IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF EORGIA
AUGUSTA DIVISION

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

ABC'S REPLY TO DEFENDANTS' CONSOLIDATED OPPOSITION TO PLAINTIFFS' AND ASSOCIATED BUILDERS AND CONTRACTORS' MOTIONS FOR A PRELIMINARY INJUNCTION

Defendants oppose ABC's and Plaintiffs' Motion for a Preliminary Injunction because, they say, "Plaintiffs have failed to show how they have been (or will be) harmed at all, much less that they face irreparable harm" by the imposition of a mandate, by Executive Order, that all Federal contractors' and subcontractors' employees must be vaccinated against COVID 19, beginning November 14, 2021. (Dkt. 63 at 3.) This is not true. The President's decree that all employees with qualifying Federal contract connections must be vaccinated promises to have massive, unprecedented, and harmful impact on the movants and their employees.

Defendants' arguments are unavailing or inapposite. First, ABC,[1] representing its members, has standing: it is sufficient at this stage of the litigation for ABC to allege *imminent*, rather than actual, harm as Defendants contend. Second, success on the merits is highly likely, given the faulty and shifting legal bases for the mandate and its adoption. Third, Plaintiffs have sufficiently alleged that they will suffer irreparable harm. Fourth, an injunction is emphatically in the public interest, given the likely adverse impact on the U.S. economy as a whole and the federal government itself, as well as the rule of law, and will cause Defendants no prejudice or injury. Finally, nationwide relief, such as that entered by the Fifth Circuit in response to a challenge of OSHA regulations purporting to impose a similar mandate on private-sector employers, is not only appropriate but desirable. For these reasons the Court should grant this Motion and issue a preliminary injunction prohibiting enforcement of EO 14042.

LEGAL STANDARD

To win a preliminary injunction the movant must establish (1) that they have a substantial likelihood of success on the merits; (2) that they will suffer irreparable harm without an injunction; (3) that the balance of equities tips in their favor; and (4) that preliminary relief serves the public interest. *Davidoff & CIE, S.A. v. PLD Int'l Corp.*, 263 F.3d 1297, 1300 (11th Cir. 2001).

ARGUMENT AND AUTHORITY

A. ABC Has Standing to Challenge the Vaccine Mandate.

To establish Article III standing, a plaintiff must show (1) injury in fact; (2) causation; and (3) redressability. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130 (1992). The party invoking federal jurisdiction bears the burden of establishing these indispensable elements. *Lujan*, 504 U.S. at 561. "[E]ach element must be supported in the same way as any other matter

[1] As in their original motion, ABC and ABCGA are herein referred to collectively as "ABC."

on which the plaintiff bears the burden of proof, *i.e.,* with the manner and degree of evidence required at the successive stages of the litigation." *Id*. At the pleading stage general factual allegations of injury resulting from the defendant's conduct may suffice to establish standing. *Id*.

Defendants make much of ABC's alleged failure to identify a particular contract – necessarily, one commencing in the future, after the vaccine mandate becomes enforceable -- which will cause them harm by imposing undue costs or requiring them to fire noncompliant employees. But the law does not require ABC to read a crystal ball: ABC has sufficiently alleged that it and its members regularly perform federal construction contracts that will be covered by Executive Order 14042 and its implementing regulations and has supplied a declaration from one of its affected members directly affected by the vaccine mandate. As the District Court in Kentucky found in its decision this date in *Kentucky v. Biden*, 3:21-cv-00055-GFVT (D. Ky. Nov. 30, 2021): "When a claim involves a challenge to a future contracting opportunity, the pertinent question is whether Plaintiffs ha[ve] made an adequate showing that sometime in the relatively near future [they] will bid on another Government contract." (quoting *Adarand Contractors, Inc. v. Pena*, 515 U.S. 200, 211 (1995)).

In *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 153-154, 130 S. Ct. 2743 (2010), the Supreme Court held that a significant *risk of imminent harm* is all that is required to show standing, at least at the pleading stage. "Standing under Article III of the Constitution requires that an injury be concrete, particularized, and actual *or imminent*; fairly traceable to the challenged action; and redressable by a favorable ruling." *Monsanto*, 561 U.S. at 149, 130 S. Ct. at 2752 (emphasis added), citing *Horne* v. *Flores*, 557 U.S. 433, 445, 129 S. Ct. 2579, 2592 (2009). Thus, contrary to Defendants' claim, there is no requirement at the pleading stage that ABC identify specific contracts over which its members will face a significant risk of imminent harm in the form

of increased costs or reduced staff. *All* of ABC's federal contractor members confront such a risk due to the unprecedented and unlawful Contractor Mandate.

As discussed more extensively in ABC's Reply in support of its Motion to Intervene, Defendants are mistaken in claiming at the pleading stage that ABC is required to identify an individual member contractor who is harmed for purposes of Article III standing. *See Doe v. Stincer*, 175 F.3d 879, 881-82 (11th Cir. 1999) ("We have never held that an association must identify an individual member to establish standing."). But out of an abundance of caution, ABC has submitted two declarations conclusively demonstrating the individual standing of identified ABC members, large and small. The Declaration of Milton Graugnard (Exhibit 2), establishes that a general contractor member of ABC, Cajun Industries, Inc. ("Cajun"), is fully qualified to perform federal construction contracts and has regularly performed such work. New federal contracts of the type Cajun has performed in the past - and is performing now - will be covered by the President's Executive Order 14042. (Id., ¶2.) Cajun has been advised of a number of forthcoming solicitations by the U.S. Army for large construction projects and intends to bid on them. In preparing to submit those bids, which will be solicited and awarded after November 14, 2021, Cajun recognizes that it will have to agree to be bound by the new FAR clauses referencing the Federal Contractor Vaccination Mandate as a condition of being awarded the work. (Id., ¶3.) Unless the Mandate is enjoined, Cajun likely will be unable to bid on these projects because of the significant risk of irreparable harm to Cajun's business resulting from the Mandate. (Id., ¶4.)

ABC is also submitting with its Reply an affidavit from James Lynn McKelvey, President of McKelvey Mechanical (Ex. 3). McKelvey is a small, native-owned, woman-owned business that regularly performs federal construction contracts with the Veterans' Administration and other federal agencies. McKelvey attests that it anticipates numerous contracts will be solicited and

awarded during the coming months by the VA. (Id., ¶¶1 & 2.) McKelvey desires to bid for and perform on such contracts, as it has in the past and currently, but will be unable to risk default or breach of its federal contracts if the Mandate is not enjoined by this Court. (Id., ¶ ¶3 & 4.)

These sworn statements from identified individual contractors put to rest the Defendants' disingenuous objections to ABC's standing. ABC is entitled to seek injunctive relief on behalf of these contractors and on behalf of the myriad federal contractor and subcontractor members of ABC doing business with the federal government in Georgia and all over the country.

B. ABC Will Suffer Irreparable Harm Without an Injunction.

ABC's affidavits, both on behalf of the entire association and the two individual contractors, not only establish ABC's standing to sue. They also conclusively show the irreparable harm imposed on ABC's federal contractor/subcontractor members, absent injunctive relief. As previously discussed in ABC's motion and in the new affidavits, many ABC members' employees have made it abundantly clear to their employers they will resist vaccination and will leave their employment rather than submit to the federal Mandate. (Graugnard Dec. ¶6; McKelvey Dec. ¶5.) Cajun employs hundreds of employees: it has surveyed its workforce and determined that more than 50% of its employees are not currently vaccinated against COVID. The number could be higher because some employees have chosen not to reveal their status. (Graugnard Dec., ¶5.) While Cajun's and ABC's leadership have encouraged all employees to get the vaccine, many have declined, and have told the company in no uncertain terms that they will leave the Company rather than be forced to get vaccinated as a condition of employment. (Id. ¶6.) If the Federal Contractor Mandate is imposed on Cajun's federal contracts it will be difficult, if not impossible, to fulfill its Federal contracts. (Id., ¶¶ 6,7.) Skilled workers cannot be readily replaced and there is already an

industry-wide workforce shortage. Cajun will be faced with the choice of default or breach of contract. (Id., ¶7.)

Because vaccination will be required not only on workers at construction sites, but also those at Company offices; and even workers who are not working on covered contracts but may have contact with covered workers, there is no practical way the Company can segregate its federal project workforce to avoid significant and irreparable harm to its private sector workforce. (Id., ¶8.) Cajun also will be severely harmed due to the un-reimbursable compliance costs imposed by the Mandate. These will range from paperwork burdens of tracking our employees' vaccination status, attempts to accommodate employees seeking the vaguely worded disability and religious exemptions, and other new protocols imposed by the Mandate. Cajun has a very limited administrative staff and cannot feasibly address these new requirements, which have nothing to do with promoting economy and efficiency of government contracts. (Id., ¶9.)

McKelvey is a small business that does not have the administrative staff needed to comply with the paperwork burdens and other administrative costs imposed by the Mandate. In addition, a majority of McKelvey's workforce is unvaccinated despite the Company's continuing efforts to encourage its employees to become vaccinated. The unvaccinated employees have made it clear that they will leave employment rather than comply with the government mandate, which will render McKelvey unable to perform its federal or private business and devastate the company. (McKelvey Dec, ¶¶5 - 7.)

Many of these are highly skilled workers who cannot be replaced, contrary to the OMB's unsupported view. *See Nat'l Ass'n of Mfrs. v. U.S. Dept. of Homeland Security*, 2020 U.S. Dist. LEXIS 182267, 2020 WL 5847503 (N.D. Cal. 2020) (ruling that skilled and unskilled workers are not "fungible.") As previously noted, the construction industry is already confronting a drastic

worker shortage, and the industry's workforce is transient by nature. As a result, if the Federal Contractor Mandate is imposed on ABC members' federal contracts it will be difficult, if not impossible, for many federal construction contractors to fulfill their federal contracts. (Graugnard Dec. ¶¶ 6,7.) Because the risk of loss is so great, many contractors – like Cajun and McKelvey – understandably feel they have no choice but to stop bidding for federal contracts, which itself constitutes irreparable harm.

Because vaccination will be required not only on workers at construction sites, but also those at Company offices; and even workers who are not working on covered contracts but may have contact with covered workers, there is no practical way the Company can segregate its federal project workforce to avoid significant and irreparable harm to its private sector workforce. (Id., ¶8.) Federal contractors also will be severely harmed due to the un-reimbursable compliance costs imposed by the Mandate. These will range from paperwork burdens of tracking employees' vaccination status, attempts to accommodate employees seeking the vaguely worded disability and religious exemptions, and other new protocols imposed by the Mandate. As the district court noted in *Kentucky v. Biden*, 3:21-cv-00055-GFVT, at p. 27 (D. Ky. Nov. 30, 2021): "Complying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance." (quoting *BST Holdings, LLC*, 2021 WL 5279381, at *8 (5th Cir. Nov. 12, 2021).

The irreparable nature of the harm inflicted by the Mandate on small businesses like McKelvey, and many other ABC members, is particularly stark. If even a handful of employees quit a company that has only 50 employees to start with, the impact of the Mandate will be potentially devastating. But McKelvey's president has been firmly told by half his workforce that they will leave if the Mandate is enforced against them. (McKelvey Dec. ¶5.) Such threatened harm is clearly irreparable.

The Government claims that covered Federal contractors will simply be able to replace workers who choose to quit rather than be subjected to a compulsory vaccination. But as previously discussed in ABC's motion, and not refuted by Defendants, there is already a labor shortage of more than 400,000 workers in the construction industry,[2] and unfilled jobs in the construction industry are at historic highs. Moreover, as noted above, ABC members employ highly skilled trade- and crafts-persons, such as licensed plumbers, electricians, ironworkers, and welders, for whom replacements simply are not readily available.

C. ABC Is Likely to Succeed on the Merits.

In their haste to force all within their power to be vaccinated against COVID 19 Defendants have failed to comply with numerous Constitutional, statutory and procedural requirements. These failures improve the odds of the movants' success.

1. The Contractor Mandate Exceeds the President's Authority Under the Procurement Act.

ABC and the State Plaintiffs have argued from the outset of this proceeding that the vaccine mandate exceeds the President's authority under the Federal Property and Administrative Services Act ("FPASA"), 40 U.S.C. §§ 101 and 121, known as the Procurement Act. As even the Defendants acknowledge in their Opposition, the President's authority to direct government procurement must be consistent with the Congressional grant of authority in the FPASA, and therefore must be "reasonably related to the Procurement Act's purpose of ensuring efficiency and economy in government procurement." (Doc. 63 at 15.).

[2] The Construction Industry Needs to Hire an Additional 430,000 Craft Professionals in 2021, March 23, 2021, ABC News Release. *See also* https://www.housingwire.com/articles/construction-worker-shortage-has-reached-crisis-levels/. (The construction industry needs more than 61,000 new hires every month, if we are to keep up with both industry growth and the loss of workers either through retirement or simply leaving the sector for good," said Home Builders Institute CEO Ed Brady. "From 2022 through 2024, this total represents a need for an additional 2.2 million new hires for construction. That's a staggering number.").

But the Administration's explanation for how the Executive Order promotes efficiency and economy is neither reasonable nor rational. As the district court has just held in *Kentucky v. Biden*, 3:21-cv-00055-GFVT, at p. 13: "If a vaccination mandate has a close enough nexus to economy and efficiency in federal procurement, then the statute could be used to enact virtually any measure at the president's whim under the guise of economy and efficiency." (*citing Ala. Ass'n of Realtors v. Dept. of Health and Human Servs*., 141 S. Ct. 2485, 2488-89 (2021). While the Defendants cite various inapposite cases in which Presidential procurement authority was upheld based upon a reasonable nexus,[3] they virtually ignore the cases placing limits on the President's authority where the President exceeded the limits of Congressional authority, as has clearly occurred here. *Chamber of Commerce v. Reich*, 74 F.3d at 1330; *ABC of SE Texas v. Rung*, 2016 U.S. Dist. LEXIS 155232, *21 (ED TX 2016). *See also Missouri v. Biden*, Case No. 4:21-cv-01329-MTS, at *3-4 (E.D. Mo. Nov. 29, 2021) ("Congress must provide clear authorization if delegating the exercise of powers of 'vast economic and political significance'….").

In their Opposition, the Defendants offer no factual evidence regarding how mandatory vaccination 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 14,042 § 1. Unmentioned in the Opposition or the OMB findings is the fact that federal construction contractors have been successfully and safely performing their federal contracts since the beginning of the pandemic, without significant worker absences due to COVID exposure or loss of productivity by construction federal contractors during 18 months of pandemic

[3] The present case bears no resemblance to such cases as (*UAW-Labor Empl. & Training Corp. v. Chao*, 325 F.3d 360 (D.C. Cir. 2003) (requiring employers to post a notice of union rights) or *Chamber of Commerce of the United States v. Napolitano*, 648 F. Supp. 2d 726, (D. Md. 2009) (requiring federal contractors to use E-Verify). The vaccine mandate compels contractors to impose drastic changes on their employees' personal health decisions for reasons far beyond mere economic goals.

to date. By imposing the Mandate now, the undisputed evidence in this record shows that the Mandate will *increase* worker absence (as employees quit or are forced to be placed on leave); will *increase* labor costs as labor shortages increase; will *decrease* efficiency of contractors and subcontractors by depriving them of many skilled employees; and will *decrease* government efficiency both short term and long term by reducing the number of federal contractors competing for the work.

Thus, it remains the case that the imposition of a requirement that workers on federal government contracts be vaccinated is an unprecedented and unjustified expansion of Presidential authority. This executive action is nothing like the executive powers cited by the Defendants in support of the mandate. The government has taken a personal health decision and made it mandatory for anyone who works on or near a federal government contract.

2. <u>The Covid Mandate Is Subject to APA and SBREFA Review</u>.

Defendants erroneously assert that the APA and SBREFA do not apply to the EO or OMB because it was a delegated presidential authority. Their reliance on *NRDC, Inc. v U.S. Dep't of State,*, 658 F. Supp. 2d 105 (DC Dist., 2009) is misplaced. First the case is related to "the President's inherent foreign affairs power not pursuant to any enabling statute." *Id at 111*. The court further explained, "Executive Orders, with specific statutory foundation, are treated as agency action and reviewed under the Administrative Procedure Act" if they "do not preclude judicial review" and "there is 'law to apply'"). *Id at 112.* Presidential actions are indeed reviewable. *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1136 (D.C. Cir. 2002); *City of Carmel-By-the-Sea v. U.S. Dept. of Transp*., 123 F.3d 1142, 1166 (9th Cir. 1997). See also *Sierra Club v. Clinton*, 689 F. Supp. 2d 1147 (D. Minn. 2010) (rejecting NRDC's holding that agency was not reviewable under any circumstances). See also *Chamber of Commerce of the United States v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996); *Associated Builders & Contrs. of Southeast Tex. v. Rung,*

2016 U.S. Dist. LEXIS 155232, *21 (ED TX 2016) ("In the present case, the Executive Order, FAR Rule, and DOL Guidance arrogate to contracting agencies the authority to require contractors to report for public disclosure mere allegations of labor law violations, and then to disqualify or require contractors to enter into premature labor compliance agreements based on their alleged violations of such laws in order to obtain or retain federal contracts. By these actions, the Executive Branch appears to have departed from Congress's explicit instructions dictating how violations of the labor law statutes are to be addressed.")

In *Reich*, the D.C. Circuit noted that "the government's brief advanced a breathtakingly broad claim of non-reviewability of presidential actions…." which the government does here. The D.C. Circuit held:

> Even if the Secretary were acting at the behest of the President, this "does not leave the courts without power to review the legality [of the action], for courts have power to compel subordinate executive officials to disobey illegal Presidential commands." *Soucie v. David,* 145 U.S. App. D.C. 144, 448 F.2d 1067, 1072 n.12 (D.C. Cir. 1971).

For similar reasons, Defendants err in claiming that they were not required to conduct an adverse impact analysis regarding small business under the Regulatory Flexibility Act. 5 U.S.C. § 604(a). Defendants contend, among other things, that the November Determination is not a final rule but is only temporary. (Doc. 63, p. 22.) The November Determination, however, purports to require that covered contractors comply with the Safer Federal Workforce Task Force Guidance ("Guidance"), including making sure all covered contractor employees are fully vaccinated no later than January 18, 2022. 86 Fed. Reg. at 63420. In other words, even though Defendants claim the November Determination is temporary, it is clearly final in terms of imposing immediate burdens and harm on federal contractors. *See Wellness Pharm., Inc. v. Becerra*, 2021 U.S. Dist. LEXIS 179276 (D.D.C. Sept. 21, 2021) (finding purported guidance issued by an agency to be in reality a legislative rule because of the agency's intent to "speak with the force of law" that "effect

a substantive change in existing law or policy."), citing *POET Biorefining, LLC v. EPA*, 970 F.3d 392, 407 (D.C. Cir. 2020). Certainly, the FAR Council was required to conduct a Regulatory Flexibility analysis, prior to approving any new clauses as significant as the vaccine mandate, as it has regularly done in the past. *See, e.g.*, *Associated Builders and Contractors of Southeast Texas v. Rung, supra*. Accordingly, Defendants were required to issue a regulatory flexibility analysis and the federal contractor mandate must be set aside for this reason alone.

3. Defendants Have Failed to Sufficiently Explain Their Changed Position.

When an agency changes its existing position, it must "display awareness that it is changing position" and "show that there are good reasons for the new policy." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 136 S. Ct. 2117, 2124-25 (2016), quoting *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515, 129 S. Ct. 1800 (2009). In *Encino Motorcars,* the Court considered whether the U.S. Department of Labor's 2011 regulation, 29 C.F.R. § 779.372(c)(1), was entitled to *Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 104 S.Ct. 2778 (1984),* deference in deciding whether service advisors employed by an automobile dealership were exempt under 29 U.S.C.S. § 213(b)(10)(A) from the FLSA's overtime provisions. The Court noted that in the usual course, when an agency is authorized by Congress to issue regulations and promulgates a regulation interpreting a statute it enforces, the interpretation receives deference if the statute is ambiguous and if the agency's interpretation is reasonable. This principle is implemented by the two-step analysis set forth in *Chevron*. First, the court must determine whether Congress has "directly spoken to the precise question at issue." *Chevron*, 467 U.S., at 842, 104 S. Ct. 2778, 81 L. Ed. 2d 694. If so, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.,* at 842-843, 104 S. Ct. 2778, 81 L. Ed. 2d 694. If not, and only then must the court defer to the agency's interpretation, but only if it is "reasonable." *Id.,* at 844, 104 S. Ct. 2778.

The Court acknowledged that "[a]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change. "When an agency changes its existing position, it "need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate." Id., citing *Fox Television Stations,* 556 U.S. at 515. But the agency must at least "display awareness that it is changing position" and "show that there are good reasons for the new policy." *Id.* (emphasis deleted). In explaining its changed position, an agency also must be cognizant that longstanding policies may have "engendered serious reliance interests that must be taken into account." *Id.*; see also *Smiley* v. *Citibank (South Dakota), N. A.*, 517 U.S. 735, 742, 116 S. Ct. 1730 (1996). "In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox Television Stations*, *supra*, at 515-516, 129 S. Ct. 1800. It follows that an "[u]nexplained inconsistency" in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice." *Encino Motorcars*, 579 U.S. 211, 136 S. Ct. at 2125-26. An arbitrary and capricious regulation of this sort is itself unlawful and receives no *Chevron* deference. *Id*.

Defendants has indulged in just such arbitrary and capricious policy flip-flops here. President Biden was opposed to mandatory vaccinations until he was for them. On January 21, 2021, President Biden instructed OSHA to prepare an Emergency Temporary Standard (ETS) to protect worker health and safety from COVID 19. On June 21, 2021, six months later, OSHA issued an ETS to protect healthcare workers with certain safety measures; however, OSHA did not find a grave danger to the employees in other industries. Furthermore, OSHA did not mandate vaccines or weekly testing even for healthcare workers that had the greatest exposure to COVID-19. On September 9, 2021, President Biden announced that his patience was wearing thin and

directed all federal agencies to require vaccines. On November 5, 2021, OSHA issued a second ETS, 86 Fed. Reg. 61,402, directed to all industries for employers of 100 or more employees to require COVID vaccines or mandatory weekly testing. The second ETS provide exceptions for employees working outdoors exclusively, which exempted many construction workers and provided exemptions for employees working remotely. However, the Defendants in its September and November determination mandated vaccines with no option to have weekly testing, no exception as to size of the contractor, no exception for outside employees, no exception from the vaccine for employees who work remotely. (Dkt. 55-11, Exh. B.) The Federal Defendants have changed their position as to mandating vaccines and are not even consistent in their rules as of today.

When the government undertakes a dramatic change of course, from opposition to vaccine mandates to their imposition, *Encino Motorcars* suggests that some sort of explanation is in order. Yet none has been offered, apart from a "loss of patience." See *BST Holdings*, 2021 U.S. App. LEXIS 33698, at *14 & n.11.

4. Defendants have not complied with the requirements of 41 U.S.C. § 1707.

The "Determination of the Acting OMB Director Regarding the Revised Safer Federal Workforce Task Force Guidance for Federal Contractors and the Revised Economy & Efficiency Analysis" ("November Determination") claims OMB is not subject to the requirements of 41 U.S.C. § 1707 pursuant to a Presidential delegation under 3 U.S.C. § 301. OMB claims this authority based on Executive Order 14042. 86 Fed. Reg. 63418. The November Determination also relies on two cases that are not applicable because they deal with matters involving relations with other countries. *See NRDC, Inc.* v. *U.S. Dep't of State,* 658 F. Supp. 2d 105, 109 & n.5, 111 (D.D.C. 2009) (cross border pipeline between US and Canada); *Detroit Int'l Bridge Co.* v. *Canada,* 189 F. Supp. 3d 85, 100 (D.D.C. 2016) (bridge between US and Canada).

Executive Order 14042 requires the executive departments and agencies (which includes the Office of Management and Budget ("OMB")) to comply with law. Executive Order 14042 provides that executive departments and agencies shall, "to the extent permitted by law," include a clause in federal contracts that obligates the covered contractors to comply with the Safer Federal Workforce Task Force Guidance ("Guidance"). Executive Order 14042, Sec. 2. Section 3 of the Order also obligates the Federal Acquisition Regulatory Council and federal agencies (which includes OMB) to takes steps "to the extent permitted by law." In other words, the Order obligates OMB to comply with law.

Federal procurement law requires that the public have an opportunity to comment on "a procurement policy, regulation, procedure or form (including an amendment or modification thereto)" before it takes effect. 41 U.S.C. § 1707(a), (b). This requirement "may be waived by the officer authorized to issue a procurement policy, regulation, procedure, or form if urgent and compelling circumstances make compliance with the requirements impracticable." 41 U.S.C. § 1707(d).

There can be no dispute that the November Determination is an effort to implement a procurement policy. 86 Fed. Reg. 63418. The Order proclaims the policy of ensuring that federal contractors provide adequate COVID-19 safeguards to covered contractor employees. Executive Order 14042, Sec. 1. The Order instructs the Director of OMB to review the Guidance and approve the Guidance if it determines that the Guidance will promote economy and efficiency in Federal contracting. Executive Order 14042, Sec. 2. The November Determination is OMB's effort to implement the procurement policy announced in the Order.

Given that Defendants are seeking to implement a procurement policy, Defendants cannot waive the notice and comment requirements of Section 1707(a) and (b) unless there are "urgent

and compelling circumstances that make compliance with the requirements impracticable." 41 U.S.C. § 1707(d). COVID-19 vaccinations became available in December 2020 and were widely available by Spring 2021 with a majority of people now vaccinated. Several months after vaccinations were available, the Order was announced on September 9, 2021, and published in the Federal Register on September 14, 2021. 86 Fed. Reg. 50985. Almost two weeks later, OMB's "Determination of the Promotion of Economy and Efficiency in Federal Contracting Pursuant to Executive Order No. 14042" was issued on September 24, 2021 and published in the Federal Register on September 28, 2021 ("September Determination"). 86 Fed. Reg. 53691. OMB had the opportunity at that time to comply with the requirements of Section 1707(a) and (b) but did not. If OMB had announced the procurement policy on September 28, the required comment period would have expired already. Defendants did not even acknowledge the applicability of Section 1707 until nearly two months later with the publication of the November Determination.[4] 86 Fed. Reg. 63418.

The November Determination incorrectly asserts that the pandemic justifies waiving the notice and comment requirements. 86 Fed. Reg. at 63423. The World Health Organization declared the COVID-19 outbreak a global pandemic on March 11, 2020.[5] More than twenty months later, Defendants cannot claim that the pandemic justifies waiving the notice and comment requirements. According to the National Center for Health Statistics, COVID-19 was only the third leading cause of death in the United States in 2020, after heart disease and cancer.[6] Furthermore, although the November Determination emphasizes the numbers of COVID-19 deaths, hospitalizations and cases, the percentages of COVID-19 deaths (0.23%), hospitalizations (0.99%) and cases (14%) in

[4] The November Determination rescinds and supersedes the September Determination. 86 Fed. Reg. 63418.
[5] https://pubmed.ncbi.nlm.nih.gov/32191675/
[6] https://www.cdc.gov/nchs/data/health_policy/Leading-Causes-of-Death-for-2015-2020.pdf

a population of more than 333,000,000 people are quite small. The assertions that "the pandemic continues to present an imminent threat to ***health and safety*** of the American people" and that "the Guidance thus promotes the most important, urgent ***public health*** measure to slow the spread of COVID-19" confirm that these matters are not within the constitutional authority of the federal government as explained in Section 5, *infra*. *See* 86 Fed. Reg. at 63423.

The November Determination disingenuously asserts that the notice and comment requirements cannot be satisfied because of timing issues. 86 Fed. Reg. at 63423. First, the November Determination contends that the Guidance as updated November 10, 2021, already extended the compliance deadline from December 8, 2021, to January 18, 2022. *Id*. If the Safer Federal Workforce Task Force extended the compliance deadline once, the Task Force should be able to extend the compliance deadline again while contemplating compliance with the notice and comment requirements of Section 1707(a) and (b). Second, the November Determination claims that the December 8, 2021, compliance deadline would apply if the notice and comment requirements were satisfied. *Id.* That argument is meritless because Defendants did not comply with Section 1707 when issuing the September Determination. Third, the November Declaration claims an effort to align the compliance date with compliance dates for the OSHA Emergency Temporary Standard for employers with more than 100 employees ("ETS") and the CMS rule for health care workers at facilities participating in Medicare and Medicaid. Before publication of the November Determination, the Fifth Circuit stayed implementation and enforcement of the ETS. *BST Holdings, L.L.C. v. OSHA*, 2021 U.S. App. Lexis 33698 (5th Cir. Nov. 12, 2021). On November 29, 2021, a district court issued a preliminary injunction against the CMS rule. *Missouri v. Biden*, Case No.4:21-cv-01329-MTS, Doc. # 28 (E.D. Mo. Nov. 29, 2021).

5. The federal government does not have authority under the U.S. CONSTITUTION to mandate vaccination.

Although Defendants contend that requiring vaccinations for the employees of federal contractors is constitutional (Doc. 63, pp. 27-30), Defendants fail to identify the constitutional provision on which they rely. Defendants argue that Procurement Act does not violate the nondelegation doctrine, but do not mention the constitutional provision that gives the federal government authority to mandate vaccinations for the employees of federal contractors. (Doc. 63, pp. 27-29.) Even though Defendants assert that the challenged actions do not exceed Congress's authority under the Commerce Clause, they deny that the Commerce Clause even applies:

> Here, by contrast, the government is not using its Commerce Clause authority to regulate anything. . . . The policies at issue in this case . . . do not implicate the Commerce Clause.

(Doc. 63, p. 30.) Thus, Defendants fail to demonstrate that the federal government has a constitutional right to mandate vaccinations for the employees of federal contractors.

ABC, however, can rely on the CONSTITUTION and Supreme Court precedent. The Tenth Amendment to the CONSTITUTION OF THE UNITED STATES OF AMERICA states, "The 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. 10. "The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the States or to the people." *United States v. Sprague*, 282 U.S. 716, 733 (1931). The Supreme Court also stated:

> The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.

United States v. Darby, 312 U.S. 100, 124 (1941).

Nowhere in the CONSTITUTION is the federal government given authority to dictate that people must be vaccinated or must submit to any other medical treatment. Nowhere in the CONSTITUTION is any State prohibited from imposing medical treatment on its people. The Tenth Amendment clarifies that the power to impose medical treatment may lie with the States and that such power does not belong to the federal government. Furthermore, if the States do not or cannot exercise the power to make medical treatment decisions, the power to make medical treatment decisions belongs to the people, not the federal government. See *Gibbons v. Ogden*, 22 U.S. 1, 203 (1824) (noting "health laws of every description" belong to the states); *BST Holdings, L.L.C. v. Occupational Safety & Health Admin.*, 17 F.4th 604, ---, 2021 WL 5279381, at *7 (5th Cir. 2021) (citing *Zucht v. King*, 260 U.S. 174, 176 (1922) (noting that precedent had long "settled that it is within the police power of a state to provide for compulsory vaccination")); Jacobson v. Massachusetts, 197 U.S. 11 (1905) (enforcing state law requiring vaccinations, deeming such health matters to "not ordinarily concern the National Government").

D. <u>The Equities and the Public Interest Weigh in Favor of Injunctive Relief</u>.

Enjoining the vaccine Mandate is in the public interest. "From economic uncertainty to workplace strife, the mere specter of the Mandate has contributed to untold economic upheaval in recent months." *BST Holdings*, 2021 WL 5279381, at *8. "The public interest is also served by maintaining our constitutional structure and . . . the liberty of individuals to make intensely personal decisions according to their own convictions." *Id*.

There is no dispute that the public has an interest in stopping the spread of COVID-19. However, the public would suffer little, if any, harm from maintaining the "status quo" through the litigation of this case. While Defendants argue that "enjoining the rule would harm the public

interest in slowing the spread of COVID-19 among millions of federal contractors and the public with whom they interact," (Doc. 63 at 34), they fail to acknowledge the harm to federal contractors if the Mandate goes into effect. In the case of construction companies, that harm will manifest itself in worsened shortages of skilled and other labor, resulting in delayed or incomplete construction projects. And those construction projects ultimately benefit the public.

Moreover, as the U.S. District Court for the Eastern District of Missouri Court acknowledged in granting a stay of the CMS vaccine mandate for healthcare workers:

> ("[T]he effectiveness of the vaccine to prevent disease transmission by those vaccinated [is] not currently known."). . . Regardless, the pandemic has continued more than twenty months now. Vaccine rates rise every day, and more therapeutics and treatments for the virus are available than ever before. The status quo today, without the CMS mandate, is still far better than the public faced even just a few months ago.

State of Missouri v. Joseph Biden, et al, Case: 4:21-cv-01329-MTS Doc. #: 28 (filed 11/29/2021).

In any event, there is no public interest in the perpetuation of unlawful agency action. As the Supreme Court said in *Alabama Ass'n of Realtors*, "[i]t is indisputable that the public has a strong interest in combating the spread of the COVID–19[;]" however, "our system does not permit agencies to act unlawfully even in pursuit of desirable ends." 141 S. Ct. at 2490.

E. <u>The Injunction Should Bar Defendants from Enforcing the EO Anywhere.</u>

Defendants seek to limit the scope of Plaintiffs' requested injunction. (Doc. 63 at 37-38.) But the Court should not confine its reach. Because Defendants acted without statutory authority, violated multiple procedural requirements and engaged in arbitrary and capricious decision-making, no aspect of the EO can stand, and it should be enjoined in its entirety. The APA provides that unlawful agency actions shall be vacated and "set aside" in their entirety, not in geographic piecemeal. See *BST Holdings*, 2021 WL 5279381, at *9 (ordering OSHA to "take no steps to

implement or enforce the Mandate until further court order," thus effectively enjoining it nationwide).

In addition, affording full relief to Plaintiffs necessitates a nationwide injunction. If the EO is enjoined in only some parts of the country, then construction workers who refuse to be vaccinated can simply move from a state where vaccination is required to one where it is not. The current shortage of skilled and other construction workers means that construction workers will be able to shop their services to a company that does not violate their personal beliefs and liberties.

The Defendants' argument that an injunction can only be tailored to the state of Alabama ignores the larger reality of the process of federal government contracting and the impact of the EO on that process. That reality is that companies are already making plans to bid on government contracts for projects throughout the United States that will be solicited and awarded after November 14, 2021, and therefore, would contain the new FAR clauses referencing the Federal Contractor Vaccination Mandate as a condition of being awarded the work. (Exhibit 2, Graugnard Decl., ¶¶ 3,4.) Sizable projects require months of advance planning prior to bidding, and typically call upon a general contractor to enter into joint ventures with minority small businesses. (Graugnard Decl., ¶ 4.) Absent a court injunction preventing the Mandate from staying or going into effect, contractors will likely be unable to bid on the upcoming federal projects in the next several months because of the significant risk of irreparable harm to their business resulting from the Mandate. (Graugnard Decl., ¶ 4).

CONCLUSION

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

Respectfully Submitted this 30th day of November 2021.

/s/ J. Larry Stine
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CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2021, I caused a true and correct copy of the foregoing to be served on counsel of record for all parties via ECF.

/s/ J. Larry Stine
J. Larry Stine

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EXHIBIT 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

STATE OF GEORGIA, ET AL,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No. 1:21-cv-163**
	)	
JOSEPH R. BIDEN, et al,	)	
	)	
Defendants.	)	

DECLARATION OF MILTON GRAUGNARD
IN SUPPORT OF PRELIMINARY INJUNCTION

I, Milton Graugnard, being duly sworn, hereby state the following based on personal knowledge;

1. I am the Executive Vice President of Cajun Industries Holdings, LLC. ("Cajun"), a nationally recognized construction leader providing fully integrated self-performed EPC (Engineering, Procurement, and Construction services to some of the largest and most renowned companies in the world, and to the federal government. Cajun performs work throughout the United States with a core geographic market along the Gulf Coast. Cajun is a member of Associated Builders and Contractors, Inc. ("ABC") national trade association and multiple chapters of ABC. I personally serve as the volunteer Secretary of ABC's national association, and will begin my elected tenure as national Chair-Elect of ABC on January 01, 2022.
2. Cajun is fully qualified to perform federal construction contracts and has regularly performed such work for a number of federal agencies, including the Army Corps of Engineers. It is my understanding that new federal contracts of the type we have performed in the past - and are performing now - will be covered by the President's Executive Order 14042, and the

implementing regulations of the federal government, referred to below as the "Federal Contractor Vaccination Mandate" or simply the "Mandate."

3. We have been advised of a number of forthcoming solicitations by the Army for construction projects of the type that Cajun would normally bid upon and perform, and which we desire to bid for. These are sizable projects that require months of advance planning prior to bidding, and typically call upon Cajun to enter into joint ventures with minority small businesses. We are in the planning stage for several such projects now. But because these projects will be solicited and awarded after November 14, 2021, we understand that the contract documents will require Cajun to agree to be bound by the new FAR clauses referencing the Federal Contractor Vaccination Mandate as a condition of being awarded the work.
4. Cajun intends to bid on one or more of the upcoming Army projects in the coming months. Construction has been deemed to be an essential industry throughout the pandemic, and Cajun has performed work on all of its federal and private contracts safely, with strict adherence to all the recommended safety protocols of OSHA and the CDC. But unless there is a court injunction preventing the Mandate from staying or going into effect, Cajun will likely be unable to bid on the upcoming federal projects in the next several months because of the significant risk of irreparable harm to Cajun's business resulting from the Mandate.
5. Cajun employs hundreds of employees, with normal fluctuations depending on available work. We have surveyed our workforce and determined that a significant percentage of our employees (well over 50 percent) are not currently vaccinated against COVID. The number could be higher because some employees have chosen not to reveal their status.
6. Cajun's leadership and ABC's leadership of which I am a part have encouraged all employees to get the vaccine. But many of our employees have told us in no uncertain terms that they will

leave the Company if they are required to get vaccinated as a condition of employment. We also know from recent experience with private customer mandates that our unvaccinated employees have refused to work under such conditions; so we do not need to speculate as to what will happen if the Federal Contractor Mandate is imposed on our federal contracts.

7. If even a few of Cajun's workers quit their jobs because of the vaccine mandate, we will be irreparably harmed in our ability to perform work for both federal and private customers. If a significant percentage of our workforce quits, we will be unable to perform our government contracts and would risk default or breach of our federal contracts. Our skilled workers cannot be readily replaced and there is already an industry-wide workforce shortage. We cannot take the chance of going into default or breach, and imposition of the Mandate will therefore force Cajun to abandon our imminent and future federal construction work, in itself irreparable harm.
8. In addition, due to the overbroad scope of the Mandate, vaccination will be required not only on workers at the site of construction, but also those at Company offices having anything to do with the covered contracts, and even workers who are not working on the covered contracts if they have any contact with those who do at company headquarters or other sites. There is no practical way we can segregate our federal project workforce to avoid significant and irreparable harm to our private sector workforce.
9. Absent judicial relief, Cajun will also be severely harmed in its ability to perform federal contracts covered by the Mandate due to the un-reimbursable compliance costs imposed. These range from paperwork burdens of tracking our employees' vaccination status, attempts to accommodate employees seeking the vaguely worded disability and religious exemptions, and other new protocols imposed by the Mandate. Cajun has a very limited administrative staff and

cannot feasibly address these new requirements, which have nothing to do with promoting economy and efficiency of government contracts.

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

11/30/21

Name

Date

EXHIBIT 3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

STATE OF GEORGIA, ET AL,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No. 1:21-cv-163**
	)	
JOSEPH R. BIDEN, et al,	)	
	)	
Defendants.	)	

DECLARATION OF JAMES LYNN MCKELVEY
IN SUPPORT OF PRELIMINARY INJUNCTION

I, James "Lynn" McKelvey, being duly sworn, hereby state the following based on personal knowledge;

1. I am the President of McKelvey Mechanical, Inc. ("McKelvey"), a Native American-owned, and woman-owned small business in the construction industry, located in Tuscaloosa, Alabama. McKelvey Mechanical is a member of Associated Builders and Contractors national trade association and its Alabama Chapter.
2. McKelvey specializes in commercial and industrial mechanical installations, upgrades, and maintenance for both private and government customers. McKelvey is fully qualified to perform federal construction contracts and has regularly performed such work for a number of federal agencies, including the Veterans' Administration. It is my understanding that new federal contracts of the type we have performed in the past - and are performing now - will be covered by the President's Executive Order 14042, and the implementing regulations of the federal government, referred to below as the "Federal Contractor Vaccination Mandate" or simply the "Mandate."

3. McKelvey traditionally bids many federal projects per year and usually performs 4-6 per year. We currently have 2 projects on the books, but we understand that future contract documents will require McKelvey to agree to be bound by the new FAR clauses referencing the Federal Contractor Vaccination Mandate as a condition of being awarded the work.
4. McKelvey intended to bid on several more of the upcoming VA projects prior to announcement of the new Mandate. But unless there is a court injunction blocking the Mandate from staying or going into effect, I do not see how we can bid because of the significant risk of irreparable harm to McKelvey's business resulting from the Mandate.
5. McKelvey employs roughly 50 employees, with normal fluctuations depending on available work. I have surveyed our workforce and determined that more than half are not currently vaccinated against COVID. The number could be higher because some employees have chosen not to reveal their status. I am fully vaccinated myself, and our company and ABC have encouraged all employees to get the vaccine. But many of our employees have told me in no uncertain terms that they will leave the Company if they are required to get vaccinated as a condition of employment. I have no doubt they mean what they say.
6. If even a few of McKelvey's workers quit their jobs because of the vaccine mandate, we will be irreparably harmed in our ability to perform work for both federal and private customers. If half of our workforce quits, or anywhere close to that number, our small business would be devastated. We cannot take that chance, and imposition of the Mandate would force McKelvey to abandon our future federal construction work. Because we are a small business, there is also no practical way we can segregate our federal project workforce to avoid the overbroad scope of the Federal Contractor Vaccination Mandate.

7. Absent judicial relief, McKelvey will also be severely harmed in its ability to perform federal contracts covered by the Mandate due to the un-reimbursable compliance costs imposed. These range from paperwork burdens of tracking our employees' vaccination status, attempting to accommodate employees seeking the vaguely worded disability and religious exemptions, and other new protocols imposed by the Mandate. McKelvey has a very limited administrative staff and cannot feasibly address these new requirements, which have nothing to do with promoting economy and efficiency of government contracts.

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

Name

11/30/2021

Date