title: _____
 Entity Name: _____
 Date: _____

Signature: _____
 Name: Adam Fischer
 Title: Lease Contracting Officer
 Date: _____

WITNESSED FOR THE LESSOR BY:

Signature: _____
 Name: _____
 Title: _____
 Date: _____

(b) *Authority*. This clause implements Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, dated September 9, 2021 (published in the Federal Register on September 14, 2021, 86 FR 50985).

(c) *Compliance*. The Contractor shall comply with all guidance, including guidance conveyed through Frequently Asked Questions, as amended during the performance of this contract, for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (Task Force Guidance) at <https://www.saferfederalworkforce.gov/contractors/>.

(d) *Subcontracts*. The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts at any tier that exceed the simplified acquisition threshold, as defined in Federal Acquisition Regulation 2.101 on the date of subcontract award, and are for services, including construction, performed in whole or in part within the United States or its outlying areas.

(End of clause)

INITIALS: _____ & _____
LESSOR GOV'T

EXHIBIT C



STATE OF NEW HAMPSHIRE
DEPARTMENT of NATURAL and CULTURAL RESOURCES
Division of Forests and Lands

172 PEMBROKE ROAD CONCORD, NEW HAMPSHIRE 03301
PHONE: 271-2214 FAX: 271-6488 WWW.NHDFL.ORG

April 09, 2019

His Excellency, Governor Christopher T. Sununu
and the Honorable Executive Council
State House
Concord, New Hampshire 03301

REQUESTED ACTION

- 1) Pursuant to RSA 227-H:9, authorize the Department of Natural and Cultural Resources (DNCR) to enter into a **RETROACTIVE** Lease Agreement (Lease) with the United States Department of Agriculture, Forest Service (USFS) of Campton, New Hampshire for communications equipment and antenna space in designated areas at Mount Washington in Mount Washington State Park for a five (5) year period from October 1, 2017 through September 30, 2022, effective upon Governor and Executive Council approval.
- 2) Further authorize DNCR to accept an initial annual rental payment of \$9,240.00. In each subsequent year of the lease, the rent will be adjusted using the Consumers Price Index (CPI) detailed in the terms of the Lease and will be deposited into accounting unit #03-35-35-351510-37420000-402040 "Mt Washington Commission".

EXPLANATION

The USFS is an agency of the United States Government in good standing with the State of New Hampshire and has been a tenant at Mount Washington since 2003. They have occupied the site as an at will tenant since October 1, 2017, while DNCR worked with them to renegotiate this lease. We began lease negotiations in August 2016. This has taken an extensive amount of time due to significant staff turnover and reorganization within the USFS. The USFS will pay all back rent once the lease has been approved.

The Lease is subject to DNCR's "Policy on Use and Management of DNCR Communication Facilities" attached as Exhibit A and all installed communication equipment shall meet the guidelines set forth by DNCR's "Technical Requirements for the Use of Communication Sites" attached as Exhibit B.

The Attorney General's office has reviewed and approved the Lease as to form, substance, and execution.

Respectfully submitted,

Brad W. Simpkins
Director

Concurred,

Sarah L. Stewart
Commissioner

Philip A. Bryce
Director, Division of Parks and Recreation

LEASE AGREEMENT
 UNITED STATES DEPARTMENT OF AGRICULTURE, FOREST SERVICE
MOUNT WASHINGTON
 MOUNT WASHINGTON STATE PARK
 SARGENT'S PURCHASE, NEW HAMPSHIRE

<u>CRITICAL DATES / TERM / RENT</u> (for State use only)	
DEFINITION	DATE
Term Effective Date: Governor and Council approval date	5/15/2019
Billing Commencement Date: beginning invoice date for rent owed, set by Lease terms to be monthly, quarterly, or annual	10/1/2017
Term & Initial Annual Rent: 5 years beginning at \$9,240.00, subject to an annual Consumer Price Index Adjustment.	

THIS LEASE AGREEMENT ("the Lease"), is made and entered into by and between the State of New Hampshire acting through its Department of Natural and Cultural Resources, having a mailing address of 172 Pembroke Road, Concord, New Hampshire 03301 ("the State"), under authority of RSA 227-H:9, and United States Department of Agriculture, Forest Service, an agency of the United States Government being located in the White Mountain National Forest, Campton, NH 03223("the Lessee"). The State and the Lessee together shall be "the Parties".

NOW, THEREFORE the Parties agree as follows:

PURPOSE: The purpose of the Lease is to provide for the use and possession by the Lessee of certain areas within and upon the real property and improvements thereon (the "Property") known as the top of Mount Washington, located in Mount Washington State Park , according to the terms and conditions set forth below.

-WITNESSETH THAT-

I. LEASED PREMISES

the State, for and in consideration of the covenants and agreements hereinafter contained and made on the part of the Lessee, does hereby lease to the Lessee:

- a) Designated space within the Yankee Building
- b) Designated spaces on the rooftop of the Yankee Building for antennas

The above described land and rights shall hereinafter be called the "Leased Premises."

No additional facilities shall be allowed without prior written permission of the State.

II. ENTRY AND USE OF LEASED PREMISES

The Lessee shall be permitted to enter and use the Leased Premises as a wireless communication

site. The Lessee shall not be permitted to use the Leased Premises for any other purpose except by prior written approval of the State. The State shall have the right to request identification of any and all individuals representing the Lessee who seek access to the Property under the terms of the Lease and to deny access to the Property by certain individuals identified, if necessary.

The State shall be notified forty eight (48) hours before the start of work, or planned maintenance, at the Leased Premises during normal business hours, Monday thru Friday between 8 a.m. and 4 p.m., however; unexpected/emergency repairs may be made immediately, with notice of such actions being made to the State within twenty four (24) hours.

Access Notifications should be made via phone, text message, or email to:

Justin Bellen
Communications Technician
NH Division of Forests and Lands
172 Pembroke Road
Concord NH 03301
Office: (603)271-2654
Cell : (603)892-5620
justin.bellen@dnr.nh.gov

III. AUTHORIZED FACILITIES

The Lessee is authorized to have the following equipment on the Property

Please reference the attached Exhibit D for facilities

The equipment listed herein shall be referred to as the Lessee's "facilities."

No additional facilities shall be allowed without written permission of the State. The approval by the State of replacement of facilities in kind shall not be unreasonably withheld or delayed.

IV. ACCESS LIMITATION

Access to the Mount Washington during the summer season shall be coordinated with the State and shall be at the Lessee's own expense. The Lessee, to the greatest extent possible, shall schedule non-emergency access at dates and times that cause the least amount of conflict with the public recreational use of the Property. Where possible, at its sole discretion and if space permits, the State will endeavor to provide the Lessee with transport on scheduled State transportation free of charge.

The State shall provide the Lessee with transportation during the winter season on an "available space" basis. Trips scheduled during normal shift changes shall be at a rate of \$100.00 per seat. For unscheduled or emergency trips, the Lessee shall pay \$500 per trip, plus the current hourly rate for State Park Staff Site Support labor. The State, at its sole discretion, may waive these fees if it deems appropriate.

The Lessee will be held responsible for damage to State land resulting from improper motorized access to Mount Washington State Park by the Lessee, or their agents.

Access contact:

Mt. Washington State Park Manager (MWSP) (603) 466-3347

Dept. of Natural and Cultural Resources (DNCR) Communications Technician (603) 271-2214

V. TERM

The term of this lease shall be October 1, 2017 through September 30, 2022, effective upon approval by the Governor and Executive Council. The State agrees that it will negotiate a new lease with Lessee in good faith at the conclusion of the term.

VI. BENEFICIAL SERVICES

Not Applicable

VII. RENT – OR CONSIDERATION

Description	Annual Dollars	Monthly Dollars
Calculated Initial Year Rent	\$9,240.00	\$770.00
Beneficial Service Credit	0	0
Final Initial Year Rent	\$9,240.00	\$770.00

Payment shall be monthly pursuant to a State issued invoice and shall commence on the first of the month following full installation of all the Facilities pursuant to EXHIBIT D, verified by the State's Communications Technician, and approved to begin/resume operation according to the Lease ("Billing Commencement Date").

****Federal Tenants Only**** Upon agreement of the parties, the Lessee may pay rent by electronic funds transfer and in such event, the State agrees to provide to the Lessee bank routing information for such purpose upon request of the Lessee.

VIII. ANNUAL ESCALATION

Each year on October 1st, the current Lease amount will be adjusted by applying the Consumer Price Index (CPI) calculated escalator. The cost of living index will be measured by the U. S. Department of Labor, Revised Consumer Price Index for All Urban Consumers, U.S. City Average, all items figure, (1982-84=100) published by the Bureau of Labor Statistics. Payment will be made with the monthly installment of fixed rent. Rent adjustments will be effective on

October 1 of each year. In August the Forest Service will determine the CPI percentage change to be applied to the lease during the following Federal Fiscal Year (October 1 through September 30). The amount of adjustment will be determined by multiplying the base rental rate by the percent of change in the cost of living index referenced above. The percent change will be computed by comparing the index figure published for August of each year with the index figure published for August of the previous year. The resulting percentage will be applied to all payments made during the next 12 month period beginning October 1 through September 30th. For example, in the year 2020 the Forest Service would use the index published for August of 2019 and that figure would be compared with the index published for August of 2020 to determine the percent change for payments to be made between 1-Oct-2020 and 30-Sep-2021.

In the event of any decreases in the cost of living index occurring during the term of the occupancy under the lease, the rental amount will be reduced accordingly. The amount of such reductions will be determined in the same manner as increases in rent provided under this clause.

IX. CONDITIONS TO ENTRY AND WORK ON THE LEASED PREMISES

The Lessee shall take precautions to minimize the impact of any work on the Property. The Lessee must coordinate any entry or activity on the Property in advance with the State's Communications Technician. The Lessee agrees to comply with all local, state and federal laws, rules and ordinances applicable to the work, and further agrees to exercise due care in the performance of all work on the Property. The Lessee shall be responsible for determining the location of all underground utilities prior to the commencement of any work. The Lessee, its contractors, agents, employees or assigns shall not make or cause to be made any governmental filings regarding the Property without the prior written consent of the State. Notwithstanding any other provisions in the Lease, the provisions of this Section shall survive the expiration or termination of the Lease. The Lessee shall restore the Property to its existing condition, reasonable wear and tear excepted, including removal of all its equipment, and shall indemnify and hold harmless the State from all loss, costs, injury or damage to persons including death, or property arising out of the Lessee's employees, agents, assigns or contractor's actions with respect to entry upon the Property pursuant to this right of entry.

X. TAXES

Unless otherwise exempt from these obligations, the Lessee shall pay, in addition to any other payments provided hereunder, all taxes and all fees, assessments and other costs or expenses now or hereafter imposed by any government authority, directly in connection with the Lessee's equipment or use of the Leased Premises. In addition, to the extent permitted by law, the Lessee shall pay that portion, if any, of the personal property taxes or other taxes directly attributable to the Lessee's equipment. Unless it is exempt from such taxation, the Lessee shall pay any increase in real estate taxes levied against the Leased Premises and the Lessee's equipment directly attributable to the Lessee's use and occupancy of the Lease Premises pursuant to the application of RSA 72:23 I, which provides for taxation of certain State properties used or occupied by persons or entities other than the State. If Lessee contends that it is exempt from such taxation, Lessee will provide the State with documentation substantiating the exemption upon the reasonable request of the State.

If required to by law, the Lessee shall make payment of such taxes, fees, and assessments to the State or such government authority as has invoiced taxes, fees, and assessments, within thirty (30) days of the date of invoice. Failure of the Lessee to pay the duly and legally assessed real estate

and/or personal property taxes, fees and assessments when due shall be cause to terminate the Lease by the State provided written notice has been given the Lessee by the party assessing the tax and sixty (60) days have elapsed from the date of the receipt of notice by the Lessee and no payment has been made.

XI. RIGHT TO LEASE - COMPLIANCE WITH LAW

The State represents that it has the full right, title, interest, power and authority to enter into the Lease and to let the Leased Premises for the term herein granted. The Lessee shall comply with all applicable federal and state laws, rules and regulations in connection with the operation of the Lease.

XII. QUIET ENJOYMENT-INSPECTION

The Lessee, upon the payment of the rent herein provided, and upon the performance of all of the terms of the Lease, shall peaceably and quietly have, hold and enjoy the Leased Premises without any hindrance, disturbance, interference or interruption from the State or from any persons claiming by, through and under the State.

Provided however, the Lessee agrees that the State or any of its duly authorized agents may with reasonable notice to the Lessee, inspect any and all the Lessee Property located on the Leased Premises during usual business hours; and

The Lessee understands and hereby accepts that other leasehold tenants occupy the Property which may result in possible inconvenience when another lessee is doing work coincidentally onsite.

XIII. MUTUAL NON-INTERFERENCE - CONFLICTS WITH RECREATIONAL USERS

The Lessee agrees to install radio equipment of the type and frequency which will not cause measurable interference to the State, other lessees of the premises or neighboring landowners. In the event the equipment of the Lessee causes such interference, and after the State has notified the Lessee of such interference, the Lessee will take all steps necessary to correct and eliminate the interference. Continued interference problems caused by the equipment of the Lessee shall be just cause for termination of the Lease subject to the provisions of Section XXVIII

The State agrees that the State and any other tenants of the Property who currently have or in the future take possession of the Property will be permitted to install only such radio equipment that is of the type and frequency which will not cause measurable interference to the Lessee. In the event any such equipment of the State or of another tenant at the Property causes such interference, the State will see that the interfering party takes all steps necessary to correct and eliminate the interference.

The State covenants and agrees that it will not permit or allow the erection, installation or construction of any buildings, or structures, on any portion of its remaining land at the Property that will shield or obstruct or otherwise interfere with the reception or transmitting of radio signals over the paths established by the Lessee; however, the Lessee agrees to comply with all reasonable requests in writing of the State or any of its agents as to particular situations which may arise to permit the erection, installation or construction of such structures. In no event however, shall the Lessee's compliance with such requests relieve the State of its obligation to see that the State or any

other interfering party take all steps necessary to correct and eliminate any interference caused thereby. In addition, all reasonable precautions will be taken by the Lessee to ensure that there will be no conflict with the State's use, which can include the public's use of the Property including, but not limited to, obstructing access to the summit or viewpoints from the summit.

XIV. ASSIGNMENT/SUBLEASE

The Lessee may not assign or transfer its rights under the Lease or sublease any portion of the Leased Premises to any third party without the express written permission of the State, which permission shall not be unreasonably denied.

In the event of a greater than fifty (50) percent change of ownership of Lessee, the State shall have the option of continuing the Lease or terminating with ninety (90) days notice to the Lessee.

XV. COMMUNICATION SITE POLICY-TECHNICAL REQUIREMENTS

The Lease is granted subject to the State of New Hampshire Department of Natural and Cultural Resources "Policy on Use and Management of DNCR Communication Facilities" adopted November 7, 1989, and last revised in July 2017, a copy of which is attached herewith, made a part hereof, and is marked Exhibit "A".

All communications equipment and appurtenances shall be installed in compliance with the "State of New Hampshire Department of Natural and Cultural Resources Technical Requirements for Use of Communication Sites" adopted June 30, 1995, and last revised in July, 2017, a copy of which is attached herewith, made a part hereof, and is marked Exhibit "B".

XVI. RISK OF LOSS - FIRE - CASUALTY

All property of every kind installed by the Lessee on the Leased Premises shall be at the sole risk of the Lessee and the State shall not be liable to the Lessee or any other person for any injury, loss, damage, or inconvenience occasioned by any cause whatsoever to Lessee installed property.

Should the existing Equipment Building on the Property be substantially damaged by fire, other casualty or act of God, then the State shall notify the Lessee as soon as it is able as to whether or not the State intends to rebuild the Equipment Building and the likely time frame within which the rebuilding would be accomplished. During such rebuilding the Lessee shall, at its option, have the right to erect suitable temporary structures to effectuate the broadcast of the signal of the Lessee. If

the State elects not to rebuild the Equipment Building then the Lessee may, at its option, elect either to terminate the Lease or to rebuild on the same site, substitute structures of similar design and size as existed prior to the damage with the approval of the State, which shall not be unreasonably withheld.

The State shall not be obligated to rebuild or replace any building wholly or substantially destroyed by fire, flood, weather event, act of God, or other casualty. The State shall not be liable to Lessee for any injury, loss, damage, or inconvenience occasioned by any cause whatsoever to the Property, including but not limited to any loss of income for any function, program or contract that may not take place for whatever reason due to an emergency or unforeseeable situation.

XVII. INSTALLATION AND MAINTENANCE - COST

All improvements installed by the Lessee at the Property for its sole benefit shall be at the expense of the Lessee, and subject to prior written approval by the State. During the term of the Lease, the Lessee will maintain such improvements installed by the Lessee on the Property in a safe and reasonable condition, and neat in appearance so as to minimize visual impact. The materials and design for the installation at the Property shall comply with all applicable federal, state and local laws, rules and approvals. The Lessee shall have all construction plans relating to the project at the Property approved by applicable federal, state and local governmental authorities having jurisdiction over construction and installation of cell facilities on the Property ("Governmental Authorities") prior to the commencement of such construction and installation.

It is understood and agreed that the ability of the Lessee to use the Property is contingent upon its obtaining, after the execution date of the Lease, all of the certificates, permits and other approvals that may be required by any Governmental Authority as well as a satisfactory building structural analysis, so as to permit the use by the Lessee of the Property as contemplated by the Lease. The State shall cooperate with the Lessee in its effort to obtain all required Governmental Authority approvals, and shall take no action which would adversely affect the status of the Property with respect to the proposed use thereof by the Lessee. In the event that any of such applications should be finally rejected or any certificate, permit, license or approval issued to the Lessee is canceled, expires, lapses, or is otherwise withdrawn or terminated by the relevant Governmental Authority, or, in the event that the Lessee determines that the Property site is no longer technically compatible for the use contemplated by the Lease, or that the Lessee, in its sole discretion, will be unable to use the Property for its intended purposes, the Lessee shall have the right to terminate the Lease subject to 90-day written notice to the State. Notice of the exercise by the Lessee of its right to terminate shall be given to the State in writing by certified mail, return receipt requested, and shall be effective upon the mailing of such notice by the Lessee. All rentals paid to said termination date shall be retained by the State. Upon such termination, the Lease shall become null and void and, except as expressly provided in the Lease, the parties shall have no further obligations including the payment of money, to each other. The Lessee shall remove any and all of its property from the Property prior to termination of the Lease under this paragraph.

XVIII. CONDITIONS - RENT ABATEMENT

The obligations of the Lessee hereunder, including the obligations to pay rent, are expressly conditioned upon and subject to the following:

- a) The continued authorization of the Lessee to use the Facilities for the purposes intended by

the Lessee pursuant to all necessary approvals from Governmental Authorities relating to such use; and

- b) The continued retention by the State of good, clear, and marketable title to the Property underlying the Leased Premises, and such title remaining free from encumbrances and restrictions which would interfere with the use of the Leased Premises intended by the Lessee or would impair the ability of the Lessee to pledge the leasehold estate as collateral to secure debt financing.

If any of the foregoing conditions should fail to remain satisfied, the Lessee shall have no obligation to pay rent until such condition is once again satisfied or waived, and rent which would otherwise be due during the intervening time pending satisfaction of such condition is hereby excused and forgiven.

XIX. LEASE RUNNING WITH THE LAND

The covenants, terms, conditions, provisions and understandings in the Lease shall be construed as covenants running with the land and are binding upon and inure to the benefits of the respective successors and assigns of the parties herein.

XX. ENTIRE AGREEMENT

The Lease expresses the entire agreement between the parties, and supersedes all prior understandings.

XXI. NOTICES

All notices, demands, requests and other communications required by the Lease shall be in writing and shall be considered properly given if sent by United States registered or certified mail, postage prepaid, to:

- a) The State:
The State of New Hampshire
Department of Natural and Cultural Resources
172 Pembroke Road
Concord, New Hampshire 03301
Attention: Administrator, Land Management Bureau

or at such other address of the State from time to time may have designated by written notice to the Lessee. Such notice shall be deemed properly given upon the posting in the United States mail.

- b) The Lessee:
United States Department of Agriculture, Forest Service
White Mountain National Forest
71 White Mountain Drive
Campton, NH, 03223

(or designee)
Attn:

or at such other address as the Lessee from time to time may have designated by written notice to the State. Such notice shall be deemed properly given upon the posting in the United States mail.

XXII. AMENDMENT - EXTENT OF INSTRUMENT - CHOICE OF LAWS - ETC.

The terms of the Lease may be modified or amended by written agreement between the Lessee and the State. The Lease is to be construed according to the laws of New Hampshire, is to take effect as a sealed instrument, is binding upon, inures to the benefits of, and shall be enforceable by the parties hereto and their respective successors and assigns.

XXIII. SOVEREIGN IMMUNITY

The Lease does not abridge or limit, nor shall it be interpreted as abridging or limiting the sovereign or official immunity to which the State and its representatives and agents are lawfully entitled.

XXIV. SEVERABILITY

If any term of the Lease or any application thereof shall be invalid or unenforceable, the remainder of the Lease and any application of such term shall not be affected thereby.

XXV. NO WAIVER OR BREACH

No assent, by either party, whether express or implied to a breach of a covenant, condition or obligation by the other party, shall act as a waiver of a right of action for damages as a result of such breach, or shall be construed as a waiver of any subsequent breach of the covenant, condition or obligation.

XXVI. NOTICE OF LEASE

The State agrees to execute a Notice of the Lease Agreement, substantially in the form of that attached hereto as Exhibit "C", which the Lessee shall record with the appropriate recording officer. The date set forth in the Notice of Lease is for recording purposes only and bears no reference to commencement of either term or rent payments.

XXVII. STATE PARK STAFF SITE SUPPORT

The Lessee agrees to reimburse the State in no less than half (1/2) hour increments for State Park staff time, requested or previously arranged by the Lessee, spent inspecting, managing, maintaining or repairing the Leased Premises or Facilities at the rate of **Fifty One Dollars and Thirty Five Cents (\$51.35) per hour**. Each call-out shall be no less than a two (2) hour minimum. Use of State Park staff shall be at the sole discretion of the appropriate State Park Manager.

Any work performed by State Park staff at the request of the Lessee shall be invoiced by the State and paid by the Lessee within thirty (30) days of receipt. If payment is not made within 30 days, all future requests for assistance may not be acted upon until such time as payment is made. All work

performed by State Park staff pursuant to this Section shall be upon the request of the Lessee, and the State assumes no liability.

XXVIII. DEFAULT - THE LESSEE'S RIGHT TO CURE - TERMINATION - RESTORATION

In the event there is a default by the Lessee with respect to any of the provisions of the Lease or its obligations under it, including the payment of rent, the State shall give the Lessee written notice of such default. After receipt of such written notice, the Lessee shall have fifteen (15) days in which to cure any monetary default and thirty (30) days in which to cure any non-monetary default, provided the Lessee shall have such extended period as may be required beyond the thirty (30) days if the nature of the cure is such that it reasonably requires more than thirty (30) days whose length of time shall be agreed upon by the parties, and the Lessee commences the cure within the thirty (30) day period and thereafter continuously and diligently pursues the cure to completion. The State may not maintain any action or effect any remedies for default against the Lessee unless and until the Lessee has failed to cure the same within the time periods provided in this paragraph. The failure of the Lessee to act to cure the default within the specified time periods shall be just cause for termination of the Lease.

The Lessee shall have the unilateral right to terminate the Lease at any time by giving ninety (90) day written notice to the State of the exercise by the Lessee of this option.

The State shall have a unilateral right of termination only in an instance where the continued presence of the facilities represents a health, safety or operational risk which cannot be reasonably addressed by alternative measures. The State shall provide ninety (90) days notice to Lessee that a termination is necessary due to that risk, unless some shorter time period is deemed reasonably necessary by the State to avoid damage to people, property or equipment. The State shall have an affirmative duty to relocate the facilities in a suitable alternative area, if available. The Lessee shall not be entitled to any damages as a result of any such termination.

The Lessee, upon termination of the Lease, shall, within sixty (60) days of termination, remove all of its equipment, personal property and all fixtures from the Property and repair any damage caused by its use of the Leased Premises or the removal of its equipment, reasonable wear and tear excepted. If such time for removal causes the Lessee to remain on the Leased Premises after termination of the Lease, the Lessee shall pay rent at then-existing monthly rate or on the existing monthly pro rata basis if based upon a longer payment term, until such time as the removal of the equipment, personal property and all fixtures are completed.


XXIX. HOLDOVER

At the sole discretion of the State, the Lessee's facilities may remain in holdover at the conclusion of the term of this Lease. The State will set rental rates for any such holdover period consistent with its' then existing policies and procedures. The State may terminate this holdover period at any time and for any reason upon ten (10) days written notice to the Lessee.

[SIGNATURE PAGE FOLLOWS]

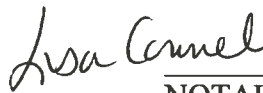
IN WITNESS WHEREOF, the parties hereto have caused the Lease to be executed the day and year first above written.

**THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF NATURAL AND CULTURAL
RESOURCES**


By: 
Sarah L. Stewart
Commissioner

THE STATE OF NEW HAMPSHIRE
COUNTY OF MERRIMACK

The foregoing instrument was acknowledged before me this 17th day of April, 2019,
by Sarah L. Stewart, in her capacity as Commissioner of the Department of Natural and Cultural
Resources

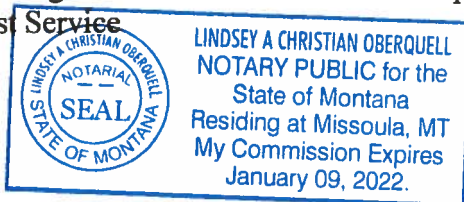
 LISA M. CONNELL
NOTARY PUBLIC
State of New Hampshire
My Commission Expires MARCH 21, 2022
NOTARY PUBLIC/JUSTICE OF PEACE
My Commission expires: 3/21/22

**UNITED STATES DEPARTMENT OF
AGRICULTURE, FOREST SERVICE**

By: 
<<SignerName>> Sarah Petrait
<<Title>> Leasing Contracting Officer
Duly Authorized

THE STATE OF Montana
COUNTY OF Missoula

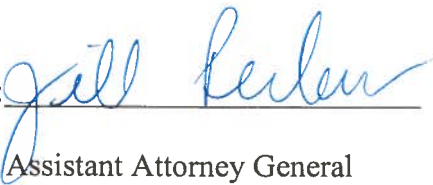
The foregoing instrument was acknowledged before me this 21 day of March, 2018,9
by, <<SignerName>> in <<his/her>> capacity as <<Title>> of United States Department of Agriculture,
Forest Service




NOTARY PUBLIC/JUSTICE OF PEACE
My Commission expires: 1/9/22

Approved as to form, substance and execution

Date 7/23/19

By: 
Assistant Attorney General

Approved by Governor and Council

Date 5/15/2019

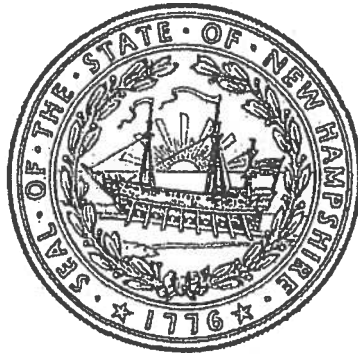
Agenda Item No. 64

The following Exhibits are attached hereto and incorporated herein by reference:

- "A" State of New Hampshire Department of Natural and Cultural Resources Policy on Use and Management of DNCR Communication Facilities revised 7/24/2017
- "B" State of New Hampshire Department of Natural and Cultural Resources Technical Requirements for Use of Communication Sites revised 7/24/2017
- "C" Notice of Lease
- "D" Equipment List

EXHIBIT A

STATE OF NEW HAMPSHIRE
DEPARTMENT OF NATURAL AND CULTURAL RESOURCES



POLICY ON USE AND MANAGEMENT OF
DNCR COMMUNICATION FACILITIES

Adopted Nov. 7 1989

Revised April 15, 1998

Reviewed January 2, 2008

Revised January 1, 2014

Formatting/Name Revised July 24, 2017

Jeffrey J. Rose, Commissioner
172 Pembroke Road
Concord, N.H. 03301
State of New Hampshire
Department of Natural and Cultural Resources

POLICY ON USE AND MANAGEMENT OF DNCR COMMUNICATIONS FACILITIES

INTRODUCTION

In 1964, the State of New Hampshire, recognizing the future needs for public communication sites and the potential proliferation of antenna towers, microwave dishes, transmitter buildings and other apparatus on New Hampshire's high peaks and ridges, established a policy limiting radio/electronics installations on Department of Natural and Cultural Resources (DNCR) administered land. At that time, the primary concerns were providing sites for future public communication needs and mitigating the visual impact of installations. New communication installations and renewals of existing permits were limited to public agencies. Requests for new communications installations by agencies not supported with public funds were considered only where installations would provide a measure of public service or public safety.

In the 1980's, three additional concerns developed regarding communication facilities on state-owned summits. First was a concern for protecting the aesthetics and natural condition of the State's high peaks and ridges. Second was a concern regarding electronic interference and signal deterioration caused by the growing number of transmission and reception installations. Although there currently isn't a way to quantify the threshold below which a transmission signal becomes unacceptably weakened by neighboring users, each addition of equipment at a site has a negative effect. As the number of installations increased, so had the concern over maintaining signal integrity since most of the communications users at state-owned mountaintops were there for the purposes of public health and safety, law enforcement, national defense, and public information.

The third concern was the potential negative impact to public health from intense communications signals. The mountaintops were originally acquired and maintained for the visiting public and it was important to limit radio frequency radiation to levels safe for continued public use of the area.

In 2012, a review of the policy was prompted by DNCR's growing responsibility for over 167,000 acres of public land and an ever increasing demand to install or expand communications facilities on DNCR lands to enhance public safety and security, and to fulfill the public interest for commercial broadband internet access. In 2013, the Policy was revised to; a) provide new guidelines and processes for establishing new or expanded communication sites in locations beyond just mountaintops; b) allow for commercial communications applications and corresponding lease fees; and c) ensure that impacts from new or expanded communications facilities to the land's traditional uses and purposes were minimized and mitigated.

As the result of a "Internal Control Review" of the Communications Program by the Office of Legislative Budget Assistant – Audit Division, a "Communications Program Manual" was developed. The Manual dovetails with the Policy and established procedures and protocols, including accountability of equipment and sites through a newly acquired database – ComSite,

and the billing and collecting of Program revenues through the State's new billing system ..
LAWSON/NHFirst.

I. DEFINITIONS:

"Commissioner" shall mean the Commissioner of the Department of Natural and Cultural Resources (DNCR).

"Permit" shall mean any form of agreement, including licenses, special use permits, or leases issued by the Commissioner for use of a DNCR communication site.

"Private user" shall mean any person or business entity, including a non-profit organization, which is not a "public user" or "quasi-public user."

"Public user" shall mean a federal, state, county, or municipal agency or some governmental association thereof.

II. GOAL:

The ultimate goal for state-owned locations used for communications facilities, including mountaintops, is to have such areas cleared of all appurtenances and machinery, with the possible exception of observation platforms. This goal cannot be realized until the technology of electronic communications has advanced to where antennas and other electrical paraphernalia are outmoded. Until that time, the overall management objective for communications sites will be to give priority to transmission sites for communications critical to the public health, safety and welfare, while minimizing the aesthetic and environmental impacts of these communications facilities.

III. POLICY:

It is the policy of the Department of Natural and Cultural Resources to permit, when no other feasible alternative is available, controlled development of state-owned land under its jurisdiction for electronic communications necessary to public health, safety and welfare; and to facilitate, wherever possible, in the consolidation of commercial electronic communication networks across the state.

IV. GUIDELINES AND CONSIDERATIONS:

A. Values to Be Protected: Management of the communications sites on DNCR lands is intended to protect three distinct values deemed essential to the public interest:

1. *Aesthetics/natural condition and public use:* To maintain the natural and scenic character of an area. Communication facilities shall be installed so as to have the least physical disturbance or modification of the natural environment and minimal impact to the public enjoyment of these environments.

2. *Public health, safety and welfare:* To consider communications projects necessary and desirable to maintain or improve the health, safety and welfare interests of the public at large, as well as to reasonably safeguard the health and safety of visitors to communication sites.
 3. *Electronic integrity:* To uphold the non-interference of communications signals and frequencies between communications systems and/or associated electrical devices.
- B. Communication Site Designation: In order to articulate the use of DNCR properties for communications activities, the following site designations are hereby established for the purpose of describing existing assets and limitations that each site category may possess. All current and future sites will be classified by these designations:
1. *Multiple Use Sites ("MU")* may allow for the full range of communication uses, so long as those uses are compatible with site conditions, typical management activities, traditional public use, and deed covenants, if any; and strive to minimize the aesthetic and environmental impacts. MU Sites typically contain electric power from off-site, phone capability, and usually have generator back-up capabilities. Infrastructure specific to communications can be erected at these sites (tower, building, etc.) provided such installations are in compliance with and meet the objectives of the other sections of this policy.
 2. *Limited Use Sites ("LU")* have one or more limitations that prohibit the expansion of a LU Site. Limitations may include, but are not limited to: access issues; protection of special aesthetic or natural site conditions; lack of a power source, telephone, or fiber resources; public health or safety concerns; interference with other communication sites; or incompatibility with other primary uses of a particular site. These sites shall have restrictions placed upon them based upon their limiting factors.
 3. *Restricted Use Sites ("RU")* are restricted communication sites and shall be limited to only those uses that are deemed a critical need for public health, safety or welfare; where the benefits derived from having the communication site outweigh the potential detriments to the values to be protected. Examples of restricted uses include those related to fire and rescue, law enforcement, emergency medical services, and/or emergency management. Such sites shall not be used for commercial activities or "for profit" purposes. Measures shall be taken to ensure that no alternatives sites exist, and that aesthetic and environmental impacts will be minimized or mitigated.
- C. Approved, Designated DNCR Sites: The following specific DNCR sites are hereby designated by the Commissioner as "Communication Sites." The letter designation after each site indicates its current designation.

Belknap Mountain, Belknap Mountain State Forest (MU)

Blue Job Mountain, Blue Job State Forest (MU)
Cannon Mountain, Franconia Notch State Park (MU)
Cardigan Mountain, (RU)
Federal Hill, Federal Hill Fire Tower (LU)
Hampton Beach State Park, (RU)
Holden Hill, Coleman State Park (MU)
Hyland Hill, Hyland Hill State Forest (MU)
Jordan Hill, Walker State Forest (RU)
Kearsarge Mountain, Kearsarge Mountain State Forest (MU)
Magalloway Mountain (RU)
Milan Hill, Milan Hill State Park (MU)
Oak Hill, Oak Hill Fire Tower (MU)
Pack Monadnock Mountain, Miller State Park (MU)
Pitcher Mountain, Pitcher Mountain Fire Tower (MU)
Prospect Mountain, Weeks State Park (LU)
Mt. Sunapee, Mt. Sunapee State Park (MU)
Wantastiquet Mountain, Wantastiquet Mountain State Forest (MU)
Warner Hill, Warner Hill Fire Tower (MU)

Development of communications facilities at these sites shall be restricted to specific areas, as determined by the Commissioner.

V. APPLICATION FOR COMMUNICATIONS SITE USE:

A. Application for a communication site use will be filed with the Commissioner, Department of Natural and Cultural Resources and shall include the following information:

1. Demonstrated need for public health and safety, or for the public welfare interests served by commercial-service communications.
2. Complete plans and specifications of the proposed installation including, but not limited to, buildings, towers, power lines, accessory structures, fuel tanks, generators, method(s) of access to the site and access improvements.
3. Detailed specifications including type, frequency, size and proposed location of

receiving and/or transmission unit(s) and antenna(s).

4. Analysis of compatibility with existing facilities and equipment (intermod and structural analysis) and power requirements.
5. Written documentation that the installation meets the current ANSI standards for controlled and uncontrolled human exposure to radio frequency electromagnetic fields. Cumulative effects of the proposed installation together with the existing facilities shall be considered.
6. Power and access availability without major new development.

B. Applications for New Communications site designations will be filed with the Commissioner, Department of Natural and Cultural Resources and shall include the following process.

1. A description of alternative sites considered, including other DNCR-designated communication sites and locations on private property, and the results from an investigation that demonstrates why the alternative sites are not feasible.
2. Compatibility with long-range multiple use plans.
3. Aesthetic compatibility with surrounding environment.
4. Impact on aesthetic/natural and recreational resources, and efforts to minimize or mitigate such impacts.
5. Deed and/or property use restrictions.

Regional and Local Review: In accordance with RSA 674:54 II, all applications for new communication site designations shall be sent to the Board of Selectmen/City Council of the municipality and to the appropriate Regional Planning Commission in which the proposed site is located to provide an opportunity for public hearing(s), subject to the following:

1. DNCR will provide a public notification in a newspaper in general circulation in the area stating that a proposal for a new communication site designation has been sent to the municipality.
2. DNCR will provide written notification to: (1) persons who have interests of record in the site; (2) persons who have written use agreements for the site on file with DNCR; (3) landowners across which the State has deeded or written access rights to the site; and (4) donors of land which contains the site.
3. DNCR personnel and the applicant shall participate in any hearing(s) requested by the municipality or by the Regional Planning Commission.

4. DNCR shall respond in writing to any written comments made by the municipality relative to the application and received within 30 days after the hearing. Responses shall identify any modifications made in response to comments from the municipality or a written explanation as to why the implementation of the comments would be contrary to the proposed public project.
5. Upon completion of the processes described in this section, applications for a new communication site shall be submitted to Governor and Executive Council for final approval.
6. Applications from public and private users shall be submitted to the local governing body by the applicant for approval under the municipality's Site Plan Review Regulation.
7. Application(s) for use permits or leases for new communication sites shall follow the same procedures as existing designated sites.
8. Application(s) for a new site, or modification or expansion of an existing site may be reviewed by the Communication Site Advisory Committee, as deemed necessary by the Commissioner.
9. Once a site has been officially designated, new users on the site can be processed by the DNCR communications office without review by the Advisory Committee, providing the new user doesn't significantly modify or alter the site, such as but not limited to adding buildings, extending the tower height or other buildings or structures, in which case it shall be reviewed by the Advisory Committee.

VI. CONSOLIDATION:

- A. Towers and buildings: on each communication site will be consolidated and shared by site users in a manner striving for the following goals:
 - I. A single, expandable, low profile transmitter building serviced by a single, non-overhead utility line.
 2. As few multiple-use, broadband antennae as are technically feasible, affixed to a single tower. Such consolidation will be planned on a site-by-site basis according to building design, cable and power layout, and vegetation distribution; and accomplished through cooperative funding among users, contributions, or bonding.
 3. Additions to, and modifications or relocation of, existing structures and equipment shall be compatible with the designated site plan for consolidation of facilities through shared use.

VII. ADVISORY COMMITTEE:

- A. Communication Site Advisory Committee is established as an adjunct to the Commissioner's office. Technical advisors may serve as deemed necessary or desirable by the Committee. Committee membership shall include the following individuals or their designee:

Director, Division of Forests and Lands
Director, Division of Parks and Recreation
Director, Division of State Police
Executive Director, New Hampshire Fish & Game Department
President/Forester, Society for the Protection of New Hampshire Forests
Executive Director, Local Government Center

- B. Purpose: The Advisory Committee is established for the purpose of advising the Commissioner on the following matters:
1. Designation of new communication sites, or modification to tower height, building size and/or expansion of existing sites if deemed necessary by the Commissioner.
 2. Developing Plans for consolidation of facilities.
 3. Policies, rules, and regulations for communication site management may be reviewed periodically
 4. Recommended changes to policy, rules and regulations for communications site management may be made by Advisory Committee, Communications Site Committee, Communications Section Chief, or the Department and approved by the Commissioner.

VIII. MODIFICATION OR EXPANSION OF EXISTING SITES:

- A. New or Expansion Proposals: Proposals for new or enlarged installations at designated communication sites, which are demonstrated to be in the overall interest of public health or safety will be given the highest priority. New users may be permitted subject to the following:
1. Can be accomplished without compromising the values to be protected under Section IV. A, and
 2. Would result in a net improvement in onsite facility aesthetics, primarily through consolidation, or
 3. Would result in enhanced public recreation access or opportunities, or
 4. Would provide the tower or building space needed to accommodate "public users," as determined by the Commissioner.

IX. INTERFERENCE:

- A. New Installations: New installations/users shall not interfere with existing installations, users and functions. Where irreconcilable conflicts arise between "public user," and "private user" installations over electronic interference, space, power supply, or location, the "public" or "quasi-public" user shall take precedence and displace the "private user." Order of displacement is: 1) private users; 2) quasi-public users engaged in low power broadcasting; 3) other quasi-public users. Within each category, newest installations shall be displaced first.
- B. Electronic Interference: In the case of a complaint of electronic interference or other conflicts created by a new installation, it shall be the responsibility of the proponent of the new installation to submit plans for resolving the complaint or potential problem. The plans shall be consistent with the site consolidation effort. The complainant and new installation proponent shall attempt to resolve the matter. Unresolved issues and the proponent's plans shall be submitted to the Communication Office within 10 working days of the complaint for review and recommendation for action by the Commissioner.

X. OTHER INSTALLATION REQUIREMENTS:

- A. Additional considerations shall include:
1. Communication tower(s) on DNCR communication sites shall be the minimum height necessary to meet technical requirements of the equipment installed and the service area, but under no circumstances shall tower structure exceed 180 feet in height.
 2. All DNCR communication sites shall meet the current American National Standards Institute (ANSI) requirements for controlled and uncontrolled human exposure to radio frequency electromagnetic fields.
 3. Permits/leases for site use are not transferable and facilities (buildings, tower and equipment) may not be sub-leased.
 4. Requests for changes or modification of a permitted installation shall be submitted in writing for approval by the Commissioner.
 5. Site users shall comply with all applicable federal, state and local laws, ordinances and rules.
 6. All equipment installations shall be accomplished in compliance with the latest edition of the "State of New Hampshire Department of Natural and Cultural Resources Technical Requirements For use of Communication Sites," and all grounding of equipment will meet Motorola's R-56 requirements.
 7. Intermod Study is required of all new prospective users or a change of frequency by a current user.

8. Structural analysis may be required by new users and upgrades by current users.
9. An RF Study is required by all new users at all sites. Sites that are manned by volunteers or paid personnel require the RF Study to specifically reference and address the effects and risk to personnel from RF exposure.

XI. TENANT CATEGORIES (basis for annual rent):

The following table depicts the tenant categories and provides the degree of annual rent to be charged in order to occupy a DNCR communication site:

CATEGORY	ANNUAL RENT BASIS
NH State Entity	Beneficial Services (No Charge Tenants as of 1/1/2013)
Federal Entity	Administrative Fee (\$1,000 as of 1/1/2013)
Government/Quasi-Government, Municipalities, County, Other State	Administrative Fee (\$1,000 as of 1/1/2013)
Commercial	Fair Market Rent
Other	Fair Market Rent

XII. FEES:

- A. Fair Market Value Rent: All new or renewed non-state tenant contracts (leases, permits, licenses) shall be assessed an annual fair market value rent (the Market Rent) or annual administrative fee(the Administrative Fee: based on beneficial services arrangements and/or other considerations) for each communications site, which shall be set by the Commissioner.
 1. Items to be considered in determining the Market Rent or Administrative Fee will include:
 - Administration costs to the state.
 - User classification (public, quasi-public, private) and type of installation.
 - Prorated share of facilities maintenance.
 - Inventory of the equipment installed at the site.
 - Benefits accruing to the state as a result of joint installation.
 - Costs associated with installations at alternative locations on private property.
 - Market Rent values on comparable private communications sites.
 - Potential impacts to existing state park or state forest operations.
 - Public safety and/or quality of life considerations.
 2. All communication installations on DNCR lands owned by or leased to non-public tenants shall be subject to local taxes, payable by the tenant.

XIII. AMENDMENTS:

The Policy may be amended from time to time to serve the public interest upon recommendation of the Communication Site Advisory Committee and approval by the Commissioner.

Approved: _____

Jeffrey. J Rose, Commissioner

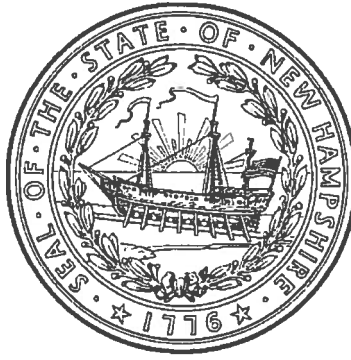
Department of Natural and Cultural Resources

Date: _____

7/27/17

Exhibit B

STATE OF NEW HAMPSHIRE
DEPARTMENT OF NATURAL AND CULTURAL RESOURCES



**TECHNICAL REQUIREMENTS
FOR USE OF COMMUNICATION SITES**

Adopted June 30, 1995
Reviewed April 27, 2005
Revised February , 2014
Formatting/Name Revised July 24, 2017

Jeffrey J. Rose, Commissioner
172 Pembroke Road
Concord, N.H. 03301

State of New Hampshire
Department of Natural and Cultural Resources
Technical Requirements
For Use of Communication Sites

Introduction

The following outlines technical requirements for installation, operation and maintenance of communication equipment and appurtenances at Department of Natural and Cultural Resources (DNCR) communication sites as required by Item III.H.6 of the DNCR "Policy On Use and Management of Mountaintops for Communication Facilities". As stated in the policy, all requests for new communication equipment installations or modifications of existing equipment require review by the Communication Site Advisory Committee and approval by the Commissioner.

The Commissioner, with counsel from the Communication Site Advisory Committee, shall be the final authority in resolution of any conflicts between site users or in interpretation of these technical requirements and may require testing of user's equipment to determine compliance or to investigate possible sources of interference.

These requirements are in addition to any standards or conditions contained in the lease/use agreement.

These requirements shall apply to all new communications facilities and to existing facilities that are upgraded or expanded. The requirements may be waived or modified by the DNCR Site Manager for facilities and/or users in existence at the date of adoption, as communication site conditions warrant.

Transmitters and Associated Equipment

- A. Transmitters shall be equipped with isolators to provide the following minimum isolation to reduce the possibility of intermodulation interference.
 - 25 db (70 MHz to 220 MHz)
 - 50 db (220 MHz to 1000 MHz)
 - 75 db (1000 MHz to 76 GHz)
- B. A Bandpass cavity shall be used between each antenna and associated transmitter or combiner. A combiner, or duplexer will satisfy this requirement.
- C. R.F. Devices including duplexers, isolators, cavities, switches, etc. shall be located inside grounded cabinets where physically possible. Open racks may be permitted on a site by site basis to fit specific needs.
- D. Grounding to each cabinet and device shall be installed and comply with current Standards and Guidelines for Communication Sites (R56), NFPA 780: Standard for the Installation of Lightning Protection Systems, and NFPA 70: National Electrical Code® when applicable.
- E. Transmission lines entering enclosed equipment cabinets shall do so via bulkhead connectors. Type "N" bulkhead connectors shall be used above 54 MHz.
- F. Power, telephone, network, or control lines shall be protected by grommets where they enter enclosed radio cabinets. Where high R.F. fields exist, telephone lines and control lines shall enter radio cabinets via RFI filtration devices.

- G. The use of RG\8, RG\58, braided shield, single shield coax cable or aluminum shielded cable is not permitted. This includes cables located within cabinets or racks. PTP, Microwave, or GPS systems whose manufacturer requires the use of LMR-400 or similar cable will be exempt providing the manufacturer's documentation is submitted to the DNCR site manager prior to installation. Double shielded RG\58 (Belden 8268, etc.) may be used in external frequency reference and 1 PPS launch timing applications.
- H. Ethernet cable (CAT5e, CAT6, etc.) shall be routed to not interfere or receive interference from RF equipment.
- I. Ethernet cable (CAT5e, CAT6, etc.) shall be plenum rated for in shelter use and shielded/ outdoor rated when used outside of the shelter or on the tower.
- J. Ethernet cable (CAT5e, CAT6, etc.), and telephone lines shall be grounded upon entry into the shelter from an outside source (tower mounted equipment, or telco lines) using a UL listed surge suppressor and shall be installed in accordance with current Standards and Guidelines for Communication Sites (R56), NFPA 780: Standard for the Installation of Lightning Protection Systems, and NFPA 70: National Electrical Code® when applicable.
- K. Microwave or PTP transceivers shall be secured to an open rack or mounted within an enclosed cabinet. Unsecured devices will not be permitted.
- L. At no time will any equipment be mounted to an ice bridge or its support structure.
- M. Microwave or PTP ODU (Outdoor Units) should be mounted as close to the antenna as possible.

Antenna System Requirements

- A. Antenna systems must be approved by the DNCR Site Manager prior to the commencement of installation work. The cost of any changes to the existing tower including structural work, tower painting, tower lighting, etc. will be paid for by the site user. Rearrangements of existing antennas will not be considered except under unusual circumstances.
- B. The design of each proposed antenna systems shall take into account the following:
 - *Antenna location will be assigned by the DNCR Site Manager based on available space, required radiation pattern, transmitter power and frequency, antenna type, mounting restrictions and interference considerations.
 - *Only antennas which provide a direct dc path to ground may be utilized.
 - *Antennas shall be equipped with coaxial lightning protectors meeting ANSI standard 62.1. Lightning protectors shall be connected to site ground system in accordance with current Standards and Guidelines for Communication Sites (R56) and NFPA 780: Standard for the Installation of Lightning Protection Systems.
 - *R.F. link antennas, control antennas, and Microwave Antennas will be assigned mounting positions as low on the tower as possible.

*Metal antenna mounting hardware and falling ice protection hardware will be hot dipped galvanized or stainless steel.

*Only solid copper jacketed coax cable will be permitted for antenna cable runs. PTP, Microwave, or GPS systems whose manufacturer requires the use of LMR-400 or similar cable will be exempt providing the manufacturer's documentation is submitted to the DNCR site manager prior to installation.

*Coax cable shall be individually attached to the tower legs or waveguide hangers. The location of coax cable runs will be assigned by the DNCR Site Manager.

*Attachment of coax cable will be by stainless steel clamps or hangers spaced a maximum of three feet apart.

*The use of plastic "tie wraps" to support coax cable in any location is not permitted. The use of coating products that emit acetic acid are not permitted. Use of ultra-violet protected "tie wraps" are allowed on a temporary basis during construction or for temporary installations.

*Grounding kits with solid copper straps and mechanical compression shall be installed at top of tower, at point where coax cable departs the tower, and at the building entrance point. These clamps will be properly sealed to prevent corrosion at the coax cable connection. Stainless steel connectors will be used from the grounding kit to the tower. Grounding kits and procedures must comply with current Standards and Guidelines for Communication Sites (R56).

*Horizontal runs of coax cable shall be protected by ice shields and supported every three feet with stainless steel clamps or hangers.

*Coax cable shall enter buildings via weatherproof cable entrance ports or cable mounting plates. Positions will be assigned by the DNCR Site Manager. Ground Clamps will be used on both sides of this connection and will be connected to the site ground system.

*Coax cable runs located inside buildings will utilize existing cable racks or will be supported overhead by hangers.

Power Requirements:

- A. Each site user will be responsible for the cost of installation of separately metered electrical service when such metering is required unless otherwise specified in the lease/use agreement.
- B. The provisions of backup power by DNCR will require approval of the DNCR Site Manager.
- C. Emergency generating equipment or battery backup units shall not be installed without approval of the DNCR Site Manager.
- D. Each new transmitter and equipment cabinet will be connected to a separately fused AC outlet in accordance with current Standards and Guidelines for Communication Sites (R56), NFPA 70: National Electrical Code®, and State Electrical codes.
- E. Under no circumstances will one station be plugged into the accessory outlet of another cabinet.

- F. All electrical installation work shall be in full compliance with current Standards and Guidelines for Communication Sites (R56), NFPA 70: National Electrical Code®, and State Electrical codes.

Administrative Items

- A. A frequency compatibility study must be performed prior to installation; it shall be done by an independent consulting firm, which has been approved by DNCR. The cost of this study is the responsibility of the site user. A subsequent study may be required each time the site user proposes an additional frequency at the site.
- B. The site user shall immediately cease operation if notified by the DNCR that they are causing harmful interference.
- C. The DNCR Site Manager shall be provided with copies of all FCC license applications, current FCC licenses and equipment specifications.
- D. The site user shall make no changes after the initial installation without prior written approval from the DNCR Site Manager.
- E. Equipment shall be maintained in such a manner as to prevent it from becoming a source of interference or a safety hazard.
- F. Equipment shall have an ID tag attached, which shows licensee's name, address, call sign, frequency, tone squelch frequency and telephone number of person or organization responsible for maintenance work. Radio station licenses shall be posted for each transmitting station as required by FCC rules.
- G. Speakers will be turned off except during periods of maintenance work.
- H. Areas in and around the site user's equipment shall be kept clean and neat at all times. In addition, exterior areas including access roads, trails, and parking area shall be kept clean. Trash and unused materials shall be immediately removed from the site and not stored on the premises in any manner.
- I. Smoking, open flame, or welding will not be permitted inside buildings.
- J. Should the site user cause discharge of any Fire Protection System, they will be responsible for all costs associated with recharging the system, cleaning the building and repairing damaged equipment.
- K. If the building has an alarm system installed, the site user will notify designated Alarm Center when entering or leaving building in accordance with posted instructions.
- L. Site access shall be as designated in and subject to restrictions as described in the lease\use agreement. The DNCR will not be responsible for plowing of access roads or trail entrances to the site unless specified in lease/use agreement.
- M. Prior to the signing of any lease, a joint visit of the site will be made by the proposed site user and the DNCR Site Manager. Any additional special technical requirements not covered in this document will be determined at this meeting.

- N. When a lease is terminated for any reason, the site user will remove all equipment including antennas and feed lines within thirty days and will be responsible for any work necessary to return site to its previously existing condition. Should the site user fail to do so, then DNCR will arrange to have work completed and will bill the site user for this work.

EXHIBIT "C"

Notice of Lease

Notice of the following Lease is hereby given in accordance with the provisions of the New Hampshire Revised Statutes Annotated, Chapter 477, Sections 7 and 7-a: and as per Chapter 72, Section 72:1, failure of the Lessee to pay the duly assessed personal and real estate taxes when due, or failure to record this Notice of Lease, shall be cause to terminate the Lease by the State.

LESSOR: **STATE OF NEW HAMPSHIRE**, Department of Natural and Cultural Resources, having a mailing address of 172 Pembroke Road, Concord, New Hampshire 03301

LESSEE: **UNITED STATES DEPARTMENT OF AGRICULTURE, FOREST SERVICE**, an agency of the United States Government being located in the White Mountain National Forest 71 White Mountain Drive, Campton, New Hampshire 03223

TERM EFFECTIVE DATE: 1-Oct-2017

DESCRIPTION: Communications Lease at Mount Washington State Park – Sargent’s Purchase , NH

LEASED PREMISES

The STATE, for and in consideration of the covenants and agreements hereinafter contained and made on the part of LESSEE, does hereby grant, demise and lease to LESSEE:

- a) Designated space within the Yankee Building for placement of radio equipment
- b) Designated spaces on the rooftop of the Yankee Building for antennas

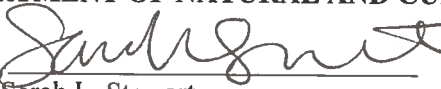
TERM: One (1) five (5) year

RIGHTS OF EXTENSION OR RENEWAL: None

EXECUTED as an instrument under seal on the dates indicated below.

LESSOR:

STATE OF NEW HAMPSHIRE
DEPARTMENT OF NATURAL AND CULTURAL RESOURCES

By: 
Sarah L. Stewart
Commissioner

STATE OF NEW HAMPSHIRE
COUNTY OF MERRIMACK

The foregoing instrument was acknowledged before me this 17th day of April, 2019, by Sarah L. Stewart, in her capacity as Commissioner of the Department of Natural and Cultural Resources.

 LISA M. CONNELL
NOTARY PUBLIC/JUSTICE OF PEACE
My Commission expires March 22, 2022

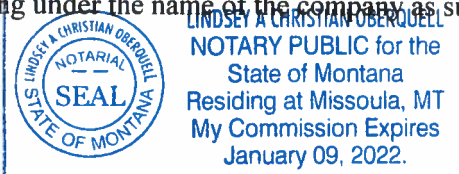
LESSEE:

UNITED STATES DEPARTMENT OF AGRICULTURE, FOREST
SERVICE

By: 
Sarah Petroff
Duly Authorized

THE STATE OF Montana
COUNTY OF Missoula

On this 21 day of march, 2019, before me, the undersigned officer, personally appeared, who acknowledged to being authorized to do so, executed the foregoing instrument for the purposes contained therein, by signing under the name of the company as such officer.




NOTARY PUBLIC/JUSTICE OF PEACE
My Commission expires: 1/9/22

EXHIBIT D

EQUIPMENT INVENTORY

Mt Washington
Site

USDA Forest Service
Organization

812-489-3391
Contact Phone #

TOWER MOUNTED EQUIPMENT:
(Antenna Make, Model, Feed-line Type)
(Tower Make, Model and height)

Roof mounted Telewave ANT150F2
1/2 LDF4 through attic
App. 20' above ground level

LOCATION:
(Mounted Elevation and Bearing on Structure)

HOUSED EQUIPMENT:
(Make, Model, Serial Number,
Tx/Rx Frequencies) Also List Back-up
Power (Batteries or UPS)

Codan/Daniels Repeater MT4E
SN 254930
Installing rack mount APC backup this
year
Tx171.525/Rx164.15

LOCATION – SHELTER:
(Rack or Cabinet Mounted)

Top floor / labeled cabinet
4 sq ft of floor space

Copy of FCC Licenses and ASR #



Signed:

241 Fort Missoula Road
Missoula, MT 59804

Address

406-329-3602

Phone Number

8/19/2019

Date:

SUBMIT TO: Justin Bellen
Division of Forests and Lands
172 Pembroke Road
Concord, NH 03301

EXHIBIT

I

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

STATE OF MISSOURI, et al.,

Plaintiffs,

v.

No. 4:21-cv-01300

JOSEPH R. BIDEN, JR., et al.,

Defendants.

DECLARATION OF DAVID SCANLAN

1. My name is David Scanlan. I am the Deputy Secretary of State for the State of New Hampshire and my duties include leadership of the Division of Vital Records. I am also a resident of New Hampshire and over the age of majority. I have personal knowledge of the facts in this declaration, and those facts are true and correct to the best of my knowledge.

2. I submit this declaration in support of Plaintiffs' Motion for Preliminary Injunction.

3. The Department recently received an Amendment of Solicitation/Modification of Contract from the Centers for Disease Control and Prevention (CDC) which is not dated and not signed. The Amendment/Modification number is "Mass Modification 22-00001." The SF30 Continuation Sheet states the purpose is "to incorporate clause 52.223-99, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors in all contracts listed on the attached Excel spreadsheet." Attached hereto as **Exhibit A** is a true and correct copy of that Amendment of Solicitation/Modification of Contract.

4. An Excel spreadsheet was sent with the Amendment of Solicitation/Modification of Contract. The Excel spreadsheet lists 3,440 contracts, three of which are with the “Secretary State, New Hampshire Dept Of.” A true and correct copy of an excerpt of that Excel spreadsheet identifying the three contracts with the “Secretary State, New Hampshire Dept Of” is attached hereto as **Exhibit B**.

5. The e-mail transmitting the Amendment of Solicitation/Modification of Contract and the Excel spreadsheet states: “The E.O. requires agencies to include a clause requiring contractors and subcontractors at any tier to comply with all guidance for contractor or subcontractor workplace locations as published by the Safer Federal Workforce Task Force (Task Force Guidance) at <https://www.saferfederalworkforce.gov/contractors/>.” “Contractors will sign and return the modification via email to the Contracting Officer of record by November 9, 2021.” A true and correct copy of the transmittal e-mail is attached hereto as **Exhibit C**.

6. The transmittal e-mail of the Amendment of Solicitation/Modification of Contract Notice to Lessor states: “Contractors will sign and return the modification via email to the Contracting Officer of record by November 9, 2021.”

7. Contract with order number 75D30121F00009 and contract number 200-2017-92606 is between the CDC and the Department of State. It provides for the Division of Vital Records sending the CDC files on New Hampshire births, deaths, and fetal deaths. The current contract expires on December 31, 2021 and it is expected the CDC will want to renew. The value of the contract is \$168,636.00. These funds, in part, support 8 full time and one part-time employee of the Division. Attached hereto as **Exhibit D** is a true and correct copy of the fully executed contract.

8. Contract listed on the CDC spreadsheet as HHSD200201792606I, but identified as order number 75D30120F00008, as part of contract number 200-2017-92606, is between the CDC and the Department. The contract had the Department send individuals authorized to certify deaths training on using the electronic reporting system. The value of the contract is \$200,000.00. This contract expires on September 30, 2022 and it is not expected to be renewed. Attached hereto as **Exhibit E** is a true and correct copy of the fully executed contract.

9. Contract 75D30121P11406 is between the CDC and the Department providing for the Division of Vital Records sending electronic files of New Hampshire deaths to the CDC. The value of the contract is \$14,329.00, it expires on May 1, 2022, and it is expected the CDC will want to renew the contract. Attached hereto as **Exhibit F** is a true and correct copy of the fully executed contract.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on this the 4th day of November, 2021.

A handwritten signature in black ink, appearing to read 'David Scanlan', is written over a horizontal line.

David Scanlan
Deputy Secretary of State

EXHIBIT

A

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT		1. CONTRACT ID CODE		PAGE OF PAGES 1 4	
2. AMENDMENT/MODIFICATION NO. Mass Modification 22-00001		3. EFFECTIVE DATE See Block 16C		4. REQUISITION/PURCHASE REQ. NO.	
5. PROJECT NO. (If applicable)					
6. ISSUED BY Centers for Disease Control and Prevention (CDC) Office of Acquisition Services (OAS) 2900 Woodcock Blvd Atlanta, GA 30341-5539		CODE 8219		7. ADMINISTERED BY (If other than Item 6) CODE	
8. NAME AND ADDRESS OF CONTRACTOR (No., street, county, State and ZIP Code)		X		9A. AMENDMENT OF SOLICITATION NO.	
				9B. DATED (See Item 11)	
				10A. MODIFICATION OF CONTRACT/ORDER NO.	
CODE 832777143		FACILITY CODE			

11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS

☐ The above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of Offers ___ is extended, ___ is not extended. Offers must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended, by one of the following methods:

(a) By completing Items 8 and 15, and returning ___ copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.

12. ACCOUNTING AND APPROPRIATION DATA (If required)

N/A

13. THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS, IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.

(√) X	A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A.
	B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation date, etc.) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(b).
X	C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF: FAR 52.243-1 Changes Fixed Price, Alt I, II, III, V; FAR 52.243-2 Changes-Cost Reimburesment, Alt I, II, III, V; FAR 52.243-3 Changes T&M and Labor Hour; FAR 52.212-4(c) Changes to Contract Terms and Conditions-Commercial Items

E. IMPORTANT: Contractor ☐ is not, ☒ is required to sign this document and return 1 copies to the issuing office.

14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF section headings, including solicitation/contract subject matter where feasible.)**See SF 30 Continuation Sheet**

15A. NAME AND TITLE OF SIGNER (Type or print)		16A. NAME OF CONTRACTING OFFICER	
15B. CONTRACTOR/OFFEROR (Signature of person authorized to sign)	15C. DATE SIGNED	16B. UNITED STATES OF AMERICA BY (Signature of Contracting Officer)	16C. DATE SIGNED

SF 30 Continuation Sheet

1. The purpose of this bilateral modification is to incorporate clause 52.223-99, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors, in all contracts listed on the attached Excel spreadsheet.

This class deviation is issued under the authority of FAR 1.404 and HHS Acquisition Regulation (HHSAR) 301.401 following consultation with the Chair of the Civilian Agency Acquisition Council (CAAC) in accordance with FAR 1.404(a) and the HHS Senior Procurement Executive in accordance with HHSAR 301.401.

2. This modification is applicable to the following:
 - Contracts and contract-like instruments* above the micro-purchase threshold.
 - Contracts and contract-like instruments that are not covered or directly addressed by the E.O. because the contract or subcontract is for the manufacturing of products.
3. The clause shall not be applied to contracts, and contract-like instruments if performance is outside the United States or its outlying areas (the exclusion is limited to employees who are performing work only outside the U.S. or its outlying areas).
4. Contractors shall add the clause to applicable subcontracts 30 days after the effective date of this modification.
5. Contractors are not required to submit verification of employee vaccinations in response to this modification; however, contractor employees must be fully vaccinated no later than December 8, 2021 pursuant to E.O. 14042.
6. Contractors are requested to sign and return the modification to the your Contracting Officer of record by November 9, 2021 by completing the SF30 blocks 8, 10A, 15A, 15B, and 15C.
7. By signing the modification, the contractor affirms it understands and agrees to comply with the mandates in E.O. 14042.

*For the purpose of this modification, the term “contract-like instruments” shall include only those instruments within the responsibility of contracting officers as that term is defined by the E.O.

FAR Deviation Clause
Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors

52.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors.
ENSURING ADEQUATE COVID-19 SAFETY PROTOCOLS FOR FEDERAL CONTRACTORS (OCT 2021) (DEVIATION)

(a) Definition. As used in this clause -
United States or its outlying areas means—

- (1) The fifty States;
- (2) The District of Columbia;
- (3) The commonwealths of Puerto Rico and the Northern Mariana Islands;
- (4) The territories of American Samoa, Guam, and the United States Virgin Islands; and
- (5) The minor outlying islands of Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Islands, Navassa Island, Palmyra Atoll, and Wake Atoll.

(b) Authority. This clause implements Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, dated September 9, 2021 (published in the Federal Register on September 14, 2021, 86 FR 50985).

(c) Compliance. The Contractor shall comply with all guidance, including guidance conveyed through Frequently Asked Questions, as amended during the performance of this contract, for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (Task Force Guidance) at <https://www.saferfederalworkforce.gov/contractors/>.

(d) Subcontracts. The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts at any tier that exceed the simplified acquisition threshold, as defined in Federal Acquisition Regulation 2.101 on the date of subcontract award, and are for services, including construction, performed in whole or in part within the United States or its outlying areas.

(End of clause)

EXHIBIT

B

Contracting Agency	Contract	Latest Mod	Order No.	Vendor	Vendor Email	Contracting Officer of Record	Contracting Officer of Record Email	Award Type	Completion Date	Ult. Completion Date	LDT0
7523 - CENTERS FOR DISEASE CONTROL AND PREVENTION	750302140009	0	HHS02002017926061	Secretary State, New Hampshire Dept Of DUNS: 179550850	lbrand@bcgliso.com	Cruz, Stephanie D	SDH@cdc.gov	Delivery Order	05/01/2022	05/01/2022	---
7523 - CENTERS FOR DISEASE CONTROL AND PREVENTION	HHS02002017926061	1		Secretary State, New Hampshire Dept Of DUNS: 179550850	stephen.wurtz@sos.nh.gov	Cruz, Stephanie D	SDH@cdc.gov	IOC	---	---	12/31/2021
7523 - CENTERS FOR DISEASE CONTROL AND PREVENTION	7503021401406	0		Secretary State, New Hampshire Dept Of DUNS: 179550850	denise.gonyer@sos.nh.gov	Mitchell, Cynthia Y	ake@cdc.gov	Purchase Order	05/01/2022	05/01/2022	---

EXHIBIT C

From: OFR OAS (CDC) <cdcofroas@cdc.gov>

Sent: Friday, October 22, 2021 12:24 PM

To: cawilliams@atcc.org; cawilliams@atcc.org; mcla0030@umn.edu; lorrie@umn.edu; kille001@umn.edu; mohammad.elias@religroupinc.com; mohammad.elias@religroupinc.com; mohammad.elias@religroupinc.com; george@reliance-cc.com; george@reliance-cc.com; george@reliance-cc.com; george@reliance-cc.com; maureen.vandegrift@lexisnexis.com; maureen.vandegrift@lexisnexis.com; ashley.osteen@thermofisher.com; robert.smith@thermofisher.com; blandon@thermigroup.com; kstogner@theremigroup.com; aaron.lutz@theremigroup.com; aaron.lutz@theremigroup.com; aaron.lutz@theremigroup.com; aaron.lutz@theremigroup.com; kstogner@theremigroup.com; mdaughterty@reprintdesk.com; amanda.sessom@rtlgenomics.com; jeffrey.schieder@buffalo.edu; kathryn.guerrera@stonybrookmedicine.edu;

sbateman@sunypoly.edu; cinzia.raponi@muhc.mcgill.ca; mary-alice.tompkins@perspecta.com;
marcb@biosearchtech.com; martin@researchsupportservices.com; jmorales@rti.org; jmorales@rti.org; RTI-ATSDR@rti.org; mkrishnan@scimetrika.com; jwithers@rti.org; bupton@rti.org; gthompson@rti.org; gthompson@rti.org;
abookout@rti.org; jmorales@rti.org; jfarrell@rti.org; jmorales@rti.org; jmorales@rti.org; jmorales@rti.org;
abookout@rti.org; jmorales@rti.org; jmorales@rti.org; jfarrell@rti.org; jmorales@rti.org; jfarrell@rti.org; jmorales@rti.org;
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stratton@rti.org; jwithers@rti.org; ssetzer@rti.org; jmorales@rti.org; mrynties@rti.org; abookout@rti.org;
abookout@rti.org; smarnell@alexton.com; enichen@rti.org; eubanks@rti.org; mmartin@2mresearch.com;
mrynties@rti.org; mrynties@rti.org; mrynties@rti.org; mrynties@rti.org; jwithers@rti.org; abookout@rti.org;
jwithers@rti.org; ellison@rti.org; jmorales@rti.org; sbrodish@rti.org; sudaan@rti.org; aliciab@rti.org; jmorales@rti.org;
jmorales@rti.org; ebongard@resolv.org; george.delclos@uth.tmc.edu; jphillips@mountainstatewaste.com;
reemetzler@comcast.net; scott.e.hammond@ricoh-usa.com; david.haggerty@ricoh-usa.com; scott.e.hammond@ricoh-usa.com;
john.grymes@ricoh-usa.com; john.grymes@ricoh-usa.com; bradley.cue@ricoh-usa.com; gary.hauser@ricoh-usa.com;
david.haggerty@ricoh-usa.com; deniese.heflin@rigaku.com; alison.appenzellar@rightstar.com;
knutringen@msn.com; anna.harb@ring-ir.com; gcasuccio@rjleegroup.com; flodovico@rjleegroup.com;
chris.hoff@roche.com; chet.bounds@roche.com; gayle.elledge@rochesterregional.com;
jeremyrohrbaugh@rohmacinc.com; rose.li@roseliassociates.com; imajor@rossstrategic.com; emaier@rossstrategic.com;
info@rotundascitech.com; trumph@rumphandassociates.com; mmartin@2mresearch.com; randy.cook@aspenmi.com;
mmartin@2mresearch.com; lisa_ashcraft@abtassoc.com; trumph@rumphandassociates.com;
trumph@rumphandassociates.com; trumph@rumphandassociates.com; wbarnes@pmconsultinggrouppllc.com;
wbarnes@pmconsultinggrouppllc.com; jennifer_l_garcia@rush.edu; jennifer_l_garcia@rush.edu; cawilliams@atcc.org;
jennifer_garcia@rush.edu; tammy.rutherford@rusticsoftware.com; tracyb@eoysi.rutgers.edu;
rdozierjr@rwdconsultingllc.com; rdozierjr@rwdconsultingllc.com; rdozierjr@rwdconsultingllc.com;
rdozierjr@rwdconsultingllc.com; rdozierjr@rwdconsultingllc.com; rdozierjr@rwdconsultingllc.com;
rdozierjr@rwdconsultingllc.com; rdozierjr@rwdconsultingllc.com; lloomis@scainc.com; alex@swapkenya.org;
nberger@safegraph.com; clay@safetyplusllc.com; cjmurchie@envisiontechnology.com;
cjmurchie@envisiontechnology.com; michael.pham@sage.com; ktruong@sakuraus.com; ktruong@sakuraus.com; Wooten, Wilma WW (CDC sdcounty.ca.gov) <Wilma.Wooten@sdcounty.ca.gov>; tprice@sanguinebio.com;
tami.binder@sanofipasteur.com; amanda.medrano@sanofi.com; amanda.medrano@sanofi.com;
Mackenzie.Fetterman@sanofi.com; tami.binder@sanofi.com; saperste@mst.edu; nencinas@sapphiremfg.com;
RDeGeyndt@savangroup.com; schabels@musc.edu; order@schrodingder.com; stefan.moergeli@unibas.ch;
sphilipson@scgcorp.com; madvi_raya@scimage.com; mkrishnan@scimetrika.com; jlazenby@scimetrika.com;
meenak@inoventures.com; Orelie, Jean (CDC scimetrika.com) <jorelien@scimetrika.com>; wendy.mcclure@scinomix.com;
wmcclure@scinomix.com; jason.lindsey@scinomix.com; andersen@scripps.edu;
jlevon@scriptpro.com; mtrammell@scriptpro.com; liuppa@sdl.com; elena.o'neill@seattlechildrens.org;
lbrand@bcgiso.com; Denise M. Gonyer <Denise.Gonyer@SOS.NH.GOV>; angela@sekon.com;
james.watt@eaglemedicalservicesllc.com; angela@sekon.com; apazahanick@selectgases.com; rnorton@selectgases.com;
rnorton@selectgases.com; rnorton@selectgases.com; john@sequoiafoundation.org; cher.street@servicesource.org;
abdulmalik.shakir@hi3solutions.com; abdulmalik.shakir@hi3solutions.com; eadozier@shimadzu.com;
lbowman@shimadzu.com; dlowe@shimadzu.com; billing@wearesrna.org; robert.mehosky@siemensgovt.com;
usa.800siemens.us@siemens.com; stephen.campbell@siemens.com; chewitt@signaturescience.com;
mitch.seil@northwindgrp.com; cherylann@simulations-plus.com; sean@yoursitehub.com; george.soltys@skillsoft.com;
george.soltys@skillsoft.com; csmith@skylight.digital; pevans@skylineinnovationsinc.com; ktrimble@sobran-inc.com;
david.wagner@dlhcorp.com; victoria.enever@springer.com; david.wagner@dlhcorp.com; victoria.enever@springer.com;
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jwest@oit.gatech.edu; victoria.enever@springer.com; david.wagner@dlhcorp.com; victoria.enever@springer.com;
david.wagner@dlhcorp.com; victoria.enever@springer.com; victoria.enever@springer.com;
alli.shelfelbine@sproutsocial.com; billingteam@sproutsocial.com; billingteam@sproutsocial.com;
florida_hendricks@sra.com; kmann@csra.com; dana.lotspeich@gdit.com; dana.lotspeich@csra.com; kmann@csra.com;
victoria.lemieux@gdit.com; victoria.lemieux@gdit.com; victoria.lemieux@gdit.com; victoria.lemieux@gdit.com;
dana.lotspeich@csra.com; mmartin@2mresearch.com; jackie.mathis@cherokee-federal.com; cawilliams@atcc.org;
lbrand@bcgiso.com; lbrand@bcgiso.com; lbrand@bcgiso.com; elizabeth.schlaudecker@cchmc.org; lbrand@bcgiso.com;

mmartin@2mresearchservices.com; mmartin@2mresearch.com; linton@srcinc.com; lisa_ashcraft@abtassoc.com; linton@srcinc.com; lisa_ashcraft@abtassoc.com; skonduru@srisaibiopharma.com; gregbierie12@gmail.com; lisan.dustevich@stclair.org; St. John, Nathaniel (CDC tsjg.com) <nstjohn@tsjg.com>; sleis@stata.com; lynda.lehing@arkansas.gov; geraldine.harris@dshs.state.tx.us; stacie.flenoy@dshs.texas.gov; tara.das@dshs.texas.gov; laura_smearman@stchome.com; David_mora@stchome.com; david mora <david_mora@stchome.com>; angela_araujo@stchome.com; david_mora@stchome.com; phyllis_olms@stchome.com; gflamme@sasrac.com; rebecca_dillen@steris.com; joe_puchan@steris.com; dawn_felker@steris.com; kyle.heaton@sterling.com; kyle.heaton@sterling.com; kyle.heaton@sterling.com; stacey@sterlingcomputers.com; stacey@sterlingcomputers.com; kyle.heaton@sterling.com; kyle.heaton@sterling.com; amy@stoneux.com; amir.shalev@stons.biz; amir.shalev@stons.biz; ralbinger@strata-safety.com; mark.menninger@stratasys.com; melissa.blatus@stratasys.com; mark.menninger@stratasys.com; spandev@stratedigm.com; bkelly@yourstrategic.com; bkelly@yourstrategic.com

Subject: FW: CDC Mass Distribution of Vaccine Modification- FAR 52.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors

Do not reply to this email as this mailbox is not monitored.

Please read the email in its entirety along with the attached modification and contract listing

CDC Contractor,

As you are aware, Executive Order (E.O.) 14042 was signed by the President on September 9, 2021. The E.O. requires agencies to include a clause requiring contractors and subcontractors at any tier to comply with all guidance for contractor or subcontractor workplace locations as published by the Safer Federal Workforce Task Force (Task Force Guidance) at <https://www.saferfederalworkforce.gov/contractors/>.

In direct correlation to the issuance of Executive Order (E.O.) 14042, see the attached bilateral modification to incorporate clause 52.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors, in all contracts or contract-like instruments, for commercial and non-commercial requirements for services, research and development, and construction services. In addition to the modification, please see the attached contract listing spreadsheet to locate your contract and the contracting officer of record.

Contractors will sign and return the modification via email to the Contracting Officer of record by November 9, 2021.

Special Instructions: If your company will be submitting one modification for multiple contracts with the CDC, a listing of the contract numbers and contracting officer names must be included with your returned modification on a separate page.

Please direct your questions to your contracting officer of record for your contract and/or contracts listed on the attached spreadsheet.

EXHIBIT D

ORDER FOR SUPPLIES OR SERVICESPAGE OF PAGES
1 3**IMPORTANT:** Mark all packages and papers with contract and/or order numbers.

1. DATE OF ORDER 04/14/2021		2. CONTRACT NO. (If any) 200-2017-92606		6. SHIP TO:	
3. ORDER NO. 75D30121F00009		4. REQUISITION/REFERENCE NO. 000HCPCC-2021-52555		a. NAME OF CONSIGNEE CDC/CCHIS/NCHS (RTP)	
5. ISSUING OFFICE (Address correspondence to) Ctrs for Disease Control & Prevention PGH Office of Acquisition Services, Branch 4 PO Box 18070, 626 Cochran's Mill Rd Pittsburgh, PA 15236-0070				b. STREET ADDRESS 4024 stirrup creek drive	
7. TO:				c. CITY DURHAM	e. ZIP CODE 27703-
a. NAME OF CONTRACTOR SECRETARY STATE, NEW HAMPSHIRE DEPT OF DUNS NUMBER: 179550850				f. SHIP VIA	
b. COMPANY NAME				8. TYPE OF ORDER	
c. STREET ADDRESS 71 SOUTH FRUIT ST				<input type="checkbox"/> a. PURCHASE REFERENCE YOUR: Please furnish the following on the terms and conditions specified on both sides of this order and on the attached sheet, if any, including delivery as indicated.	
d. CITY CONCORD	e. STATE NH	f. ZIP CODE 03301-6503		<input type="checkbox"/> b. DELIVERY Except for billing instructions on the reverse, this delivery order is subject to instructions contained on this side only of this form and is issued subject to the terms and conditions of the above-numbered contract.	
9. ACCOUNTING AND APPROPRIATION DATA See Section B				10. REQUISITIONING OFFICE HCPCC	
11. BUSINESS CLASSIFICATION (Check appropriate box(es))					
<input type="checkbox"/> a. SMALL <input checked="" type="checkbox"/> b. OTHER THAN SMALL <input type="checkbox"/> c. DISADVANTAGED <input type="checkbox"/> d. WOMEN-OWNED					
12. F.O.B. POINT Destination		14. GOVERNMENT B/L NO.		15. DELIVER TO F.O.B. POINT ON OR BEFORE (Date) 05/01/2022	
13. PLACE OF				16. DISCOUNT TERMS Net 30 Days	
a. INSPECTION	b. ACCEPTANCE				

17. SCHEDULE (See reverse for Rejections)

ITEM NO. (a)	SUPPLIES OR SERVICES (b)	QUANTITY ORDERED (c)	UNIT (d)	UNIT PRICE (e)	AMOUNT (f)	QUANTITY ACCEPTED (g)
	<p>To ensure payment, invoice must reference the TO#200-2017-92606 0009, DUNS, and Tax ID Number.</p> <p>For Invoice/Payment information: 678-475-4510 Send Invoices to FAX: 404-638-5324 or Email: cpbapinv@cdc.gov</p> <p>Vendor POC: Denise Gonyer PH: (603) 271-4655 Email: denise.gonyer@sos.nh.gov</p> <p>CDC POCs:</p> <p>Program POC: Connie Gentry PH: (919) 541-7642 Email: cmc6@cdc.gov</p> <p>CS: Eric D. Sullivan PH: (412) 386-5290 Email: lr4@cdc.gov</p>					
SEE BILLING INSTRUCTIONS ON REVERSE	18. SHIPPING POINT	19. GROSS SHIPPING WEIGHT	20. INVOICE NO.		\$169,136.00	17(h) TOT. (Cont. pages)
	21. MAIL INVOICE TO:					
	a. NAME Centers for Disease Control and Prevention (FMO)					
	b. STREET ADDRESS (or P.O. Box) PO Box 15580 404-718-8100					
	c. CITY Atlanta	d. STATE GA	e. ZIP CODE 303330080		\$169,136.00	17(i) GRAND TOTAL

22. UNITED STATES
OF AMERICA (Signature)

Eric D. Sullivan

Digitally signed by Eric D. Sullivan

Date: 2021.04.13 14:20:37 -04'00'

23. NAME (Typed)

Eric Delaney Sullivan

TITLE: CONTRACTING/ORDERING OFFICER

SECTION B - SUPPLIES OR SERVICES AND PRICES/COSTS

ITEM	SUPPLIES / SERVICES	QUANTITY/UNIT	EXTENDED PRICE
0001	<u>VSCP DATA</u> Contractor will provide Vital Statistics Cooperative Program (VSCP) data in accordance with the <i>Statement of Work</i> under the base IDIQ contract. This task order is for the collection and delivery of Vital Statistics Data for the date range of January 1, 2021 – December 31, 2021. Period of Performance: April 14, 2021 – May 1, 2022 This is a Firm Fixed Price Line Item. This is a non-severable line item. *Partial Payments are Authorized on the CLIN*	1 Job	\$168,636.00
	Line(s) Of Accounting: 939ZTTB 252P 2021 75-21-0959 5627411101 \$168,636.00		
0002	<u>VSCP SPECIAL PROJECT-NOMS</u> Special Project to support the continual development of a national system for producing coded industry and occupation data from death certificates as described in the <i>Statement of Work</i> below. Period of Performance: April 14, 2021 – May 1, 2022 This is a Firm Fixed Price Line Item. This is a non-severable line item. Invoices may be submitted upon receipt of a data quality report from NIOSH after the close of the data year.	1 Job	\$500.00
	Line(s) Of Accounting: 927ZLGT 252P 2021 75-21-0953 5611111301 \$500.00		

STATEMENT OF WORK

VSCP Special Project-NOMS-Industry and Occupation Coding Special Project

This special project is awarded based on the following eligibility criteria: must collect unedited Industry and Occupation (I/O) free text narratives in electronic format on the death certificate and submit to NCHS (≤ 40 characters each for Industry and Occupation) as part of the ongoing VSCP mortality file transmission process.

The purpose of this project is to support the continual development of a national system for producing coded industry and occupation data from death certificates. The task order provides partial reimbursement to jurisdiction health departments for their cooperation in this project.

Data items used in this Special Project are already included in the VSCP mortality file contract deliverables. The following items will be transmitted to NIOSH for the sole purpose of Industry and Occupation coding and quality control: death certificate number, jurisdiction of occurrence, year of death, industry literal text and occupation literal text. Codes will be returned to jurisdictions through NCHS for their own use. NCHS will incorporate the codes into its national files and publications. Restrictions on release of these files from NCHS are governed by Section C.12 of the VSCP contract. NIOSH will destroy the data received within one year of the close of the data year.

Period of performance: 04/14/2021 – 05/01/2022

Invoices may be submitted upon receipt of a data quality report from NIOSH after the close of the data year.

EXHIBIT

E

ORDER FOR SUPPLIES OR SERVICES

PAGE OF PAGES
1 7

IMPORTANT: Mark all packages and papers with contract and/or order numbers.

1. DATE OF ORDER 09/01/2020		2. CONTRACT NO. (If any) 200-2017-92606		6. SHIP TO:	
3. ORDER NO. 75D30120F00008		4. REQUISITION/REFERENCE NO. 000HCPCC-2020-49806		a. NAME OF CONSIGNEE CDC/CCHIS/NCHS (RTP)	
5. ISSUING OFFICE (Address correspondence to) Ctrs for Disease Control & Prevention PGH Office of Acquisition Services, Branch 4 PO Box 18070, 626 Cochrans Mill Rd Pittsburgh, PA 15236-0070				b. STREET ADDRESS 4024 Stirrup Creek Drive	
7. TO:				c. CITY DURHAM	d. STATE NC
				e. ZIP CODE 27703-	
a. NAME OF CONTRACTOR SECRETARY STATE, NEW HAMPSHIRE DEPT OF DUNS NUMBER: 179550850				f. SHIP VIA	
b. COMPANY NAME				8. TYPE OF ORDER	
c. STREET ADDRESS 71 SOUTH FRUIT ST				<input type="checkbox"/> a. PURCHASE REFERENCE YOUR: Please furnish the following on the terms and conditions specified on both sides of this order and on the attached sheet, if any, including delivery as indicated.	
d. CITY CONCORD				<input type="checkbox"/> b. DELIVERY Except for billing instructions on the reverse, this delivery order is subject to instructions contained on this side only of this form and is issued subject to the terms and conditions of the above-numbered contract.	
e. STATE NH					
f. ZIP CODE 03301-6503					
9. ACCOUNTING AND APPROPRIATION DATA 9390C9X 252P 2020 75-20-0952 5643111101				10. REQUISITIONING OFFICE HCPCC	
11. BUSINESS CLASSIFICATION (Check appropriate box(es))					
<input type="checkbox"/> a. SMALL <input checked="" type="checkbox"/> b. OTHER THAN SMALL <input type="checkbox"/> c. DISADVANTAGED <input type="checkbox"/> d. WOMEN-OWNED					
12. F.O.B. POINT Destination		14. GOVERNMENT B/L NO.		15. DELIVER TO F.O.B. POINT ON OR BEFORE (Date) 08/31/2022	
13. PLACE OF				16. DISCOUNT TERMS Net 30 Days	
a. INSPECTION		b. ACCEPTANCE			

17. SCHEDULE (See reverse for Rejections)

ITEM NO. (a)	SUPPLIES OR SERVICES (b)	QUANTITY ORDERED (c)	UNIT (d)	UNIT PRICE (e)	AMOUNT (f)	QUANTITY ACCEPTED (g)
	<p>To ensure payment, invoice must reference the TO# 200-2017-92606 0008, DUNS, and Tax ID Number.</p> <p>For Invoice/Payment information: 678-475-4510 Send Invoices to FAX: 404-638-5324 or Email: fmoapinv@cdc.gov</p> <p>Vendor POC: Steven M. Wurtz Email: stephen.wurtz@sos.nh.gov</p> <p>CDC POCs: Program POC: Connie Gentry PH: (919) 541-7642 Email: cmc6@cdc.gov</p> <p>CS: Cynthia Y. Mitchell PH: (412) 386-6101 Email: akq9@cdc.gov</p>					
SEE BILLING INSTRUCTIONS ON REVERSE	18. SHIPPING POINT	19. GROSS SHIPPING WEIGHT	20. INVOICE NO.		\$200,000.00	17(h) TOT. (Cont. pages)
	21. MAIL INVOICE TO:					
	a. NAME Centers for Disease Control and Prevention (FMO)				\$200,000.00	17(i) GRAND TOTAL
	b. STREET ADDRESS (or P.O. Box) PO Box 15580 404-718-8100					
	c. CITY Atlanta	d. STATE GA	e. ZIP CODE 303330080			

22. UNITED STATES
OF AMERICA (Signature)


23. NAME (Typed)

Cynthia Y Mitchell

TITLE: CONTRACTING/ORDERING OFFICER

SECTION B - SUPPLIES OR SERVICES AND PRICES/COSTS

ITEM	SUPPLIES / SERVICES	QTY / UNIT	UNIT PRICE	EXTENDED PRICE
0003	VSCP SPECIAL PROJ Death Data	1 Job	\$200,000.00	\$200,000.00

The Period of Performance is September
01, 2020- August 31, 2022

Line(s) Of Accounting:
9390C9X 252P 2020 75-20-0952
5643111101 \$200,000.00

This is a Non-severable CLIN
This is a FFP CLIN

In accordance with FAR Clause 52.232.32 Performance-Based Payments in Section I, the following payment Milestones have been approved for this Task Order 0008 under Contract 200-2017-92606 with the Dpartment of Health, New Hampshire.

Deliverables	Percent of Budget Eligible To be Billed
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For Task Order	0008		
Approved Project Plan 65%			\$130,000.00
Quarterly Quality Report #1 - 5%			\$10,000.00
Quarterly Quality Report #2 - 5%			\$10,000.00
Quarterly Quality Report #3 - 5%			\$10,000.00
Final Project Report - 20%			\$40,000.00
Total			\$200,000.00

SECTION C – DESCRIPTION/SPECIFICATIONS/WORK STATEMENT

DEPARTMENT OF HEALTH AND HUMAN SERVICES (HHS) NATIONAL CENTER FOR HEALTH STATISTICS (NCHS) DIVISION OF VITAL STATISTICS (DVS)

C.1.1 Background

The NCHS is responsible for monitoring the health of the Nation. The National Vital Statistics System (NVSS) is one of the data systems used for this monitoring activity. NVSS is a legislatively-mandated data program, producing data on births, deaths, and fetal deaths. Over 6.5 million state records are collected annually for processing, coding, analysis, and publication in aggregate form; of these events, about 2.8 million are death records. These records, which make up the U.S. Mortality Data System, are critical data for understanding the health of the nation, conducting public health surveillance of diseases and epidemics, and understanding the effectiveness of the healthcare and health financing systems.

The quality of the cause-of-death information on mortality records has long been a topic of national concern. Recent improvements in timeliness through the extensive use of Electronic Death Registration Systems (EDRS) in states provides a unique opportunity to add the focus of improving the quality of the causes of death reported on the death certificate.

C.1.2 Purpose

Two goals of the NVSS are to improve the timeliness and quality of the mortality data. Timely reporting of quality death information is critical for detecting and defining pandemic and other calamitous events as well as showing shifts in causes of death by age, race and sex. After a number of years of effort, there has been an increase in the proportion of death records received within 10 days of death from 11% in 2011 to 61% in 2019. While the goal of 80% received in that time frame has not yet been achieved nationally, several states have ongoing special projects with timeliness improvement as an objective.

Quality initiatives have been started on several fronts, including developing and implementing standards for death certificate reporting and death investigations, best practices for querying in states, e-learning modules with CME credits for training of physicians and coroners, and a web service called VIEWS (Validation and Interactive Edits Web Service) to enable states to improve data quality at the source.

With such a wide range of possible opportunities to increase data quality, it is prudent to try to identify which type is most appropriate for specific audiences. Furthermore, the outcome of training and outreach may be increased if targeted to certifiers with similar quality issues. Certifiers who, as a group, are found to list non-specific and/or intermediate causes of death more often than other certifiers are a group that could warrant targeted training. Additionally, concerted efforts to increase cause of death quality among persons who certify a high proportion of death certificates will have a higher impact on overall data quality than efforts among a large number of certifiers who each are responsible for a low number of death certifications each year.

Recently, an effort has been initiated within NCHS to explore the possibility of identifying death certifiers stratified by such characteristics as volume of death certification and/or the setting where the certifier is working (e.g., hospital, hospice) in an effort to target cause of death quality initiatives to have the most impact. NCHS has also been working on identifying causes of death, and their associated ICD-10 codes, which in general are unsuitable as an underlying cause of death.

This RFTOP recognizes that the specific strategies necessary to improve quality will vary from state to state. Thereby, this RFTOP describes the goals to be achieved rather than the strategies. Jurisdictions have discretion to determine the interventions and strategies necessary for achieving NCHS goals. The respondents to this RFTOP are expected to work with NCHS and other Subject Matter Experts in identifying groups of certifiers that can be effectively targeted for quality improvement interventions and devising their strategies to meet the national goals. The interventions and the strategies will need to be approved by NCHS.

C.1.3 Scope of Work

The scope of work of this Project is to develop methods and pilot an approach to improve the quality of cause-of-death reporting based on identifying and targeting individual certifiers and groups of certifiers with similar quality issues. Specifically, within two (2) years after the award of this contract, the jurisdiction shall carry out the following sets of work.

1. Develop methods and reports in conjunction with NCHS for identifying individual certifiers and/or groups of certifiers with consistent data quality problems for targeted outreach and training.
2. Use the results of the previous task to (a) develop strategies and interventions for targeted outreach to specific certifiers and/or groups of certifiers; and (b) implement those target interventions with certifiers identified in task #1.
3. Provide to NCHS a report (a) documenting the methods and reports created to identify certifier level cause of death data quality issues; (b) describing in detail the strategies developed and piloted for targeted outreach; and (c) evaluating the effectiveness of the targeted outreach on certifier specific and overall cause of death data quality. The report should include copies of materials used, as well as documentation of any training programs carried out. The materials will be made available to other jurisdictions if identified as successful. Information on challenges, barriers, and approaches which were not successful should also be included in this report to provide information on strategies to avoid.

C.2 Tasks to be performed by Category

The Contractor shall complete the following tasks:

Task #1: Kick-off meeting

Within 30 days after the award of the contract, the contractor shall meet with the COR and the relevant NCHS Project staff to discuss the contract, including its tasks and deliverables. The Contractor shall produce a summary of this meeting within 15 calendar days after the kick-off meeting to ensure understanding of the agreements reached.

Task #2: Development of Project Plan

The Contractor shall develop a Project Plan that lays out the approach that will be used, milestones, and timeline for completing the task outlined in the scope of work. NCHS will review the project plan and revisions may be requested based on that analysis.

This contractor should provide NCHS the project plan within 60 days of award.

Task #3: Implementation of the Project Plan

The Contractor shall implement the strategies per its Project Plan. Jurisdictions may use an array of strategies to conduct the required activities.

The Contractor shall provide quarterly reports describing efforts undertaken, challenges identified, and potential resolutions to the challenges. It will also describe the status of their project activities versus the approved project schedule. The format for this report will be agreed upon as part of the finalization of the project plan in Task #2.

The Contractor shall also meet with the NCHS Project Officer at least once a quarter to discuss the status of the State's project and any contract issues.

Task #4: Final Report

The last performance report shall be a Final Report (a) documenting the methods and reports created to identify certifier level cause of death data quality issues; (b) describing in detail the strategies developed and piloted for targeted outreach; and (c) evaluating the effectiveness of the targeted outreach on certifier specific and overall cause of death data quality. The report should include copies of materials used, as well as documentation of any training programs carried out. The materials will be made available to other jurisdictions if identified as successful. Information on challenges, barriers, and approaches which were not successful should also be included in this report to provide information on strategies to avoid.

Materials that were put together for use during the project will be provided to NCHS to share with other jurisdictions for their use. This will include, but not be limited to,

- Training materials
- Brochures, letters and other written documents
- Minutes from meetings, sampled by meeting type

HHSAR Provision, 352.239-73: Electronic and Information Technology Accessibility Notice

(a) Section 508 of the Rehabilitation Act of 1973 (29 U.S.C. 794d), as amended by the Workforce Investment Act of 1998 and the Architectural and Transportation Barriers Compliance Board Electronic and Information (EIT) Accessibility Standards (36 CFR part 1194), require that when Federal agencies develop, procure, maintain, or use electronic and information technology, Federal employees with disabilities have access to and use of information and data that is comparable to the access and use by Federal employees who are not individuals with disabilities, unless an undue burden would be imposed on the agency. Section 508 also requires that individuals with disabilities, who are members of the public seeking information or services from a Federal agency, have access to and use of information and data that is comparable to that provided to the public who are not individuals with disabilities, unless an undue burden would be imposed on the agency.

(b) Accordingly, any offeror responding to this solicitation must comply with established HHS EIT accessibility standards. Information about Section 508 is available at <http://www.hhs.gov/web/508>. The complete text of the Section 508 Final Provisions can be accessed at <http://www.access-board.gov/sec508/standards.htm>.

(c) The Section 508 accessibility standards applicable to this contract are: 1194.

- 205 WCAG 2.0 Level A & AA Success Criteria
- 302 Functional Performance Criteria
- 502 Inoperability with Assistive Technology
- 504 Authoring Tools
- 602 Support Documentation
- 603 Support Services

In order to facilitate the Government's determination whether proposed EIT supplies meet applicable Section 508 accessibility standards, offerors must submit an HHS Section 508 Product Assessment Template, in accordance with its completion instructions. The purpose of the template is to assist HHS acquisition and program officials in determining whether proposed EIT supplies conform to applicable Section 508 accessibility standards. The template allows offerors or developers to self-evaluate their supplies and documentation detail - whether they conform to a specific Section 508 accessibility standard, and any underway remediation efforts addressing conformance issues. Instructions for preparing the HHS Section 508 Evaluation Template are available under Section 508 policy on the HHS Web site <http://hhs.gov/web/508>.

In order to facilitate the Government's determination whether proposed EIT services meet applicable Section 508 accessibility standards, offerors must provide enough information to assist the Government in determining that the EIT services conform to Section 508 accessibility standards, including any underway remediation efforts addressing conformance issues.

(d) Respondents to this solicitation must identify any exception to Section 508 requirements. If a offeror claims its supplies or services meet applicable Section 508 accessibility standards, and it is later determined by the Government, i.e., after award of a contract or order, that supplies or services delivered do not conform to the accessibility standards, remediation of the supplies or services to the level of conformance specified in the contract will be the responsibility of the Contractor at its expense.

(e) Electronic content must be accessible to HHS acceptance criteria. Checklist for various formats are available at <http://508.hhs.gov/>, or from the Section 508 Coordinator listed at <https://www.hhs.gov/web/section-508/additional-resources/section-508-contacts/index.html>. Materials that are final items for delivery should be accompanied by the appropriate checklist, except upon approval of the Contracting Officer or Representative

EXHIBIT

F

ORDER FOR SUPPLIES OR SERVICESPAGE OF PAGES
1 18**IMPORTANT:** Mark all packages and papers with contract and/or order numbers.

1. DATE OF ORDER 06/08/2021		2. CONTRACT NO. (If any) 75D30121P11406		6. SHIP TO:	
3. ORDER NO.		4. REQUISITION/REFERENCE NO. 000HCPCC-2021-55134		a. NAME OF CONSIGNEE CDC/CCHIS/NCHS (RTP)	
5. ISSUING OFFICE (Address correspondence to) Centers for Disease Control and Prevention (CDC) Office of Acquisition Services (OAS) 626 Cochrans Mill Rd Pittsburgh, PA 15236-0070				b. STREET ADDRESS 4024 stirrup creek drive	
7. TO:				c. CITY DURHAM	d. STATE NC
				e. ZIP CODE 27703-	
a. NAME OF CONTRACTOR SECRETARY STATE, NEW HAMPSHIRE DEPT OF DUNS NUMBER: 179550850				f. SHIP VIA	
b. COMPANY NAME				8. TYPE OF ORDER	
c. STREET ADDRESS 71 SOUTH FRUIT ST				<input checked="" type="checkbox"/> a. PURCHASE REFERENCE YOUR: Please furnish the following on the terms and conditions specified on both sides of this order and on the attached sheet, if any, including delivery as indicated.	
d. CITY CONCORD	e. STATE NH	f. ZIP CODE 03301-6503		<input type="checkbox"/> b. DELIVERY Except for billing instructions on the reverse, this delivery order is subject to instructions contained on this side only of this form and is issued subject to the terms and conditions of the above-numbered contract.	
9. ACCOUNTING AND APPROPRIATION DATA 9390EGP 252P 2021 75-X-0943 5650RF1101				10. REQUISITIONING OFFICE HCPCC	
11. BUSINESS CLASSIFICATION (Check appropriate box(es)) <input type="checkbox"/> a. SMALL <input checked="" type="checkbox"/> b. OTHER THAN SMALL <input type="checkbox"/> c. DISADVANTAGED <input type="checkbox"/> d. WOMEN-OWNED					
12. F.O.B. POINT Destination		14. GOVERNMENT B/L NO.		15. DELIVER TO F.O.B. POINT ON OR BEFORE (Date) 05/01/2022	
13. PLACE OF				16. DISCOUNT TERMS Net 30 Days	
a. INSPECTION	b. ACCEPTANCE				

17. SCHEDULE (See reverse for Rejections)

ITEM NO. (a)	SUPPLIES OR SERVICES (b)	QUANTITY ORDERED (c)	UNIT (d)	UNIT PRICE (e)	AMOUNT (f)	QUANTITY ACCEPTED (g)
	<p>This is a firm fixed price contract. To ensure payment, invoice must reference the contract # 75D30121P11406, DUNS, and Tax ID Number.</p> <p>For Invoice/Payment information: 678-475-4510 Send Invoices to FAX: 404-638-5324 or Email: cpbapinv@cdc.gov</p> <p>Vendor POC: Denise Gonyer Email: denise.gonyer@sos.nh.gov</p> <p>CDC POCs: Program POC: Connie Gentry PH: (919) 541-7642 Email: cmc6@cdc.gov</p> <p>CS: Cynthia Y. Mitchell PH: (412) 386-6101 Email: cmitchell@cdc.gov</p>					
SEE BILLING INSTRUCTIONS ON REVERSE	18. SHIPPING POINT	19. GROSS SHIPPING WEIGHT	20. INVOICE NO.		\$14,329.00	17(h) TOT. (Cont. pages)
	21. MAIL INVOICE TO:					
	a. NAME Centers for Disease Control and Prevention (FMO)				\$14,329.00	17(i) GRAND TOTAL
	b. STREET ADDRESS (or P.O. Box) PO Box 15580 404-718-8100					
	c. CITY Atlanta	d. STATE GA	e. ZIP CODE 303330080			

22. UNITED STATES
OF AMERICA (Signature)

Cynthia Y. Mitchell -S

Digitally signed by Cynthia Y.
Mitchell -S
Date: 2021.06.08 06:43:46 -04'00'

23. NAME (Typed)

Cynthia Y Mitchell

TITLE: CONTRACTING/ORDERING OFFICER

SECTION B - SUPPLIES OR SERVICES AND PRICES/COSTS

ITEM	SUPPLIES / SERVICES	QTY / UNIT	UNIT PRICE	EXTENDED PRICE
0001	NATIONAL DEATH INDEX (NDI) DATA Information to Establish, Maintain, and Operate the National Death Index (NDI) in accordance with the <i>Statement of Work</i> below. The purpose of this contract is to continue collection of information and data for the National Death Index and to assure the qualitative reliability and timely availability of those data for the upcoming performance period. Period of Performance: June 8, 2021 through May 1, 2022 <u>*Partial Payments are Authorized*</u>	1 Job	\$14,329.00	\$14,329.00
	Line(s) Of Accounting: 9390EGP 252P 2021 75-X-0943 5650RF1101 \$14,329.00			

There are no clauses/provisions included in this section.

Statement of Work

TITLE: Information to Establish, Maintain, and Operate the National Death Index (NDI)

I. BACKGROUND

In February 1977, a working group was established to develop plans and procedures for implementation of a National Death Index program. Such a program would provide legitimate scientific researchers with the means to determine whether individuals in their research study had died. The working group, consisting of representatives of jurisdictions' vital statistic systems, data users, and NCHS staff, was charged with developing specific recommendations regarding datasets to be used for indexing and searching; data to be provided to users; operating procedures for the program; user eligibility; criteria for matches; and an operating protocol for the program. The NDI differs from the routine mortality data collection in that it is not a statistical data file to estimate national rates, but a service provided to the research community to identify their study subjects who have died.

The need for a National Death Index has been recognized for many years. This need has expanded rapidly over the years because of the development of several national programs requiring mortality follow-up of individual subjects in studies of public health and medical importance. The work group determined that the need for establishing a National Death Index was of high priority in meeting research needs at practical costs in dollars, time, and resources, and recommended an overall concept for a National Death Index and an operational protocol for developing and operating a National Death Index program.

Death records are collected from the 50 jurisdictions, District of Columbia, New York City, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands. The terms Contractor and jurisdiction are interchangeably used throughout this document and refer to one of these 57 areas.

II. PURPOSE

The purpose of this contract is to continue the purchase of information and data from the jurisdiction(s) for the National Death Index and to obtain assurance of the qualitative reliability and timely availability of those data for the upcoming performance period.

III. SCOPE OF WORK

The Contractor shall furnish selected death record information for the principal months of registration of 1 January 2021 through 31 December 2021. The Contractor shall include the information submitted specifically for the National Death Index (items in Section IV.1. below) with the demographic death record when submitted for the Vital Statistics Cooperative Program (VSCP). Once received from the contractor, the NDI, demographic, and cause of death information will be used by NCHS to update the National Center for Health Statistics (NCHS) for its use in maintaining the National Death Index (NDI) file. The National Death Index file will be used to determine the death certificate number, date of

death, jurisdiction of death and cause(s) of death for specific individuals included in medical and public health projects and studies.

This contract limited to the purchase of jurisdictional data. As such, Federal Information Security Act of 2002 (FISMA 2002) as modified by the Federal Information Security Modernization Act of 2014 (FISMA 2014) and Appendix III of Office of Management Budget Memorandum (OMB) A-130 do not apply.

IV. TASKS TO BE PERFORMED

During the performance of the contract period and utilizing the specifications provided by NCHS, the Contractor shall provide information needed for the National Death Index for an estimated 12,408 deaths that occur in the jurisdiction (estimated based on number of deaths from the previous year), specifically the Contractor shall:

1. Provide the following specific items of information and provide data files containing these items to NCHS per the timeframe specified in the VSCP contract. Items listed in bold text are solely for the National Death Index and will not be retained in the statistical data provided under the VSCP contract.
 - a. Place of Death - jurisdiction, County
 - b. jurisdiction File Number
 - c. **Name of Decedent - Last Name, First Name, Middle Initial**
 - d. **Name - Alias or Cross Reference Indicator**
 - e. Sex
 - f. Date of Death - Month, Day, Year
 - g. Race
 - h. Age at Death - Unit, Number of Units
 - i. Date of Birth - Month, Day, Year
 - j. jurisdiction of Birth
 - k. **Social Security Number**
 - l. jurisdiction of Residence
 - m. **Father's Surname**
 - n. Marital Status
 - o. Multiple and underlying cause(s) of death

Data files are to be delivered in the specified NCHS format and detail in coordination with related demographic data using the State and Territorial Exchange of Vital Events (STEVE), or other method specified by NCHS.

2. Provide to NCHS a data record for each death registered in the jurisdiction's vital statistics office for the principal months of January 2021 - December 2021 including delays and any corrections that are requested for records previously submitted. **Prior data year records that are registered after the jurisdiction's annual statistical file cutoff are to be submitted on an electronic form (image or separate data file) or, with prior approval, on paper copy.**
3. Provide a replacement file for any shipment not meeting accuracy or completeness requirements (if any).

4. Query each death record in accordance with the jurisdiction's query program and NCHS guidelines, which can be found at http://www.cdc.gov/nchs/data/dvs/Instruction_Manual_revise20_2013.pdf.
5. Provide quality data free of errors due to mature and effective quality control procedures; actively identify/correct errors.
6. Prepare the NDI data file to include all NDI items specified in item 1 for each death registered during the period covered by the contract.
7. Along with the data, also provide NCHS with detailed data file format and specifications for selected items of information upon request. These documents shall be consistent with NCHS item and code structures that will be furnished to the Contractor by NCHS prior to preparation of the data file by jurisdictions.
8. The Contractor shall prepare and submit a replacement data file, at no additional cost to the Federal Government, when files fail to meet prescribed specifications. Corrected records shall be provided for as long as the jurisdiction updates computer records for its own use.

V. GOVERNMENT FURNISHED MATERIALS

No government materials will be furnished.

VI. PERIOD OF PERFORMANCE

The performance period will be from date of award through May 1, 2022 for data months of January 2021 - December 2021.

VII. DELIVERABLES

The Contractor shall furnish the data file (as described in section IV) to the Data Acquisition, Classification and Evaluation Branch (DACEB), Division of Vital Statistics, NCHS, P.O. Box 12214, Research Triangle Park, North Carolina 27709, the following items:

Upon request, definitions for coding selected items and NCHS needs for data file format and layout for calendar year 2021 shall be provided.

Include NDI data items with the VSCP data file. File shall contain records for events occurring in each principal month of registration including belated records, alias records, and each principal correction received in the jurisdiction's office for any data year from 1979 forward. Principal Months: January 2021 - December 2021.

VIII. CONTRACTING OFFICER'S REPRESENTATIVE

Connie Gentry is hereby designated as the Contracting Officer's Representative (COR) for this contract. The COR is responsible for guiding the technical aspects of the project. The COR shall not make any commitment or authorize any changes which affect the contract price, terms, or conditions. Any such changes shall be referred to the Contracting Officer for action.

IX. PAYMENT TERMS (note if and how partial payments are authorized)

As consideration for full performance of the work stated under section *IV. TASKS TO BE PERFORMED*, the Government shall pay the Contractor the firm fixed price of \$14,329. Partial payments are authorized.

The number of records identified in IV. are estimates only and are not purchased hereby and is based on the previous closed data year. In no event will the Government be obligated to pay for records received when such payment would require funds in excess of the total funds available as set forth on the face page of this purchase order. Payment shall not be made for duplicate records received nor to replace records in error; payments are based on the previous closed data year counting only unique death certificate numbers received. This amount is payable upon receipt and acceptance, by the Government, of those items specified in IV.

Copies of invoices must be submitted to NCHS, Office of Acquisition Services (OAS), and Office of Financial Resources (OFR) using CDC form number SF 1034 (Public Voucher for Purchases and Services Other Than Personal). The form can be located at www.gsa.gov; select Forms Library then Standard Forms (SF) tab and scroll down the list. The following information is required for the invoice to be accepted: contract number, tax identification number, DUNS number, invoice/voucher number, contract line item number (CLIN), data months, and date invoice was prepared. Invoices can be submitted via mail, email, or fax using the information provided below.

NCHS:

Connie Gentry
P.O. Box 12214
Research Triangle Park, NC 27709
Fax: (919) 541-1126

Office of Acquisition Services:

Eric Sullivan
626 Cochrans Mill Road
Pittsburgh, PA 15236
Fax: 412-386-6429

Office of Financial Resources

P. O. Box 15580
Atlanta, GA 30329
Fax: 404-638-5324

In order to ensure prompt payment, we suggest that you submit a copy of each invoice directly to the NCHS COR and Contracting Officer or Contract Administrator **concurrently** with submission to the Office of Financial Resources (OFR). **It saves time, postage, and speeds up the payment processing by emailing the invoices to the 3 listed email addresses below:**

1. Office of Financial Resources (OFR) Email: CPBAPINV@CDC.GOV
1. OAS Contract Administrator Email: ESULLIVAN2@CDC.GOV
2. NCHS COR Email: DAEBPROC@CDC.GOV

Again, invoices must be concurrently submitted to NCHS, OAS, and OFR.

X. Special Contract Requirements

Cybersecurity Enhancement Act of 2015

Transmissions across the internet into Federal information systems are monitored for cybersecurity purposes in accordance with the Cybersecurity Enhancement Act of 2015 (6 U.S.C. §§ 151 and 151 note).

1. Rights to Data

The data obtained under this contract will be abstracted from vital records filed under the laws and regulations of the individual jurisdictions, and the jurisdictions retain ownership of said data. No restrictions may be placed upon the Contractor's right to publish or disseminate information acquired under this contract.

2. Confidentiality of Contractor Provided Data

Pursuant to the Public Health Service Act (42 USC 242m.), Section 308(d), and regulations of the Secretary, the Government assures the Contractor that: (1) the information purchased under this contract will be used only for statistical research and reporting purposes by the National Center for Health Statistics and other purposes agreed to in writing by the contractor, and (2) information purchased under this contract shall not be published or released in other form if the particular establishment or person supplying the information or identified in it is identifiable unless consented to in writing by the Contractor. All NCHS employees and contractors accessing the data provided under this contract will be required to sign the NCHS Affidavit of Nondisclosure and complete NCHS confidentiality training on an annual basis.

It is understood that the Contractor hereby provides NCHS permission to link the VSCP and NDI files for its own projects without further jurisdiction approval, provided that no identifiable data are released or used for other than statistical tabulations.

All such projects shall meet the following criteria:

- a. NCHS data used in the NDI file search shall have been collected by NCHS under NCHS' own legislative authority and shall be subject to NCHS' assurances of

confidentiality. Applications for the NDI search shall be filed by NCHS, and all criteria for the use of NDI shall apply.

- b. No identifying data (e.g., names, addresses, social security numbers, death certificate numbers) shall be released outside of NCHS. The NDI Advisors (currently consisting of 3 groups of 8 individuals each drawn from state vital registrars offices, federal employees, academia and private industry), who serve as voluntary, unbiased reviewers of all NDI applications, are charged with ensuring that all NDI applications meet the security, confidentiality, and data usage requirements specified by the jurisdictions. They may choose to approve release of identifiable data under strict adherence to jurisdictional requirements. No follow back shall be conducted on the basis of the NDI search or any death record information without the consent of the jurisdiction NDI Advisors. NDI Advisors can require the researcher to go through full NCHS/jurisdiction review because of the researcher's desire to follow-back to the next of kin based on information found in the NDI search. This full review will have to be done prior to the NDI search being undertaken.
- c. No other agency, organization, or individual shall have exclusive rights to any of the data results acquired from the NDI search or the linkage of the VSCP and NDI files. Such data shall be in the public domain and shall be made available by NCHS in the form of statistical data files, published and unpublished tabulations, reports, articles, and papers. All such files, tabulations, reports, articles, and papers shared outside NCHS shall meet NCHS standards on confidentiality.
- d. All statistical data released by NCHS shall be subject to NCHS' usual standards with regard to privacy and confidentiality as outlined in the NCHS Staff Manual on Confidentiality.

In all other situations, NCHS must seek jurisdiction permission before linking files containing data obtained under the VSCP contracts. Payment for these uses is negotiable.

3. Privacy Act Applicability (Mar 1998)

Notification is hereby given that the Contractor and its employees are subject to criminal penalties for violation of the Privacy Act to the same extent as employees of the Government. The Contractor shall assure that each of its employees knows the prescribed rules of conduct and that each is aware that he or she can be subjected to criminal penalty for violation of the Act. A copy of 45 CFT Part 5b, Privacy Act Regulations, will be provided by the Government under separate cover.

I. **HHSAR Provision, 352.239-73: Electronic and Information Technology Accessibility Notice**

- A. Section 508 of the Rehabilitation Act of 1973 (29 U.S.C. 794d), as amended by the Workforce Investment Act of 1998 and the Architectural and Transportation Barriers Compliance Board Electronic and Information (EIT) Accessibility Standards (36 CFR

part 1194), require that when Federal agencies develop, procure, maintain, or use electronic and information technology, Federal employees with disabilities have access to and use of information and data that is comparable to the access and use by Federal employees who are not individuals with disabilities, unless an undue burden would be imposed on the agency. Section 508 also requires that individuals with disabilities, who are members of the public seeking information or services from a Federal agency, have access to and use of information and data that is comparable to that provided to the public who are not individuals with disabilities, unless an undue burden would be imposed on the agency.

A. Accordingly, any offeror responding to this solicitation must comply with established HHS EIT accessibility standards. Information about Section 508 is available at <http://www.hhs.gov/web/508>. The complete text of the Section 508 Final Provisions can be accessed at <http://www.access-board.gov/sec508/standards.htm>.

B. The Section 508 accessibility standards applicable to this contract are: 1194.

205 WCAG 2.0 Level A & AA Success Criteria
302 Functional Performance Criteria
502 Inoperability with Assistive Technology
504 Authoring Tools
602 Support Documentation
603 Support Services

In order to facilitate the Government's determination whether proposed EIT supplies meet applicable Section 508 accessibility standards, offerors must submit an HHS Section 508 Product Assessment Template, in accordance with its completion instructions. The purpose of the template is to assist HHS acquisition and program officials in determining whether proposed EIT supplies conform to applicable Section 508 accessibility standards. The template allows offerors or developers to self-evaluate their supplies and documentation detail - whether they conform to a specific Section 508 accessibility standard, and any underway remediation efforts addressing conformance issues. Instructions for preparing the HHS Section 508 Evaluation Template are available under Section 508 policy on the HHS Web site <http://hhs.gov/web/508>.

In order to facilitate the Government's determination whether proposed EIT services meet applicable Section 508 accessibility standards, offerors must provide enough information to assist the Government in determining that the EIT services conform to Section 508 accessibility standards, including any underway remediation efforts addressing conformance issues.

C. Respondents to this solicitation must identify any exception to Section 508 requirements. If a offeror claims its supplies or services meet applicable Section 508 accessibility standards, and it is later determined by the Government, i.e., after award of a contract or order, that supplies or services delivered do not conform to the accessibility

standards, remediation of the supplies or services to the level of conformance specified in the contract will be the responsibility of the Contractor at its expense.

- D. Electronic content must be accessible to HHS acceptance criteria. Checklist for various formats are available at <http://508.hhs.gov/>, or from the Section 508 Coordinator listed at <https://www.hhs.gov/web/section-508/additional-resources/section-508-contacts/index.html>. Materials that are final items for delivery should be accompanied by the appropriate checklist, except upon approval of the Contracting Officer or Representative.

CLAUSES

FAR SOURCE	TITLE AND DATE
52.204-13	System for Award Management Maintenance (Oct 2016)
52.204-18	Commercial and Government Entity Code Maintenance (Jul 2016)
52.212-4	Contract Terms and Conditions- Commercial Items (Jan 2017)
52.232-39	Unenforceability of Unauthorized Obligations (Jun 2013)
52.232-40	Providing Accelerated Payments to Small Business Contractors (Dec 2013)
352.222-70	Contractor Cooperation in Equal Employment Opportunity Investigations (Dec 2015)

FAR 52.252-2 -- CLAUSES INCORPORATED BY REFERENCE. (Feb 1998)

This contract incorporates one or more clauses by reference, with the same force and effect as if they were given in full text. Upon request, the Contracting Officer will make their full text available. Also, the full text of a clause may be accessed electronically at this/these address(es):

<https://www.acquisition.gov/browse/index/far>

<http://www.hhs.gov/policies/hhsar/subpart301-1.html>

(End of Clause)

52.212-5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders-Commercial Items (Jan 2021)

(a) The Contractor shall comply with the following Federal Acquisition Regulation (FAR) clauses, which are incorporated in this contract by reference, to implement provisions of law or Executive orders applicable to acquisitions of commercial items:

(1) 52.203-19, Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements (Jan 2017) (section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) and its successor provisions in subsequent appropriations acts (and as extended in continuing resolutions)).

(2) 52.204-23, Prohibition on Contracting for Hardware, Software, and Services Developed or Provided by Kaspersky Lab and Other Covered Entities (Jul 2018) (Section 1634 of Pub. L. 115-91).

(3) 52.204-25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment. (Aug 2020) (Section 889(a)(1)(A) of Pub. L. 115-232).

(4) 52.209-10, Prohibition on Contracting with Inverted Domestic Corporations (Nov 2015).

(5) 52.233-3, Protest After Award (Aug 1996) (31 U.S.C. 3553).

(6) 52.233-4, Applicable Law for Breach of Contract Claim (Oct 2004) (Public Laws 108-77 and 108-78 (19 U.S.C. 3805 note)).

(b) The Contractor shall comply with the FAR clauses in this paragraph (b) that the Contracting Officer has indicated as being incorporated in this contract by reference to implement provisions of law or Executive orders applicable to acquisitions of commercial items:

[Contracting Officer check as appropriate.]

___ (1) 52.203-6, Restrictions on Subcontractor Sales to the Government (June 2020), with Alternate I (Oct 1995) (41 U.S.C. 4704 and 10 U.S.C. 2402).

___ (2) 52.203-13, Contractor Code of Business Ethics and Conduct (Jun 2020) (41 U.S.C. 3509)).

___ (3) 52.203-15, Whistleblower Protections under the American Recovery and Reinvestment Act of 2009 (Jun 2010) (Section 1553 of Pub. L. 111-5). (Applies to contracts funded by the American Recovery and Reinvestment Act of 2009.)

X (4) 52.204-10, Reporting Executive Compensation and First-Tier Subcontract Awards (Jun 2020) (Pub. L. 109-282) (31 U.S.C. 6101 note).

___ (5) [Reserved].

___ (6) 52.204-14, Service Contract Reporting Requirements (Oct 2016) (Pub. L. 111-117, section 743 of Div. C).

___ (7) 52.204-15, Service Contract Reporting Requirements for Indefinite-Delivery Contracts (Oct 2016) (Pub. L. 111-117, section 743 of Div. C).

X (8) 52.209-6, Protecting the Government's Interest When Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment. (Jun 2020) (31 U.S.C. 6101 note).

X (9) 52.209-9, Updates of Publicly Available Information Regarding Responsibility Matters (Oct 2018) (41 U.S.C. 2313).

___ (10) [Reserved].

___ (11) (i) 52.219-3, Notice of HUBZone Set-Aside or Sole-Source Award (Mar 2020) (15 U.S.C. 657a).

___ (ii) Alternate I (Mar 2020) of 52.219-3.

___ (12) (i) 52.219-4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns (Mar 2020) (if the offeror elects to waive the preference, it shall so indicate in its offer) (15 U.S.C. 657a).

___ (ii) Alternate I (Mar 2020) of 52.219-4.

___ (13) [Reserved]

___ (14) (i) 52.219-6, Notice of Total Small Business Set-Aside (Nov 2020) (15 U.S.C. 644).

___ (ii) Alternate I (Mar 2020) of 52.219-6.

___ (15) (i) 52.219-7, Notice of Partial Small Business Set-Aside (Nov 2020) (15 U.S.C. 644).

___ (ii) Alternate I (Mar 2020) of 52.219-7.

___ (16) 52.219-8, Utilization of Small Business Concerns (Oct 2018) (15 U.S.C. 637(d)(2) and (3)).

___ (17) (i) 52.219-9, Small Business Subcontracting Plan (Jun 2020) (15 U.S.C. 637(d)(4)).

___ (ii) Alternate I (Nov 2016) of 52.219-9.

___ (iii) Alternate II (Nov 2016) of 52.219-9.

___ (iv) Alternate III (Jun 2020) of 52.219-9.

___ (v) Alternate IV (Jun 2020) of 52.219-9

___ (18) (i) 52.219-13, Notice of Set-Aside of Orders (Mar 2020) (15 U.S.C. 644(r)).

___ (ii) Alternate I (Mar 2020) of 52.219-13.

___ (19) 52.219-14, Limitations on Subcontracting (Mar 2020) (15 U.S.C. 637(a)(14)).

___ (20) 52.219-16, Liquidated Damages-Subcontracting Plan (Jan 1999) (15 U.S.C. 637(d)(4)(F)(i)).

___ (21) 52.219-27, Notice of Service-Disabled Veteran-Owned Small Business Set-Aside (Mar 2020) (15 U.S.C. 657f).

X (22) (i) 52.219-28, Post Award Small Business Program Rerepresentation (Nov 2020) (15 U.S.C. 632(a)(2)).

___ (ii) Alternate I (MAR 2020) of 52.219-28.

___ (23) 52.219-29, Notice of Set-Aside for, or Sole Source Award to, Economically Disadvantaged Women-Owned Small Business Concerns (Mar 2020) (15 U.S.C. 637(m)).

___ (24) 52.219-30, Notice of Set-Aside for, or Sole Source Award to, Women-Owned Small Business Concerns Eligible Under the Women-Owned Small Business Program (Mar2020) (15 U.S.C. 637(m)).

___ (25) 52.219-32, Orders Issued Directly Under Small Business Reserves (Mar 2020) (15 U.S.C. 644(r)).

___ (26) 52.219-33, Nonmanufacturer Rule (Mar 2020) (15U.S.C. 637(a)(17)).

X (27) 52.222-3, Convict Labor (Jun 2003) (E.O.11755).

___ (28) 52.222-19, Child Labor-Cooperation with Authorities and Remedies (Jan2020) (E.O.13126).

___ (29) 52.222-21, Prohibition of Segregated Facilities (Apr 2015).

___ (30) (i) 52.222-26, Equal Opportunity (Sep 2016) (E.O.11246).

___ (ii) Alternate I (Feb 1999) of 52.222-26.

___ (31) (i) 52.222-35, Equal Opportunity for Veterans (Jun 2020) (38 U.S.C. 4212).

___ (ii) Alternate I (Jul 2014) of 52.222-35.

___ (32) (i) 52.222-36, Equal Opportunity for Workers with Disabilities (Jun 2020) (29 U.S.C. 793).

___ (ii) Alternate I (Jul 2014) of 52.222-36.

___ (33) 52.222-37, Employment Reports on Veterans (Jun 2020) (38 U.S.C. 4212).

___ (34) 52.222-40, Notification of Employee Rights Under the National Labor Relations Act (Dec 2010) (E.O. 13496).

X (35) (i) 52.222-50, Combating Trafficking in Persons (Oct 2020) (22 U.S.C. chapter 78 and E.O. 13627).

___ (ii) Alternate I (Mar 2015) of 52.222-50 (22 U.S.C. chapter 78 and E.O. 13627).

__X_ (36) 52.222-54, Employment Eligibility Verification (Oct 2015). (Executive Order 12989). (Not applicable to the acquisition of commercially available off-the-shelf items or certain other types of commercial items as prescribed in 22.1803.)

__ (37) (i) 52.223-9, Estimate of Percentage of Recovered Material Content for EPA-Designated Items (May 2008) (42 U.S.C. 6962(c)(3)(A)(ii)). (Not applicable to the acquisition of commercially available off-the-shelf items.)

__ (ii) Alternate I (May 2008) of 52.223-9 (42 U.S.C. 6962(i)(2)(C)). (Not applicable to the acquisition of commercially available off-the-shelf items.)

__ (38) 52.223-11, Ozone-Depleting Substances and High Global Warming Potential Hydrofluorocarbons (Jun 2016) (E.O. 13693).

__ (39) 52.223-12, Maintenance, Service, Repair, or Disposal of Refrigeration Equipment and Air Conditioners (Jun 2016) (E.O. 13693).

__ (40) (i) 52.223-13, Acquisition of EPEAT®-Registered Imaging Equipment (Jun 2014) (E.O.s 13423 and 13514).

__ (ii) Alternate I (Oct 2015) of 52.223-13.

__ (41) (i) 52.223-14, Acquisition of EPEAT®-Registered Televisions (Jun 2014) (E.O.s 13423 and 13514).

__ (ii) Alternate I (Jun 2014) of 52.223-14.

__ (42) 52.223-15, Energy Efficiency in Energy-Consuming Products (May 2020) (42 U.S.C. 8259b).

__ (43) (i) 52.223-16, Acquisition of EPEAT®-Registered Personal Computer Products (Oct 2015) (E.O.s 13423 and 13514).

__ (ii) Alternate I (Jun 2014) of 52.223-16.

__X_ (44) 52.223-18, Encouraging Contractor Policies to Ban Text Messaging While Driving (Jun 2020) (E.O. 13513).

__ (45) 52.223-20, Aerosols (Jun 2016) (E.O. 13693).

__ (46) 52.223-21, Foams (Jun 2016) (E.O. 13693).

__ (47) (i) 52.224-3 Privacy Training (Jan 2017) (5 U.S.C. 552 a).

__ (ii) Alternate I (Jan 2017) of 52.224-3.

__ (48) 52.225-1, Buy American-Supplies (Jan 2021) (41 U.S.C. chapter 83).

__ (49) (i) 52.225-3, Buy American-Free Trade Agreements-Israeli Trade Act (Jan 2021)(41 U.S.C. chapter 83, 19 U.S.C. 3301 note, 19 U.S.C. 2112 note, 19 U.S.C. 3805 note, 19 U.S.C. 4001 note, Pub. L. 103-182, 108-77, 108-78, 108-286, 108-302, 109-53, 109-169, 109-283, 110-138, 112-41, 112-42, and 112-43.

__ (ii) Alternate I (Jan 2021) of 52.225-3.

__ (iii) Alternate II (Jan 2021) of 52.225-3.

__ (iv) Alternate III (Jan 2021) of 52.225-3.

__ (50) 52.225-5, Trade Agreements (Oct 2019) (19 U.S.C. 2501, et seq., 19 U.S.C. 3301 note).

__X_ (51) 52.225-13, Restrictions on Certain Foreign Purchases (Jun 2008) (E.O.'s, proclamations, and statutes administered by the Office of Foreign Assets Control of the Department of the Treasury).

__ (52) 52.225-26, Contractors Performing Private Security Functions Outside the United States (Oct 2016) (Section 862, as amended, of the National Defense Authorization Act for Fiscal Year 2008; 10 U.S.C. 2302 Note).

__ (53) 52.226-4, Notice of Disaster or Emergency Area Set-Aside (Nov 2007) (42 U.S.C. 5150).

__ (54) 52.226-5, Restrictions on Subcontracting Outside Disaster or Emergency Area (Nov 2007) (42 U.S.C. 5150).

__ (55) 52.229-12, Tax on Certain Foreign Procurements (Jun 2020).

__ (56) 52.232-29, Terms for Financing of Purchases of Commercial Items (Feb 2002) (41 U.S.C. 4505, 10 U.S.C. 2307(f)).

__ (57) 52.232-30, Installment Payments for Commercial Items (Jan 2017) (41 U.S.C. 4505, 10 U.S.C. 2307(f)).

__X_ (58) 52.232-33, Payment by Electronic Funds Transfer-System for Award Management (Oct 2018) (31 U.S.C. 3332).

__ (59) 52.232-34, Payment by Electronic Funds Transfer-Other than System for Award Management (Jul 2013) (31 U.S.C. 3332).

__ (60) 52.232-36, Payment by Third Party (May 2014) (31 U.S.C. 3332).

__ (61) 52.239-1, Privacy or Security Safeguards (Aug 1996) (5 U.S.C. 552a).

__ (62) 52.242-5, Payments to Small Business Subcontractors (Jan 2017) (15 U.S.C. 637(d)(13)).

__ (63) (i) 52.247-64, Preference for Privately Owned U.S.-Flag Commercial Vessels (Feb 2006) (46 U.S.C. Appx. 1241(b) and 10 U.S.C. 2631).

- ___ (ii) Alternate I (Apr 2003) of 52.247-64.
- ___ (iii) Alternate II (Feb 2006) of 52.247-64.

(c) The Contractor shall comply with the FAR clauses in this paragraph (c), applicable to commercial services, that the Contracting Officer has indicated as being incorporated in this contract by reference to implement provisions of law or Executive orders applicable to acquisitions of commercial items:

[Contracting Officer check as appropriate.]

- ___ (1) 52.222-41, Service Contract Labor Standards (Aug 2018) (41 U.S.C. chapter 67).
- ___ (2) 52.222-42, Statement of Equivalent Rates for Federal Hires (May 2014) (29 U.S.C. 206 and 41 U.S.C. chapter 67).
- ___ (3) 52.222-43, Fair Labor Standards Act and Service Contract Labor Standards-Price Adjustment (Multiple Year and Option Contracts) (Aug 2018) (29 U.S.C. 206 and 41 U.S.C. chapter 67).
- ___ (4) 52.222-44, Fair Labor Standards Act and Service Contract Labor Standards-Price Adjustment (May 2014) (29 U.S.C. 206 and 41 U.S.C. chapter 67).
- ___ (5) 52.222-51, Exemption from Application of the Service Contract Labor Standards to Contracts for Maintenance, Calibration, or Repair of Certain Equipment-Requirements (May 2014) (41 U.S.C. chapter 67).
- _X_ (6) 52.222-53, Exemption from Application of the Service Contract Labor Standards to Contracts for Certain Services-Requirements (May 2014) (41 U.S.C. chapter 67).
- ___ (7) 52.222-55, Minimum Wages Under Executive Order 13658 (Nov 2020).
- ___ (8) 52.222-62, Paid Sick Leave Under Executive Order 13706 (Jan 2017) (E.O. 13706).
- ___ (9) 52.226-6, Promoting Excess Food Donation to Nonprofit Organizations (Jun 2020) (42 U.S.C. 1792).

(d) Comptroller General Examination of Record. The Contractor shall comply with the provisions of this paragraph (d) if this contract was awarded using other than sealed bid, is in excess of the simplified acquisition threshold, as defined in FAR 2.101, on the date of award of this contract, and does not contain the clause at 52.215-2, Audit and Records-Negotiation.

(1) The Comptroller General of the United States, or an authorized representative of the Comptroller General, shall have access to and right to examine any of the Contractor's directly pertinent records involving transactions related to this contract.

(2) The Contractor shall make available at its offices at all reasonable times the records, materials, and other evidence for examination, audit, or reproduction, until 3 years after final payment under this contract or for any shorter period specified in FAR subpart 4.7, Contractor Records Retention, of the other clauses of this contract. If this contract is completely or partially terminated, the records relating to the work terminated shall be made available for 3 years after any resulting final termination settlement. Records relating to appeals under the disputes clause or to litigation or the settlement of claims arising under or relating to this contract shall be made available until such appeals, litigation, or claims are finally resolved.

(3) As used in this clause, records include books, documents, accounting procedures and practices, and other data, regardless of type and regardless of form. This does not require the Contractor to create or maintain any record that the Contractor does not maintain in the ordinary course of business or pursuant to a provision of law.

(e) (1) Notwithstanding the requirements of the clauses in paragraphs (a), (b), (c), and (d) of this clause, the Contractor is not required to flow down any FAR clause, other than those in this paragraph (e)(1) in a subcontract for commercial items. Unless otherwise indicated below, the extent of the flow down shall be as required by the clause-

- (i) 52.203-13, Contractor Code of Business Ethics and Conduct (Jun 2020) (41 U.S.C. 3509).
- (ii) 52.203-19, Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements (Jan 2017) (section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) and its successor provisions in subsequent appropriations acts (and as extended in continuing resolutions)).
- (iii) 52.204-23, Prohibition on Contracting for Hardware, Software, and Services Developed or Provided by Kaspersky Lab and Other Covered Entities (Jul 2018) (Section 1634 of Pub. L. 115-91).
- (iv) 52.204-25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment. (Aug 2020) (Section 889(a)(1)(A) of Pub. L. 115-232).
- (v) 52.219-8, Utilization of Small Business Concerns (Oct 2018) (15 U.S.C. 637(d)(2) and (3)), in all subcontracts that offer further subcontracting opportunities. If the subcontract (except subcontracts to small business concerns) exceeds the applicable threshold specified in FAR 19.702(a) on the date of subcontract award, the subcontractor must include 52.219-8 in lower tier subcontracts that offer subcontracting opportunities.
- (vi) 52.222-21, Prohibition of Segregated Facilities (Apr 2015).
- (vii) 52.222-26, Equal Opportunity (Sep 2015) (E.O. 11246).

- (viii) 52.222-35, Equal Opportunity for Veterans (Jun 2020) (38 U.S.C. 4212).
 - (ix) 52.222-36, Equal Opportunity for Workers with Disabilities (Jun 2020) (29 U.S.C. 793).
 - (x) 52.222-37, Employment Reports on Veterans (Jun 2020) (38 U.S.C. 4212).
 - (xi) 52.222-40, Notification of Employee Rights Under the National Labor Relations Act (Dec 2010) (E.O. 13496). Flow down required in accordance with paragraph (f) of FAR clause 52.222-40.
 - (xii) 52.222-41, Service Contract Labor Standards (Aug 2018) (41 U.S.C. chapter 67).
 - (xiii) (A) 52.222-50, Combating Trafficking in Persons (Oct 2020) (22 U.S.C. chapter 78 and E.O. 13627).
(B) Alternate I (Mar 2015) of 52.222-50 (22 U.S.C. chapter 78 and E.O. 13627).
 - (xiv) 52.222-51, Exemption from Application of the Service Contract Labor Standards to Contracts for Maintenance, Calibration, or Repair of Certain Equipment-Requirements (May 2014) (41 U.S.C. chapter 67).
 - (xv) 52.222-53, Exemption from Application of the Service Contract Labor Standards to Contracts for Certain Services-Requirements (May 2014) (41 U.S.C. chapter 67).
 - (xvi) 52.222-54, Employment Eligibility Verification (Oct 2015) (E.O. 12989).
 - (xvii) 52.222-55, Minimum Wages Under Executive Order 13658 (Nov 2020).
 - (xviii) 52.222-62, Paid Sick Leave Under Executive Order 13706 (Jan 2017) (E.O. 13706).
 - (xix) (A) 52.224-3, Privacy Training (Jan 2017) (5 U.S.C. 552a).
(B) Alternate I (Jan 2017) of 52.224-3.
 - (xx) 52.225-26, Contractors Performing Private Security Functions Outside the United States (Oct 2016) (Section 862, as amended, of the National Defense Authorization Act for Fiscal Year 2008; 10 U.S.C. 2302 Note).
 - (xxi) 52.226-6, Promoting Excess Food Donation to Nonprofit Organizations (Jun 2020) (42 U.S.C. 1792). Flow down required in accordance with paragraph (e) of FAR clause 52.226-6.
 - (xxii) 52.247-64, Preference for Privately Owned U.S.-Flag Commercial Vessels (Feb 2006) (46 U.S.C. Appx. 1241(b) and 10 U.S.C. 2631). Flow down required in accordance with paragraph (d) of FAR clause 52.247-64.
- (2) While not required, the Contractor may include in its subcontracts for commercial items a minimal number of additional clauses necessary to satisfy its contractual obligations.
(End of clause)

FAR 52.204-21 –Basic Safeguarding of Covered Contractor Information Systems (Jun 2016)

(a) *Definitions.* As used in this clause--

“Covered contractor information system” means an information system that is owned or operated by a contractor that processes, stores, or transmits Federal contract information.

“Federal contract information” means information, not intended for public release, that is provided by or generated for the Government under a contract to develop or deliver a product or service to the Government, but not including information provided by the Government to the public (such as on public Web sites) or simple transactional information, such as necessary to process payments.

“Information” means any communication or representation of knowledge such as facts, data, or opinions, in any medium or form, including textual, numerical, graphic, cartographic, narrative, or audiovisual (Committee on National Security Systems Instruction (CNSSI) 4009).

“Information system” means a discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information (44 U.S.C. 3502).

“Safeguarding” means measures or controls that are prescribed to protect information systems.

(b) Safeguarding requirements and procedures.

- (1) The Contractor shall apply the following basic safeguarding requirements and procedures to protect covered contractor information systems. Requirements and procedures for basic safeguarding of covered contractor information systems shall include, at a minimum, the following security controls:

- (i) Limit information system access to authorized users, processes acting on behalf of authorized users, or devices (including other information systems).
- (ii) Limit information system access to the types of transactions and functions that authorized users are permitted to execute.
- (iii) Verify and control/limit connections to and use of external information systems.
- (iv) Control information posted or processed on publicly accessible information systems.
- (v) Identify information system users, processes acting on behalf of users, or devices.
- (vi) Authenticate (or verify) the identities of those users, processes, or devices, as a prerequisite to allowing access to organizational information systems.
- (vii) Sanitize or destroy information system media containing Federal Contract Information before disposal or release for reuse.
- (viii) Limit physical access to organizational information systems, equipment, and the respective operating environments to authorized individuals.
- (ix) Escort visitors and monitor visitor activity; maintain audit logs of physical access; and control and manage physical access devices.
- (x) Monitor, control, and protect organizational communications (i.e., information transmitted or received by organizational information systems) at the external boundaries and key internal boundaries of the information systems.
- (xi) Implement subnetworks for publicly accessible system components that are physically or logically separated from internal networks.
- (xii) Identify, report, and correct information and information system flaws in a timely manner.
- (xiii) Provide protection from malicious code at appropriate locations within organizational information systems.
- (xiv) Update malicious code protection mechanisms when new releases are available.
- (xv) Perform periodic scans of the information system and real-time scans of files from external sources as files are downloaded, opened, or executed.

(2) *Other requirements.* This clause does not relieve the Contractor of any other specific safeguarding requirements specified by Federal agencies and departments relating to covered contractor information systems generally or other Federal safeguarding requirements for controlled unclassified information (CUI) as established by Executive Order 13556.

(c) *Subcontracts.* The Contractor shall include the substance of this clause, including this paragraph (c), in subcontracts under this contract (including subcontracts for the acquisition of commercial items, other than commercially available off-the-shelf items), in which the subcontractor may have Federal contract information residing in or transiting through its information system.

(End of clause)

CDC37.0001 Non-Personal Services (Apr 2013)

(a) Personal services shall not be performed under this contract. Although the Government may provide sporadic or occasional instructions within the scope of the contract, the Contractor is responsible for control and supervision of its employees. If the Contractor (including its employees) believes any Government action or communication has been given that would create a personal services relationship between the Government and any Contractor employee, the Contractor shall promptly notify the Contracting Officer of this communication or action.

(b) The contractor shall comply with, and ensure their employees and subcontractors comply with, CDC Policy titled "Identification of Contractors' Employees and Safeguarding Government Information." No Contractor employee shall hold him or herself out to be a Government employee, agent, or representative. No Contractor employee shall state orally or in writing at any time that he or she is acting on behalf of the Government. In all communications with third parties in connection with this contract, Contractor employees shall identify themselves as Contractor employees and specify the name of the company for which they work. . The contractor is limited to performing the services identified in the contract statement of work and shall not interpret any communication with anyone as a permissible change in contract scope or as authorization to perform work not described in the contract. All contract changes will be incorporated by a modification signed by the Contracting Officer.

(c) The Contractor shall ensure that all of its employees and subcontractor employees working on this contract are informed of the substance of this clause. The Contractor agrees that this is a non-personal services contract; and that for all the purposes of the contract, the Contractor is not, nor shall it hold itself out to be an agent or partner of, or joint venture with, the Government. The Contractor shall notify its employees that they shall neither supervise nor accept supervision from Government employees. The substance of this clause shall be included in all subcontracts at any tier.

(d) Nothing in this clause shall limit the Government's rights in any way under any other provision of the contract, including those related to the Government's right to inspect and accept or reject the services performed under this contract.

(End of Clause)

CDCA_G001 – Invoice Submission (March 2021)

(a) The Contractor shall submit the original contract invoice/voucher in one of the following ways: 1) mail, 2) facsimile, 3) email:

Mailing Address:

The Centers for Disease Control and Prevention
Office of Financial Resources (OFR)
P.O. Box 15580
Atlanta, GA 30333

Fax: 404-638-5324

Email: cpbapinv@cdc.gov

NOTE: Submit only one Invoice in PDF format per attachment.

(b) Subject Line must contain the word “Invoice” Example: Subject: Invoice SAM12345 for Contract 75D30121*****

(c) The content/details of the email must include the below information provided in the body of the email:

- Contract or PO Number:
- Invoice Number:
- Amount:
- Vendor Name:

Only one invoice can be sent to the mailbox with the above relevant details in the body (multiple invoices need to be sent in multiple emails)

(d) The contractor shall submit 2 copies of the invoice to the cognizant contracting office previously identified in this contract. These invoice copies shall be addressed to the attention of the Contracting Officer.

(e) Do not send Links, Zip Files, or .DAT files containing PDF Invoices

(f) The Contractor is ☒ , is not ☐ required to submit a copy of each invoice directly to the Contracting Officer's Representative (COR) concurrently with submission to the Contracting Officer.

(g) In accordance with 5 CFR part 1315 (Prompt Payment), CDC's Office of Financial Resources is the designated billing office for the purpose of determining the payment due date under FAR 32.904.

(h) The Contractor shall include (as a minimum) the following information on each invoice:

- (1) Contractor's Name & Address
- (2) Contractor's Tax Identification Number (TIN)
- (3) Purchase Order/Contract Number and Task Order Number, if Appropriate
- (4) Invoice Number
- (5) Invoice Date
- (6) Contract Line Item Number and Description of Item
- (7) Quantity
- (8) Unit Price & Extended Amount for each line item
- (9) Shipping and Payment Terms
- (10) Total Amount of Invoice
- (11) Name, title and telephone number of person to be notified in the event of a defective invoice
- (12) Payment Address, if different from the information in (c)(1).
- (13) DUNS + 4 Number
- (14) Electronic funds transfer (EFT) banking info

For the status of invoices, please contact the OFR Service desk at ofrservicedesk@cdc.gov

NOTE: If your invoice has supporting documents, please combine the invoice and supporting documents as one PDF file. Do not submit the invoice and its supporting documents separately.

(End of Clause)

EXHIBIT

J

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

STATE OF MISSOURI, et al.,

Plaintiffs,

v.

JOSEPH R. BIDEN, JR., et al.,

Defendants.

No. 4:21-cv-01300

DECLARATION OF ANDREW ARMACOST

1. My name is Dr. Andrew Armacost, and I am the President of the University of North Dakota. I am also a resident of North Dakota and over the age of majority. I have personal knowledge of the facts in this declaration, and those facts are true and correct to the best of my knowledge.

2. I submit this declaration to provide documentation for Plaintiffs' Motion for Preliminary Injunction.

3. The University of North Dakota (UND) Energy & Environmental Research Center (EERC) has entered into Indefinite Delivery, Indefinite Quantity Subcontract No. P010227025 with Leidos, Inc. (Leidos), to provide support for Leidos's work under Prime Contract No. 89243318CFE000003, that has been issued by United States Department of Energy National Energy Technology Laboratory (NETL).

The Subcontract's period of performance is from May 31, 2019, through December 30, 2023. In the two-and-a-half years since the contract was placed, Leidos has contracted with

UND to perform sixteen projects in the total amount of \$9,020,262. In the coming years, the EERC anticipates additional project collaborations with Leidos and NETL that would be valued at tens of millions of dollars.

On Monday, October 18, 2021, Leidos provided the EERC with a modification to include FAR 52.223-99 entitled “Ensuring Adequate Covid-19 Safety Protocols for Federal Contractors (Oct 2021) (Deviation)” as a mandatory flow-down clause. Leidos stated that this clause was mandated by the Federal Government as a result of Executive Order 14042 “Ensuring Adequate COVID Safety Protocols for Federal Contractors.” On Tuesday November 2, 2021, the EERC received a request from Leidos requesting a status update on whether the EERC would execute the required modification.

Should this contract be terminated, UND would lose approximately: 1. \$1,000,000 of currently authorized project funding; 2. \$800,000 of future incremental funding; and 3. multiple millions in anticipated future projects under this existing agreement. Should UND lose this funding, this would negatively impact energy research, development, and commercialization in North Dakota and the United States. In addition, multiple positions might need to be cut.

Should this contract be modified, UND would incur substantial financial expenses to administer, enforce, and create policies around a vaccine mandate for employees. It is also anticipated that UND will lose employees as a result of instituting a vaccine mandate, and may be faced with litigation by employees, making it difficult or impossible to carry out UND’s critical mission of developing critical research for North Dakota and the United States.

4. UND has entered into Indefinite Delivery, Indefinite Quantity Subcontract No. S-G30002-IDIQ-30-UND (Subcontract) with Applied Research Associates (ARA), for the

UND Research Institute for Autonomous Systems (RIAS) to provide support for ARA's work under Prime Contract No. GS00Q14OADU304, issued by United States General Services Administration (GSA).

The Subcontract's period of performance is from May 07, 2021, through September 29, 2025. On Wednesday, October 20, 2021, ARA provided UND with a new Task Order under the Subcontract, to include FAR 52.223-99 entitled "Ensuring Adequate Covid-19 Safety Protocols for Federal Contractors (Oct 2021) (Deviation)" as a mandatory inclusion. ARA stated that this clause was mandated by the Federal Government as a result of Executive Order 14042 "Ensuring Adequate COVID Safety Protocols for Federal Contractors." On Tuesday November 2, 2021, UND received a request from ARA requesting a status update on when UND would execute the new Task Order. On Tuesday, November 2, 2021, UND asked for clarification regarding the timeline expected for compliance with EO 14042.

Should UND be unable to accept and execute this Task Order, UND would lose approximately: 1. \$700,000 of currently authorized project funding; 2. \$1,100,000 of future incremental funding under this Task Order; and 3. multiple millions in anticipated future Task Orders under this Subcontract. Should UND lose this funding, this would negatively impact augmented reality research in North Dakota and the United States.

5. Moreover, UND holds over 125 additional active federally funded contracts and cooperative agreements valued at more than \$100,000,000 and outstanding proposals for federal contracts and cooperative agreements valued in excess of \$30 million. While UND has not yet received requests to modify these additional agreements, each would be subject to modification and/or the inclusion of FAR 52.223-99 in any renewals. UND is a global leader in energy, aviation, space, UAS/autonomy, medical, national security, big data and other

important research. The loss of these active contracts and cooperative agreements and associated state and private dollars would have devastating impacts on research and educational programs at UND and the economy and quality of life of the people of North Dakota.

Signing contracts that include FAR 52.223-99 as a result of Executive Order 14042, and flowing this requirement down to our subcontractors, will result in large, unplanned expenses to administer, enforce, and develop policies around a vaccine mandate at UND. In addition, these proposed contract modifications require that UND flows these requirements down to our subcontractors and ensure they do the same. It is possible that UND will face lawsuits from employees and subcontractors and lose the critical expertise of employees and subcontractors as a result of implementing these contracts with vaccine mandates. The loss of these employees and subcontractors will diminish UND's ability to develop cutting edge technologies and take away from UND's mission to provide transformative learning, discovery, and community engagement opportunities for tomorrow's leaders.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on this the 4th day of November, 2021.



Andrew Armacost
President, University of North Dakota

EXHIBIT

K

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

STATE OF MISSOURI, et al.,

Plaintiffs,

v.

JOSEPH R. BIDEN, JR., et al.,

Defendants.

No. 4:21-cv-01300

DECLARATION OF TARA EVANS

Pursuant to 28 U.S.C. § 1746, I hereby declare that the foregoing is true and correct:

1. I am Vice President and General Counsel for the University of Wyoming. In that capacity, I am Chief legal advisor for the University, Board of Trustees, President and University officers and administrators. I manage all litigation matters involving the University. I am also a resident of Wyoming and am over the age of majority. I have personal knowledge of all facts stated in this declaration.

2. The University of Wyoming, which is a State entity, has a number of federal contracts, including cooperative agreements and subcontracts, with various federal agencies that are either up for a renewal or extension or expected to be awarded to the University in the near future.

3. Currently, the University approximates it has eighteen federal contracts and subcontracts for a total of \$1.9 million.

4. A federal contract with the Department of the Army and a federal subcontract with Sandia National Laboratories are currently above \$250,000 and the University is expecting additional funding for those agreements in the future. In addition, the University has a separate federal

subcontract with Sandia National Laboratories which is less than \$250,000 but the University is expecting additional funding as part of that agreement in the near future which will increase the amount to over \$250,000.

5. The University has approximately 125 active cooperative agreements for a total of approximately \$138 million.

6. Approximately fifty-three of the 125 cooperative agreements are currently above \$250,000 which accounts for approximately \$132 million of the total funding.

7. On October 18, the University received a notice from one of its prime contractors, Leidos, indicating that to receive an extension of its subcontract past December 23, 2021, the University is required to sign Modification #2, which incorporates the requirements of Executive Order 14042. The research supported under this proposal is aimed at identifying and securing a domestic source of rare elements from Wyoming coal basins. Rare earth elements are necessary for a wide range of products including cellular devices, computer hard drives, electric vehicles, flat-screen monitors, magnets, and significant national defense applications such as electronic displays guidance systems, lasers, and radar. Today most rare earth elements (>85%) are sourced and processed in China. Identifying and securing a domestic supply of rare earth elements is important to national and energy security. The Leidos modification includes language that the University will comply with all federal guidance and FAQ's published by the Safer Federal Workforce Task Force, which includes the requirement that covered contractor employees be fully vaccinated no later than December 8. Leidos is insisting the University sign the agreement despite this subcontract being under the \$250,000 threshold amount. The Leidos contract supports salary for three research scientists at the University's School of Energy Resources and has funded one graduate student. Leidos did not give a specific date that the University must sign the modification,

but made it clear that the University must comply to maintain the current contract. Since the subcontract does not meet the EO threshold amount of \$250,000, the University has requested a delay in compliance until March 1, 2022, but has not yet received an answer from Leidos.

8. On October 25, the University received an email notice from the National Science Foundation that it will be implementing EO 14042 in all of its cooperative agreements, including existing cooperative agreements by amendment. The language adopts the federal guidance but limits its applicability to subawards that exceed the \$250,000 threshold. The University's King Air Facility would be affected by this change and is among those up for incremental funding in August 2022. The King Air Facility is a National Atmospheric Research Facility that runs numerous deployments for National Science Foundation investigators nationally and internationally. The University is also developing a new research aircraft that will enhance the University's climate, severe weather, and wildfire smoke impact research capabilities and is expected to be available for deployments in 2023. In addition to the research, the King Air is a nationally critical facility for lower atmospheric research. The cooperative agreement fully funds 16 employees and partially funds six employees. All of this would be jeopardized if the University does not receive the incremental funding. The National Science Foundation notice stated specifically that they have updated their Cooperative Agreement Financial and Administrative Terms and Conditions to implement EO 14042 and that the revised Terms and Conditions will apply to all new cooperative agreements and funding amendments to existing cooperative agreements made on or after October 25, 2021.

9. The University's Established Program to Stimulate Competitive Research (EPSCoR) projects are under National Science Foundation cooperative agreements. In August 2022, the University expects to receive an amendment and a potential new award of \$4,190,348 between the

two University lead projects. If the University does not receive this funding, it will affect a total of 54 employees (postdoctoral researchers, graduate students, undergraduate students and staff); subawards with other institutions of higher education, a Wyoming Community College and a small business; and collaborations with the Wyoming Wind River Reservation and industry.

10. The University has a federal contract with the Department of the Army for funding on a multi-year project to install and monitor Mesonet sites in Wyoming which connect as part of the Upper Missouri River Basin Plains Snowpack and Soil Monitoring Station. This project has a maximum ceiling of \$8,000,000, and if the University were to lose funding to complete the project it will have state and national impacts on proper weather monitoring. The full establishment of the network will have significant economic value along with the improved climatic and hydrologic data for Wyoming and the nation. The data from the network will be of great value to hydrologic and climate researchers at the University and nation and greatly improve the ability to work with State and Federal partners in addressing water resource management needs in Wyoming. The University has not received an official notice regarding incorporation of EO 14042 on this federal contract, but anticipates notice within the next couple months related to its next task order, which includes funding for three Mesonet sites.

11. The University has a number of other federal contracts that currently are under the \$250,000 threshold but as they are renewed will be over the threshold. The University anticipates receiving notices to comply with EO 14042 on these contracts, including a contract with Sandia National Laboratories in December 2021 and May 2022 that involves advanced grid modeling and an atmosphere to electrons (A2e) program. The loss of these federally funded projects would result in loss of positions at the University, loss of time on critical research areas, loss of research educational opportunities for students, and would have state and national impacts.

12. As of October 25, the University has approximately 2,846 total benefited employees and 3,555 total non-benefited employees (of these non-benefitted employees, approximately 1,726 are student employees who are taking some credit hours at the University).

13. A large portion of these employees could be impacted by the federal contractor requirements due to the portion of the mandate that those on campus who interact with the University employees working on, or in connection with, a federal covered contract are subject to the federal requirements.

14. Per the guidelines, these interactions could take place even in common areas such as a parking garage, lobby, and elevators resulting in a potentially broad application.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on this 4th day of November 2021.



Tara Evans
Vice President and General Counsel
University of Wyoming

EXHIBIT

L

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

STATE OF MISSOURI, et al.,

Plaintiffs,

v.

No. 4:21-cv-01300

JOSEPH R. BIDEN, JR., et al.,

Defendants.

DECLARATION OF KAREN PAT PITNEY

1. My name is Karen Pat Pitney, and I am the interim President of the University of Alaska. I am also a resident of Alaska and over the age of majority. I have personal knowledge of the facts in this declaration, and those facts are true and correct to the best of my knowledge.

2. I submit this declaration in support of Plaintiffs' Motion for Preliminary Injunction.

3. The University of Alaska System includes the following three separately accredited institutions of higher education: University of Alaska Fairbanks (UAF), University of Alaska Anchorage (UAA), and University of Alaska Southeast (UAS).

4. The University of Alaska System operates world-class research facilities, the interruption and threatened interruption of which will cause incalculable and irreparable damage to the State of Alaska, national security, and the national scientific community.

5. UAF currently has \$200 million in multi-year federal contracts impacted by the

Executive Order, and expects close to \$100 million more in the coming months.

6. UAF's Geophysical Institute operates some of the most sophisticated rocket science programs in the world, including the Poker Flats Rocket Range and the Wilson Alaska Technical Center's Geophysical Detection of Nuclear Proliferation University Affiliated Research Center (Rocket Science Programs).

7. Contracts with the Department of Defense (DoD) and National Aeronautics and Space Administration (NASA) provide the vast majority of the funding for UAF's Rocket Science Programs.

8. The contracts with DoD and NASA cover thirty percent of the overhead for the Rocket Science Programs.

Poker Flat Rocket Range

9. UAF Operates the Poker Flat Rocket Range. The Poker Flat Rocket Range is the only high-altitude rocket range in the United States, the largest land-based rocket research range in the world, and the only scientific rocket launching facility in the world owned by a university.

10. One of the contracts involving the Poker Flat Rocket Range is Contract # 80GSFC20C0023.

11. Contract # 80GSFC20C0023 provides funding to support the ongoing operations by UAF of the Poker Flat Rocket Range under contract to NASA's Wallops Flight Facility, which is part of the Goddard Space Flight Center.

12. On October 7, 2021, the NASA contracting officers contacted the UAF's Office of Grants and Contracting Administration (OGCA), noting that they were tasked with modifying Contract # 80GSFC20C0023 to include a clause implementing Executive Order

14042, and attached a copy of the clause. *See* Exhibit 1.

13. On October 12, 2021, the OGCA noted the receipt of the email. *Id.*

14. On October 18, NASA contracting officers followed up requesting an update on the signature status of the modification sent on October 7. *Id.*

15. On October 19, the OGCA replied noting that it had forwarded the modification request to the University of Alaska's General Counsel for review, and requested time to review the modification request. *Id.*

16. On October 26, 2021, the federal contracting officer contacted OGCA requesting an update by no later than close of business on October 27, 2021, and noting that the modification "was required to be implemented by October 15, 2021." *Id.*

17. The OGCA replied that the University of Alaska's General Counsel was still reviewing the contract modification, noted that the University of Alaska had concerns about the breadth of the impact and asked: "Is there a possibility to add language that limits this to those that work physically at the range or narrow it in some form?" *Id.*

18. The federal contracting officer replied that he could "appreciate that this situation [(concern about overbreadth)] might arise," but that he and his fellows "have been instructed not to include or modify language." *Id.*

19. Rather, the federal contracting officer explained that they "have been instructed by NASA [headquarter]s to incorporate the modification as is, due to the need to have a standard application across all NASA contracts." *Id.*

20. The language used by NASA's contracting officer demonstrates that the "bilateral modification" was an attempt to unilaterally amend Contract # 80GSFC20C0023, as the University of Alaska had no power to negotiate.

21. The University of Alaska interpreted this exchange to imply a threat of termination for failure to acquiesce in the modification demand.

Wilson Alaska Technical Center's Geophysical Detection of Nuclear Proliferation

22. UAF operates the DOD-funded Geophysical Detection of Nuclear Proliferation (GDNP) University Affiliated Research Center (UARC) which detects, locates, characterizes, and assesses the threat potential of nuclear activities worldwide through research, development, testing, and evaluation of scientific and technological capabilities.

23. One of the federal contracts supporting the GDNP UARC is Contract # HQ0034-18-D-0027 P00003.

24. Contract # HQ0034-18-D-0027 P00003 provides funding to operate and maintain the facilities, equipment, and personnel necessary to the ongoing service of U.S. government interest in nuclear treaty verification through the issuance of discrete task orders that fall under the GDNP UARC's core mission of the geophysical detection of nuclear proliferation.

25. On October 15, DoD contracting officers contacted UAF's OGCA with the contract modification stating "please review and sign the attached, so that we can continue using your services under the UARC." Exhibit 2.

26. The DOD contracting officer stated that DoD would "prefer a response [n later than] 21 October 2021," and noted "our options for moving much beyond this date are quite limited." *Id.*

27. Unlike NASA, DoD's modification initially took the form of a unilateral change request, though it was subsequently changed to a bilateral change request. *Id.*

28. On October 26, 2021, Associate General Counsel Wayne L. Mowery, Jr.

contacted DoD's contracting officer requesting clarification. *Id.*

29. On October 28, 2021, the DoD contracting officer responded to the request for clarification indicating that the contracting officer lacked authority to incorporate any changes to the proposed modification as the terms were issued outside of the Department of Defense. *Id.*

30. As with the NASA contract with the Poker Flat Rocket Range, DoD did not afford UAF any opportunity to negotiate as to the modification's language.

31. The University of Alaska interpreted this exchange to imply a threat of termination for failure to acquiesce in the modification demand.

Harm

32. The University of Alaska System, including specifically UAF, will suffer irreparable harm including the potential loss of world-renowned faculty and degree candidates for its post-graduate degree programs.

33. Losing federal contracts would result in the loss of over 750 jobs, including faculty members and degree candidates. If faculty members are lost, it is uncertain whether or not they would be willing to return, as any departing faculty members would almost certainly be recruited by other institutions.

34. The loss of federal contracts would cause a ripple effect that would be felt across the nation and world as UAF's research provides data to public and private sector scientific facilities.

35. The loss of faculty and staff including degree-candidate students would constitute irreparable harm to UAF and would potentially constitute irreparable harm to the national scientific community.

36. The federal contracts in question fund world renowned faculty members who are highly sought after and other universities and research institutions would vigorously compete to recruit any faculty members and degree candidates who lost their employment with UAF.

37. Losing faculty members would result in a loss of those faculty members' scientific knowledge, institutional memory, and human capital, and this loss cannot be quantified in monetary terms or remedied by monetary damages.

38. Losing faculty members and degree candidates would hobble the Poker Flat Rocket Range and GDNP UARC individually as well as the UAF's Geophysical Institute as a whole, and require years, if not decades, to recover.

University of Alaska System's Response

39. Due to the Federal government's outright refusal to negotiate the proposed modification, UAF had no choice but to accept the proposed modifications to the contracts in question to avoid catastrophic damage to UAF, the State of Alaska, the United States, and the worldwide scientific community and to limit potential future impacts to UAF relationships with key funding agencies.

40. At the request of UAF, the University of Alaska System has elected to implement a vaccination requirement as necessary to comply with the accepted contract modifications.

41. UAF has implemented a vaccination requirement for all employees working on the UAF Troth Yeddha' campus in Fairbanks and at all UAF research sites, as well as all UAF employees at other locations who are funded by UAF federal contracts.

42. At this time the University of Alaska System does not believe the vaccination

requirement implicates the operations of the UAA and UAS campuses, but the extent of the executive order's vaccine mandate as interpreted by different federal agencies is unclear.

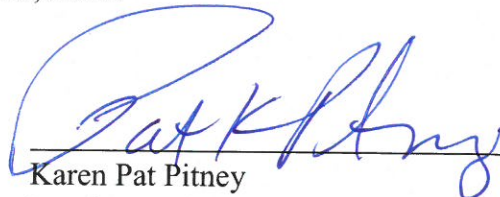
43. This ongoing uncertainty undermines the University of Alaska System's ability to confidently assess whether its actions thus far satisfy the federal government's interpretation of the vaccine mandate.

44. As a critical provider of educational, research, and government support services in Alaska, maintaining federal research contract support serves the economic and security interests of the State of Alaska and the United States as a whole.

45. In light of the criticality of these programs to the operations of the University of Alaska and the significant impacts loss of such funding would entail, the proposed modifications and the process used in implementing the requirements removed any meaningful options the University of Alaska had in relation to the acceptance or rejection of the proposed modifications.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on this the 4th day of November, 2021.



Karen Pat Pitney
Interim President, University of Alaska

EXHIBIT

1

[REDACTED]

From: [REDACTED]
Sent: Thursday, November 4, 2021 9:33 AM
To: [REDACTED]
Subject: FW: [EXTERNAL] RESPONSE: PFRR Contract #80GSFC20C0023 Mod #11 - COVID FAR Clause

From: Koerner, Martin E. (WFF-210I) [REDACTED]
Sent: Tuesday, October 26, 2021 12:44 PM
To: Tapiana Wray [REDACTED]
Cc: Feimster, Lashawn K. (GSFC-210I) [REDACTED]
Subject: RE: [EXTERNAL] RESPONSE: PFRR Contract #80GSFC20C0023 Mod #11 - COVID FAR Clause

Hi Taps,

Thanks for the response and I can appreciate that this situation might arise. However, we have been instructed not to include or modify language in the mods. NASA is using the authority of the changes clause to incorporate the EO to preserve the rights of the contractors. Furthermore, release language has not been incorporated into the mod, nor any reference to the change being incorporated at no cost. We have been instructed by NASA HQs to incorporate the modification as is, due to the need to have a standard application across all NASA contracts. We acknowledge that you are reserving your right to seek an equitable adjustment at a later time if there is an impact that can be quantified, which the Changes Clause does allow.

Please let me know if you have any other questions.

Thank You

Martin E. Koerner, II
Contract Specialist, Code 210: I
NASA, Goddard Space Flight Center
Wallops Flight Facility, Code 210: W
Wallops Island, VA 23337
Phone: [REDACTED]

From: Tapiana Wray [REDACTED]
Sent: Tuesday, October 26, 2021 2:22 PM
To: Koerner, Martin E. (WFF-210I) [REDACTED]
Subject: RE: [EXTERNAL] RESPONSE: PFRR Contract #80GSFC20C0023 Mod #11 - COVID FAR Clause

Hi Martin,

This is still with General Counsel. Is there a possibility to add language that limits this to those that work physically at the range or narrow it in some form? As you can imagine this is creating some concerns about breadth of impact and those implications.

Many thanks,

Taps



Tapiana Wray MBA, MEd, HRM, CPRA
Acting Executive Director
Principal Grant & Contract Management Officer
Office of Grants & Contracts Administration
University of Alaska Fairbanks
PO Box 757880 | Fairbanks, AK 99775-7880

Phone: [REDACTED]

Office: [REDACTED]

Website: <http://www.uaf.edu/ogca/>

The [University of Alaska Fairbanks](#) is an AA/EQ employer and educational institution and prohibits illegal discrimination against any individual. Learn more about UA's [notice of nondiscrimination](#).

From: Koerner, Martin E. (WFF-210I) [REDACTED]
Sent: Tuesday, October 26, 2021 10:58 AM
To: Tapiana Wray [REDACTED]
Cc: Feimster, Lashawn K. (GSFC-210I) [REDACTED]; Marsh, Gordon D. (WFF-8100) [REDACTED]; Kathe Rich [REDACTED]; Teri Langton [REDACTED]; Melissa Campbell [REDACTED]; Wayne Mowery Jr [REDACTED]
Subject: RE: [EXTERNAL] RESPONSE: PFRR Contract #80GSFC20C0023 Mod #11 - COVID FAR Clause

Hi Tapiana,

I wanted to kindly follow up with the status of this request. Please provide an update by no later than COB tomorrow as this was required to be implemented by October 15, 2021.

Thank You

Martin E. Koerner, II
Contract Specialist, Code 210: I
NASA, Goddard Space Flight Center
Wallops Flight Facility, Code 210: W
Wallops Island, VA 23337
Phone: [REDACTED]

From: Tapiana Wray [REDACTED]
Sent: Thursday, October 21, 2021 1:02 PM
To: Koerner, Martin E. (WFF-210I) [REDACTED]
Cc: Feimster, Lashawn K. (GSFC-210I) [REDACTED]; Marsh, Gordon D. (WFF-8100) [REDACTED]; Kathe Rich [REDACTED]; Teri Langton [REDACTED]; Melissa Campbell [REDACTED]; Wayne Mowery Jr [REDACTED]
Subject: RE: [EXTERNAL] RESPONSE: PFRR Contract #80GSFC20C0023 Mod #11 - COVID FAR Clause

Hi Martin,

Sounds good. Thank you.

Many thanks,

Taps



Tapiana Wray MBA, MEd, HRM, CPRA
Acting Executive Director
Principal Grant & Contract Management Officer
Office of Grants & Contracts Administration
University of Alaska Fairbanks
PO Box 757880 | Fairbanks, AK 99775-7880

Phone: [REDACTED]

Office: [REDACTED]

Website: <http://www.uaf.edu/ogca/>

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From: Koerner, Martin E. (WFF-210I) [REDACTED]
Sent: Thursday, October 21, 2021 9:57 AM
To: Tapiana Wray [REDACTED]
Cc: Feimster, Lashawn K. (GSFC-210I) [REDACTED]; Marsh, Gordon D. (WFF-8100) [REDACTED]; Kathe Rich [REDACTED]; Teri Langton [REDACTED]; Melissa Campbell [REDACTED]
Subject: RE: [EXTERNAL] RESPONSE: PFRR Contract #80GSFC20C0023 Mod #11 - COVID FAR Clause

Hi Tapiana,

Please advise the University legal counsel to submit questions in writing to the CO, LaShawn Feimster and copy myself. We will work with NASA legal counsel to address the questions.

Thank You

Martin E. Koerner, II
Contract Specialist, Code 210: I
NASA, Goddard Space Flight Center
Wallops Flight Facility, Code 210: W
Wallops Island, VA 23337
Phone: [REDACTED]

From: Tapiana Wray [REDACTED]
Sent: Tuesday, October 19, 2021 9:01 PM
To: Koerner, Martin E. (WFF-210I) [REDACTED]
Cc: Feimster, Lashawn K. (GSFC-210I) [REDACTED]; Marsh, Gordon D. (WFF-8100) [REDACTED]; Kathe Rich [REDACTED]; Teri Langton [REDACTED]; Melissa Campbell [REDACTED]
Subject: RE: [EXTERNAL] RESPONSE: PFRR Contract #80GSFC20C0023 Mod #11 - COVID FAR Clause

Hi Martin,

Thank you for following up. The request for bilateral modification of existing Contract # 80GSFC20C0023 as authorized by agreement of the parties has been forwarded to University legal for review of the proposed additional terms. The University will follow up with NASA once it has completed its internal review of this request. Would you be able to provide contact information for NASA legal counsel handling such requests in case University legal counsel has additional questions or comments on the proposed bilateral modification.

Many thanks,

Taps



=====
Tapiana Wray MBA, MEd, HRM, CPRA
Acting Executive Director
Principal Grant & Contract Management Officer
Office of Grants & Contracts Administration
University of Alaska Fairbanks
PO Box 757880 | Fairbanks, AK 99775-7880

Phone: [REDACTED]

Office: [REDACTED]

Website: <http://www.uaf.edu/ogca/>

The [University of Alaska Fairbanks](http://www.uaf.edu/) is an AA/EO employer and educational institution and prohibits illegal discrimination against any individual. Learn more about UA's [notice of nondiscrimination](#).

=====

From: Koerner, Martin E. (WFF-210I) [REDACTED]
Sent: Monday, October 18, 2021 12:24 PM
To: Rosemary Madnick [REDACTED]; Tapiana Wray [REDACTED]; Melissa Campbell [REDACTED]
Cc: Feimster, Lashawn K. (GSFC-210I) [REDACTED]; Marsh, Gordon D. (WFF-8100) [REDACTED]; Kathe Rich [REDACTED]; Teri Langton [REDACTED]
Subject: RE: [EXTERNAL] RESPONSE: PFRR Contract #80GSFC20C0023 Mod #11 - COVID FAR Clause

Good Afternoon,

Please provide the status of the signed modification the Government is requesting.

Thank You,
Martin

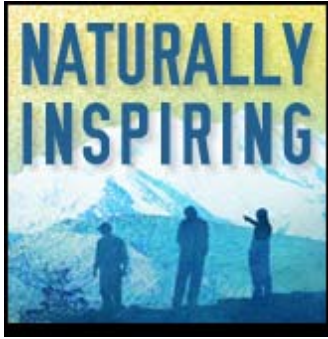
Martin E. Koerner, II
Contract Specialist, Code 210: I
NASA, Goddard Space Flight Center
Wallops Flight Facility, Code 210: W
Wallops Island, VA 23337
Phone: [REDACTED]

From: Rosemary Madnick [REDACTED]
Sent: Tuesday, October 12, 2021 3:50 PM
To: Koerner, Martin E. (WFF-210I) [REDACTED]; Tapiana Wray [REDACTED]; Melissa Campbell [REDACTED]
Cc: Feimster, Lashawn K. (GSFC-210I) [REDACTED]; Marsh, Gordon D. (WFF-8100) [REDACTED]; Kathe Rich [REDACTED]; Teri Langton [REDACTED]
Subject: [EXTERNAL] RESPONSE: PFRR Contract #80GSFC20C0023 Mod #11 - COVID FAR Clause

Thank you Martin, we have noted receipt of the email.

Stay well,

Rosie



Rosemary Madnick

Executive Director
Office of Grants and Contracts Administration
University of Alaska Fairbanks
West Ridge Research Building (WRRB)
2145 North Tanana Loop, WRRB 008
P.O. Box 757880
Fairbanks, Alaska 99775-7880

Phone: [REDACTED]
www. <http://uaf.edu/ogca/>

**President, National Council of University Research Administrators (NCURA)
Washington, DC**

My last day with the University of Alaska Fairbanks is Friday, October 15, 2021. If there is anything you need prior to my departure, notify me immediately so I may address.

This email will not be valid for any correspondence related to the Office of Grants and Contracts Administration (OGCA) after my departure. Please contact any of the following individuals for assistance on OGCA matters:

OGCA Management Team:

Acting Executive Director and Principal Grants and Contracts Management Officer (Pre-Award)

Taps Wray - [REDACTED]

Principal Grants and Contracts Management Officer (Post-Award)

Samantha Aleshire - [REDACTED]

OGCA General Information: [REDACTED]

It was a pleasure to work with everyone during my time at the University.

OGCA values your opinion!

Please take our short survey and tell us how we're doing!

[Client Satisfaction Survey](#)

The [University of Alaska Fairbanks](#) is an AA/EO employer and educational institution and prohibits illegal discrimination against any individual. Learn more about UA's [notice of nondiscrimination](#).

From: Koerner, Martin E. (WFF-210I) [REDACTED]
Sent: Thursday, October 7, 2021 1:00 PM
To: Tapiana Wray [REDACTED]; Melissa Campbell [REDACTED]; Rosemary Madnick [REDACTED]
Cc: Feimster, Lashawn K. (GSFC-210I) [REDACTED]; Marsh, Gordon D. (WFF-8100) [REDACTED]; Kathe Rich [REDACTED]
Subject: PFRR Contract #80GSFC20C0023 Mod #11 - COVID FAR Clause
Importance: High

Good Afternoon,

Please find attached for your signature Modification #11 which implements Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, dated September 9, 2021. I have been tasked with inserting this clause into the contract via bilateral modification by October 15, 2021. Please review and let me know immediately if you have any questions or require anything further in order to execute this modification. Your prompt attention in this matter is greatly appreciated.

Thank You

Martin E. Koerner, II
Contract Specialist, Code 210: I
NASA, Goddard Space Flight Center
Wallops Flight Facility, Code 210: W
Wallops Island, VA 23337
Phone: [REDACTED]

EXHIBIT

2

[REDACTED]

From: Boorstein, Douglas J CIV WHS AD (USA) [REDACTED]
Sent: Thursday, October 28, 2021 12:12 PM
To: [REDACTED]
Cc: 'Tapiana Wray'; 'Keith Dunkle'; 'Matthew Mohler'; 'Matthew Cooper'
Subject: RE: [Non-DoD Source] RE: HQ0034-18-D-0027 P00003 - Adding Covid-19 Deviation

Good afternoon,

Thanks for your note. My responses are interspersed below, in orange. As a side note, while I do not work for WHS-AD as an attorney, I am a licensed attorney, and also attended Dickinson School of Law.

--

Douglas J. Boorstein
Contracting Officer and Team Lead
Research, Logistics, and Analysis Branch (RLAB)
Enterprise Acquisition and Sustainment Division (EASD)
Washington Headquarters Services - Acquisition Directorate
4800 Mark Center Drive, Suite 09F09
Alexandria, VA 22350
Phone: [REDACTED]
Government iPhone: ([REDACTED])
Email: [REDACTED]

From: [REDACTED]
Sent: Tuesday, October 26, 2021 7:49 PM
To: Boorstein, Douglas J CIV WHS AD (USA) [REDACTED]
Cc: 'Tapiana Wray' [REDACTED]; 'Keith Dunkle' [REDACTED]; 'Matthew Mohler' [REDACTED]; 'Matthew Cooper' [REDACTED]
Subject: FW: [Non-DoD Source] RE: HQ0034-18-D-0027 P00003 - Adding Covid-19 Deviation

All active links contained in this email were disabled. Please verify the identity of the sender, and confirm the authenticity of all links contained within the message prior to copying and pasting the address to a Web browser.

Mr. Boorstein:

Your bilateral modification request has been forwarded to the Office of General Counsel at the University of Alaska for review. As we consider the impact of your proposed modifications to the performance obligations of UA under the contract in question, we have a couple questions which we would like clarified. If you could please provide feedback on the following questions, it would assist our office in reviewing the terms of the proposed modification and to consider the impacts from accepting these new terms.

1. Will DOD consider requests for edits to the proposed modification language and terms to clarify the extent of coverage and scope of terms such as "covered contractor employee" or "covered contractor workplaces" as currently outlined in the Safer Federal Workforce Task Force? If so, we would be happy to draft and circulate revised proposed terms to start negotiations on such proposed edits.

This guidance is issued outside of the Department of Defense, under the authority of the Director of the Office of Management and Budget. As such, I do not have authority to negotiate the extent of coverage nor changes to the definitions. If the language is changed by the Office of Management and Budget, we would incorporate those changes (or, if the changes were at the discretion of the agency concerned, be at least willing to negotiate those changes with the University of Alaska).

2. Will DOD consider edits to extend the implementation timelines set forth in the Safer Federal Workforce Task Force Guidance, given the extremely tight timelines provided?

Again, this guidance is issued outside of the Department of Defense, by the Director of the Office of Management and Budget. As such, I do not have authority to negotiate changes to the timelines.

3. Will DOD be providing applicable equitable adjustments per Federal Acquisition Regulation guidance for out-of-scope contract performance changes that result from this modification to the terms of the contract in question, including potential adjustments in both costs and performance schedules as appropriate?

On a case by case basis, the Department of Defense will *consider* a request for equitable adjustment. The University of Alaska would need to justify its request.

I appreciate your response and look forward to working with you through this bilateral modification process.

I am willing to have a teleconference with you to discuss this, but, as discussed above, I have very limited authority to negotiate changes to the guidance.

Sincerely,
Wayne

=====
This electronic transmission contains confidential information belonging to the University of Alaska Office of the General Counsel. If you are not the intended recipient or an authorized agent or employee of the intended recipient, please read no further and follow the instructions at the end of this message.
=====

Wayne L. Mowery, Jr.

Associate General Counsel

Email: [REDACTED] <[REDACTED]>

Phone: [REDACTED]

=====
This is an attorney-client privileged communication. If this transmission has reached you in error, any review, examination, use, disclosure, reproduction or distribution of this transmission or the information contained herein is prohibited. Please immediately notify the sender by telephone at [REDACTED] and delete this message. Thank you.

From: Boorstein, Douglas J CIV WHS AD (USA) [REDACTED]

[REDACTED] >

Sent: Thursday, October 21, 2021 10:39 AM

To: Tapiana Wray [REDACTED]

Cc: LP Persia OLeary [REDACTED]; Keith Dunkle

[REDACTED] >; Maren Savage [REDACTED]

[REDACTED] >; Matthew Mohler [REDACTED]

[REDACTED] >; [REDACTED]

Subject: RE: [Non-DoD Source] RE: HQ0034-18-D-0027 P00003 - Adding Covid-19 Deviation

Good afternoon,

I've revised this in accordance with your request. Please advise if acceptable, and, if it is, sign and return this document. Thanks.

--

Douglas J. Boorstein

Contracting Officer and Team Lead

Research, Logistics, and Analysis Branch (RLAB)

Enterprise Acquisition and Sustainment Division (EASD)

Washington Headquarters Services - Acquisition Directorate

4800 Mark Center Drive, Suite 09F09

Alexandria, VA 22350

Government iPhone: [REDACTED]

Email: [REDACTED] <Caution-mailto [REDACTED]>

From: Tapiana Wray [REDACTED]

Sent: Tuesday, October 19, 2021 8:54 PM

To: Boorstein, Douglas J CIV WHS AD (USA) [REDACTED]

Cc: LP Persia OLeary [REDACTED]

[REDACTED] Keith Dunkle

[REDACTED] Maren Savage [REDACTED]

[REDACTED] ; Matthew Mohler [REDACTED]

[REDACTED] ; [REDACTED]

Subject: [Non-DoD Source] RE: HQ0034-18-D-0027 P00003 - Adding Covid-19 Deviation

All active links contained in this email were disabled. Please verify the identity of the sender, and confirm the authenticity of all links contained within the message prior to copying and pasting the address to a Web browser.

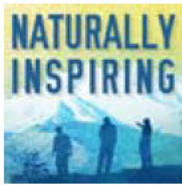
Good Afternoon Douglas,

Thank you for the modification. As our General Counsel has reviewed this there is a question about the language that is used for this supplement. The question is the use of FAR 52.253-2 Alt V falls under unilateral change requests within the scope of the contract. EO 14042 should be a bilateral modification by agreement of both parties. We request the change to Section 13 – check Box D and insert Bilateral Modification by agreement of the parties.

Please let me know if this change is agreeable.

Many thanks,

Taps



=====

Tapiana Wray MBA, MEd, HRM, CPRA
Acting Executive Director
Principal Grant & Contract Management Officer
Office of Grants & Contracts Administration
University of Alaska Fairbanks
PO Box 757880 | Fairbanks, AK 99775-7880

Phone
Office:

[REDACTED]

Website: Caution-Caution-<http://www.uaf.edu/ogca/> < Caution-
<http://www.uaf.edu/ogca/> > < Caution-Caution-
<http://www.uaf.edu/ogca/> < Caution-<http://www.uaf.edu/ogca/> > >
The University of Alaska Fairbanks < Caution-Caution-
<http://www.uaf.edu/> < Caution-<http://www.uaf.edu/> > > is an AA/EO
employer and educational institution and prohibits illegal discrimination against any individual. Learn
more about UA's notice of nondiscrimination < Caution-Caution-
<https://www.alaska.edu/titleIXcompliance/nondiscrimination> < Caution-
<https://www.alaska.edu/titleIXcompliance/nondiscrimination> > > .

=====

Begin forwarded message:

From: "Boorstein, Douglas J CIV WHS AD (USA)" [REDACTED]

> >

Subject: HQ0034-18-D-0027 P00003 - Adding Covid-19 Deviation

Date: October 15, 2021 at 2:51:32 PM AKDT

To: Matthew Mohler [REDACTED]

[REDACTED], Keith Dunkle [REDACTED]

Cc: "Campbell, Craig P CIV OSD OUSD A-S (USA)" [REDACTED]

[REDACTED] "Williams, David G CIV DTRA RD (USA)" [REDACTED]

[REDACTED] "Narcisse, Pierre A CIV WHS AD (USA)" [REDACTED]

[REDACTED]

Good afternoon,

As discussed, please review and sign the attached, so that we can continue using your services under the UARC.

I would prefer a response NLT 21 October 2021. Please advise if you will be unable to meet this date. However, as discussed, our options for moving much beyond this date are quite limited.

Thanks.

--

Douglas J. Boorstein
Contracting Officer and Team Lead
Research, Logistics, and Analysis Branch (RLAB)
Enterprise Acquisition and Sustainment Division (EASD)
Washington Headquarters Services - Acquisition Directorate
4800 Mark Center Drive, Suite 09F09
Alexandria, VA 22350

[REDACTED]
Government iPhone:

Email [REDACTED]

EXHIBIT

M

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

STATE OF MISSOURI, et al.,

Plaintiffs,

v.

JOSEPH R. BIDEN, JR., et al.,

Defendants.

No. 4:21-cv-01300

DECLARATION OF JASON JACKSON

1. My name is Jason Jackson, and I am the Director of the Nebraska Department of Administrative Services. I am also a resident of the State of Nebraska and over the age of majority. I have personal knowledge of the facts in this declaration, and those facts are true and correct to the best of my knowledge.

2. I submit this declaration in support of Plaintiffs' Motion for Preliminary Injunction.

3. The State of Nebraska has various state agencies that are federal contractors and will be directly affected by the federal contractor vaccine mandate that Plaintiff States have challenged in this case.

4. The Nebraska Department of Health and Human Services is a contractor for the federal Centers for Disease Control and Prevention ("CDC"). That Nebraska agency currently has a contract with CDC to provide Vital Statistics Cooperative Program data and to perform special projects related to that program. The amount of this contract exceeds the simplified

acquisition threshold defined in Section 2.101 of the Federal Acquisition Regulation (“FAR”). As a result, it appears that this contract falls within the class of contracts to which the federal contractor vaccine mandate applies.

5. The Nebraska Department of Agriculture is a contractor for the federal Department of Health and Human Services. That Nebraska agency currently has an animal food inspection contract with that federal agency. The amount of this contract exceeds the simplified acquisition threshold defined in Section 2.101 of the FAR. As a result, it appears that this contract falls within the class of contracts to which the federal contractor vaccine mandate applies.

6. The Nebraska Department of Education is a contractor for the federal Department of Education. That Nebraska agency currently has a National Assessment of Educational Progress contract with that federal agency. The amount of this contract exceeds the simplified acquisition threshold defined in Section 2.101 of the FAR. As a result, it appears that this contract falls within the class of contracts to which the federal contractor vaccine mandate applies.

7. The Nebraska Game and Parks Commission is a contractor for the U.S. Army Corps of Engineers – an agency under the federal Department of Defense. That Nebraska agency currently has a contract for endangered species studies with that federal agency. The amount of this contract exceeds the simplified acquisition threshold defined in Section 2.101 of the FAR. As a result, it appears that this contract falls within the class of contracts to which the federal contractor vaccine mandate applies.

8. On October 28, 2021, Nebraska Governor Pete Ricketts issued Executive Order No. 21-16, which is titled “Federal Government’s COVID-19 Vaccine Mandate Interference

in State Government Operations.” A copy of the Executive Order is attached to this declaration.

9. The Executive Order is directed to each “Cabinet executive branch agency” in Nebraska. The Nebraska Department of Administrative Services, under my leadership, is a Cabinet executive branch agency that falls under the Executive Order.

10. According to the Executive Order, the State “recognizes that Nebraskans have individual responsibility and personal freedom over their healthcare decisions and that the decision to receive a COVID-19 vaccination is a personal choice involving medical, religious, and other personal factors.”

11. The Executive Order directs that “[n]o Cabinet executive branch agency shall be a party in any agreement, any contract, any contract amendment, contract renewal, contract addendum, contract modification, grant agreement, lease agreement, memorandum of understanding or agreement that includes any requirement imposing a duty, obligation, or mandate on any person to receive a COVID-19 vaccination.”

12. The Executive Order became “effective immediately and shall remain in effect until specifically rescinded or amended by further Executive Order.”

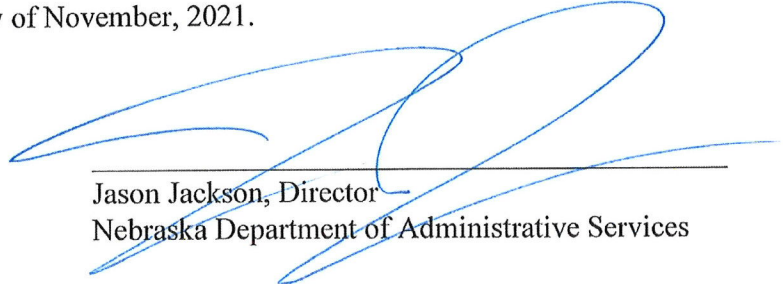
13. Some of the Nebraska agencies with federal contracts mentioned above are “Cabinet executive branch agencies” that are covered by the Executive Order. Those include the Nebraska Department of Health and Human Services and the Nebraska Department of Agriculture.

14. Some of the Nebraska agencies with federal contracts mentioned above are not “Cabinet executive branch agencies” and so they are not covered by the Executive Order. Those include the Nebraska Department of Education and the Nebraska Game and Parks

Commission.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on this the 4th day of November, 2021.



Jason Jackson, Director
Nebraska Department of Administrative Services



STATE *of* NEBRASKA
OFFICE OF THE GOVERNOR
LINCOLN

Executive Order No. 21-16

**Federal Government's COVID-19 Vaccine Mandate Interference in
State Government Operations**

WHEREAS, the State of Nebraska in 2020 implemented a mass vaccination program to combat the spread of the novel COVID-19 virus and over 73% of Nebraskans who are 12 and older are either fully vaccinated or partially vaccinated;

WHEREAS, I have continued to encourage all eligible Nebraskans to get vaccinated against COVID-19;

WHEREAS, the State further recognizes that Nebraskans have individual responsibility and personal freedom over their healthcare decisions and that the decision to receive a COVID-19 vaccination is a personal choice involving medical, religious, and other personal factors;

WHEREAS, individuals are not, nor should they be, mandated by Nebraska state statutes to receive a COVID-19 vaccine;

WHEREAS, the federal government has announced that it will unilaterally impose new vaccination mandates on federal employees, federal contractors, healthcare workers, and those businesses with 100 or more employees; and


WHEREAS, these vaccination mandates demonstrate massive overreach on the part of the federal government, are legally suspect, and should not, in any manner, be construed to flow through to any state government agency contract or those companies with whom state government enters into contracts.

NOW THEREFORE, I, Pete Ricketts, Governor of the State of Nebraska, by virtue of the authority vested in me by the Constitution and laws of Nebraska, do hereby order and direct the following actions in order to oppose the federal government's COVID-19 vaccine mandate overreach:

1. No Cabinet executive branch agency shall be a party in any agreement, any contract, any contract amendment, contract renewal, contract addendum, contract modification, grant agreement, lease agreement, memorandum of understanding or agreement that includes any requirement imposing a duty, obligation, or mandate on any person to receive a COVID-19 vaccination.
2. All Cabinet executive branch agencies shall immediately notify the Governor's Office if any federal agency attempts to require a COVID-19 vaccination mandate of any kind with regard to any contracts or funding or lease agreements between the state government agency and the federal government.
3. All other executive branch agencies are encouraged to comply with these directives.
4. This Executive Order shall become effective immediately and shall remain in effect until specifically rescinded or amended by further Executive Order.

IN WITNESS THEREOF, I have hereunto set my hand and caused the Great Seal of the State of Nebraska to be affixed on this 28th day of October, 2021.





Pete Ricketts, Governor
State of Nebraska

Attest:



Robert Evnen, Secretary of State
State of Nebraska

EXHIBIT

N

DECLARATION OF MARCIA MAHANEY,
DIRECTOR OF ADMINISTRATION
MISSOURI DEPARTMENT OF HEALTH AND SENIOR SERVICES

I, Marcia Mahaney, being first duly sworn upon my oath, do hereby state as follows:

1. I am the Director of Administration for the Missouri Department of Health and Senior Services (DHSS). I am also a resident of Missouri and over the age of majority. I have personal knowledge of the facts in this declaration, and those facts are true and correct to the best of my knowledge.

2. In the performance of its statutory duties, DHSS participates with the federal government on a variety of programs, including as a contractor to the Federal government, and receives federal funds for the completion of certain responsibilities.

3. Programs where DHSS acts as a federal contractor include the following:

- a. The DHSS is a contractor for the Food Inspection Program. The DHSS currently has a contract for food establishment inspections with the Food and Drug Administration. The amount paid to the DHSS pursuant to this contract was approximately \$391,859 for Fiscal Year 2021 (July 1, 2020 to June 30, 2021). The amount of that contract exceeds the simplified acquisition threshold defined in Section 2.101 of the Federal Acquisition Regulation.

- b. The DHSS is a contractor for the Vital Statistics Program. The DHSS currently has a contract for enumeration of birth with the Social Security Administration. The amount paid to the DHSS pursuant to this contract was approximately \$265,142 for Fiscal Year 2021 (July 1, 2020 to June 30, 2021). The amount of that contract exceeds the simplified acquisition threshold defined in Section 2.101 of the Federal Acquisition Regulation.
- c. The DHSS is a contractor for the Vital Statistics Program. The DHSS currently has a contract for vital records for the Vital Statistics Cooperative Program with the Centers for Disease Control and Prevention. The amount paid to the DHSS pursuant to this contract was approximately \$334,324 for Fiscal Year 2021 (July 1, 2020 to June 30, 2021). The amount of that contract exceeds the simplified acquisition threshold defined in Section 2.101 of the Federal Acquisition Regulation.

4. The following received all or a portion of their salaries from funds provided under the federal contract:

- a. At least 24 employees of the DHSS received all or a portion of their salaries for Fiscal Year 2021 from funds provided under the federal contract for duties related to the Food Inspection Program.

- b. At least 22 employees of the DHSS received all or a portion of their salaries for Fiscal Year 2021 from funds provided under the federal contract for duties related to the Vital Statistics Program.

5. Based on the general percentage of Missourians who have chosen not to take a COVID-19 vaccine, I anticipate that the federal vaccine mandate will lead to a significant number of employees of DHSS quitting. Conversely, I anticipate that the agency will be compelled to terminate valuable employees for non-compliance pursuant to the federal vaccine mandate.

6. Employees potentially terminated by the agency pursuant to the federal vaccine mandate would likely apply for unemployment benefits. Assuming such benefits were granted, this would impose a significant financial cost to the agency.

7. The recruitment of qualified employees is a significant consideration by the agency. I anticipate that the federal vaccine mandate will limit the number of potential applicants and make agency recruitment more difficult. I anticipate that such issues of resignations and recruitment will interfere with the agency's ability to administer state services pursuant to its statutory duties.

8. Given the broad scope of the federal vaccine mandate, the concerns set forth in paragraphs 5 to 7 will apply to many other employees of DHSS, even those whose salaries are not directly funded by federal contracts.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the

foregoing is true and correct.

Executed on this 4th day of November, 2021.

A handwritten signature in blue ink, appearing to read "Marcia Mahaney", is written over a horizontal line.

Marcia Mahaney
Director of Administration
Missouri Department of DHSS

EXHIBIT O

DECLARATION OF DRU BUNTIN, DIRECTOR
MISSOURI DEPARTMENT OF NATURAL RESOURCES

I, Dru Buntin, being first duly sworn upon my oath, do hereby state as follows:

1. I am the Director of the Missouri Department of Natural Resources (“DNR”). I am also a resident of Missouri and over the age of majority. I have personal knowledge of the facts in this declaration, and those facts are true and correct to the best of my knowledge.

2. DNR has entered into three separate agreements with the U.S. General Service Agency (“GSA”) to provide oversight of environmental investigation and remediation of certain federal facilities pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act.

3. In emails dated October 8, 2021 and October 10, 2021, GSA proposed modification of those agreements to incorporate the requirements of Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors (the “Order”). The emails stated that the contract modifications would be mandatory before GSA would renew, extend the period of performance of the contracts, or exercise an option. These agreements are currently set to expire on December 31, 2021. The emails also stated that GSA may take interim actions if signed modifications are not returned to GSA by November 14, 2021, such as: “Temporarily hiding contractor information GSA websites and/or e-tools” or “Flagging contractors that have not accepted the modification”.

4. DNR has several other agreements with federal agencies that are

scheduled to expire in 2022.

5. DNR disputes that any of these agreements meet the definition of a federal contract or contract-like instrument as those terms are defined in the Order, and that we are consequently subject to any federal contractor vaccine mandate.

6. In the alternative, and without in any way admitting or stipulating to being a federal contractor for purposes of a federal vaccine mandate, if DNR would be determined to be subject to any federal contracting vaccine mandate, we would be at substantial risk of the harms detailed in the following paragraphs.

7. At least 10 employees of Missouri Department of Natural Resources received all or a portion of their salaries for Fiscal Year 2021 from funds provided pursuant to the agreements with GSA.

8. The broad scope of the Order and its implementing guidance purports to require nearly all of DNR's employees be fully vaccinated by the first full day of the period of performance on a renewed or extended contract, even those whose salaries are not directly funded from federal agreement, as well as any employee working for an "affiliate company" of DNR, such as private concessionaires in certain State Parks.

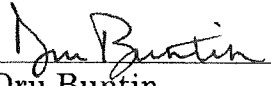
9. Implementing and enforcing the continually changing requirements of the Order in the time frame required would place an undue administrative burden upon DNR, reducing the agency's ability to fulfill its statutory duties, and affect its ability to provide necessary services to the public.

10. Implementation and enforcement of the Order could lead to increased employee turnover, resulting in undue financial and administrative burdens on DNR from decreased productivity and morale; increased costs for recruiting, onboarding, and training new employees; and the potential payment of unemployment claims.

11. The recruitment of qualified employees is a significant consideration by the agency. Implementation and Enforcement of the Order will limit the number of applicants and has the potential to make agency recruitment more difficult. Increased employee resignations and recruitment would interfere with the agency's ability to administer state services pursuant to its statutory duties.

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

Executed on this 4th day of November, 2021.



Dru Buntin
Director
Missouri Department of Department of Natural Resources