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493*

**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Mark Brnovich, in his official capacity as
Attorney General of Arizona; the State of
Arizona; Al Reble; Phoenix Law
Enforcement Association (“PLEA”); and
United Phoenix Firefighters Association
Local 493,

Plaintiffs,

v.

Joseph R. Biden in his official capacity as
President of the United States; Alejandro
Mayorkas in his official capacity as
Secretary of Homeland Security; United
States Department of Homeland Security;
Troy Miller in his official capacity as
Senior Official Performing the Duties of
the Commissioner of U.S. Customs and

No. 2:21-cv-01568-MTL

**THIRD AMENDED COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF**

1 Border Protection; Tae Johnson in his
2 official capacity as Senior Official
3 Performing the Duties of Director of U.S.
4 Immigration and Customs Enforcement;
5 Ur M. Jaddou in her official capacity as
6 Director of U.S. Citizenship and
7 Immigration Services; United States
8 Office of Personnel Management; Safer
9 Federal Workforce Task Force
10 (“SFWTF”); Kiran Ahuja in her official
11 capacity as director of the Office of
12 Personnel Management and as co-chair of
13 the SFWTF; General Services
14 Administration; Robin Carnahan in her
15 official capacity as administrator of the
16 General Services Administration and as
17 co-chair of the SFWTF; Office of
18 Management and Budget; Shalanda
19 Young in her official capacity as Acting
20 Director of the Office of Management
21 and Budget and as a member of the
22 SFWTF; and Jeffrey Zients in his official
23 capacity as co-chair of the SFWTF and
24 COVID-19 Response Coordinator; L.
25 Eric Patterson in his official capacity as
26 Director of the Federal Protective Service
and member of the SFWTF; James M.
Murray in his official capacity as Director
of the United States Secret Service and
member of the SFWTF; Deanne Criswell
in her official capacity as Director of the
Federal Emergency Management Agency
and member of the SFWTF; Rochelle
Walensky in her official capacity as
Director of the Centers for Disease
Control and Prevention and member of
the SFWTF; Defendant Centers for
Disease Control and Prevention; the
Federal Acquisition Regulatory Council;
Mathew C. Blum, in his official capacity
as Chair of the Federal Acquisition
Regulatory Council and Acting
Administrator of the Office of Federal

1 Procurement Policy, Office of
2 Management and Budget; Lesley A.
3 Field, in her official capacity as a member
4 of the Federal Acquisition Regulatory
5 Council and Acting Administrator for
6 Federal Procurement at the Office of
7 Federal Procurement Policy, Office of
8 Management and Budget; Karla S.
9 Jackson, in her official capacity as a
10 member of the Federal Acquisition
11 Regulatory Council and Assistant
12 Administrator for Procurement at the
13 National Aeronautics and Space
14 Administration; Jeffrey A. Koses, in his
15 official capacity as a member of the
16 Federal Acquisition Regulatory Council
17 and Senior Procurement Executive at the
18 General Services Administration; John
19 M. Tenaglia in his official capacity as a
20 member of the Federal Acquisition
21 Regulatory Council and Principal
22 Director of Defense Pricing and
23 Contracting at the Department of
24 Defense; the United States of America;
25 the Department of Justice; Merrick
26 Garland in his official capacity as
Attorney General of the United States;
and the City of Phoenix

Defendants.

INTRODUCTION

1
2 1. This case presents circumstances that would have been unthinkable to our
3 Founding Fathers. Defendants seek to impose vaccine mandates that are patently unfair,
4 clearly devoid of common sense, and manifestly unlawful. They are also dangerously un-
5 American.

6 2. Defendants are trying to use federal procurement statutes to create out of thin
7 air sweeping new power for the President to issue decrees over one-quarter of the economy.
8 But the United States is not a dictatorship, and one man cannot simply snap his fingers and
9 transform conduct that was previously lawful—and even protected by state law—into
10 unlawful actions that are exceedingly dangerous to citizens' economic well-being. Instead,
11 the President could do so—if at all—if he had statutory authority upon which he could rely
12 and followed the procedures required by those statutes. Here, President Biden has neither
13 such statutory authority nor has his Administration complied with the mandatory
14 procedures of the procurement statutes putatively (but not actually) giving him authority
15 to impose the challenged vaccination mandate here.

16 3. The explicit purpose of those procurement statutes, however, is only to
17 achieve greater economy and efficiency in the federal government's purchase of goods and
18 services. Yet, Defendants claim that federal procurement statutes give them plenary power
19 over the personal and private medical decisions of millions of people, thereby infringing
20 upon (1) their constitutional rights to maintain their bodily integrity and to refuse medical
21 treatment, and (2) their explicit statutory rights under the Emergency Use Authorization
22 statute. Remarkably, Defendants apparently do not even appear to understand how the
23 federal procurement statutes function, for Defendants failed to follow the basic statutory
24 constraint that requires that significant changes to procurement policies must be published
25 for notice and comment before taking effect.
26

1 4. The sweep of the contractor mandates is exceedingly broad, and reaches
2 multiple *State* agencies, departments, and other entities, including the State’s own Division
3 of Civil Rights and its universities. And not content with subjecting only federal contractors
4 to this unconstitutional and unlawful abuse, Defendants also seek to do the same to federal
5 employees. And because Defendants have already amended the guidance for Contractor
6 and Employee mandates multiple times, there is no telling what other onerous obligations
7 may put Plaintiffs in breach at a moment’s notice.

8 5. The Biden Administration has announced multiple, unprecedented federal
9 mandates requiring persons to be vaccinated against COVID-19, upon threat of losing
10 their jobs or their livelihood. In particular, on September 9, 2021, President Biden
11 pronounced that his “patience is wearing thin”¹ with Americans who choose not to receive
12 the COVID-19 vaccine. President Biden announced plans to require that all private
13 employers with more than 100 employees impose COVID-19 vaccine mandates on their
14 employees; that all federal employees and contractors receive the COVID-19 vaccine; and
15 that virtually all health care providers receive the COVID-19 vaccine.

16 6. Defendants’ unlawful actions here, however, are but one piece of a greater
17 series of constitutionally improper actions: one of the greatest infringements upon
18 individual liberties, principles of federalism, and separation of powers ever attempted by
19 *any* administration in the history of our Republic. Defendants’ ambitions are not limited
20 to exceeding their delegated powers and violating the Constitution *merely* through
21 trampling upon due process. They also violate principles of federalism, under which the
22 federal government has only enumerated powers, by exercising the sort of general police
23 power reserved *solely* to the States under the Tenth Amendment and unconstitutionally
24 subvert Congress’s authority by exercising quintessentially *legislative* powers, and in a
25

26 ¹ 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/> (accessed Sept. 10, 2021)

1 manner that could never pass either (let alone both) Houses of Congress today—which is
2 precisely why Defendants have no intent whatsoever to ask for legislative authorization
3 to take such unprecedented actions. Under our Constitution, the President is not a king
4 who can exercise this sort of unbridled power unilaterally. And even George III wouldn't
5 have dreamed that he could enact such sweeping policies by royal decree alone.

6 7. Defendants' vaccine mandates might have been legally defensible in a
7 universe where there had never been a Magna Carta, a Constitution, and a Bill of Rights;
8 or maybe in a universe where the United States only had a unitary national government
9 with no shared sovereignty with the States. But we do not inhabit such a parallel universe.
10 Defendants' mandates are wholly foreign to our actual system—a federal republic where
11 powers are divided between the States and the Federal government. In our republic, the
12 Federal government possesses only those powers specifically enumerated in the
13 Constitution. And at all levels of government, powers are further limited by the natural
14 rights retained by the people. However, Defendants appear to have forgotten these basic
15 principles that are taught in the first week of high school civics class.

16 8. Recognizing that the Federal Government lacks the authority to directly
17 impose a mandate, even the President's own Chief of Staff retweeted that what the
18 administration was planning would be the "ultimate work-around."
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Source: <https://www.foxnews.com/politics/klain-vaccine-coronavirus-mandate>

PARTIES

9. Plaintiff Mark Brnovich is the Attorney General of the State of Arizona. He is the State's chief legal officer and has the authority to represent the State in federal court.

10. Plaintiff State of Arizona is a sovereign state of the United States of America. Arizona sues to vindicate its sovereign, quasi-sovereign, and proprietary interests.

11. Plaintiff Arizona is one of four states on the United States-Mexico border. As a border state, it suffers disproportionately from immigration-related burdens. Upon information and belief, multiple agencies and political subdivisions of the State are contractors with the federal government and thus subject to Defendants' COVID-19 vaccine mandate. Included among those contractors is the Civil Rights Division of the Arizona Attorney General's Office.

12. Plaintiff Al Reble has been an employee of the Department of Justice for 30 years. He works at the federal courthouse in Phoenix, Arizona. He has an exemplary

1 personnel record, and no record of prior discipline, with “Outstanding” performance
2 evaluations the past two years (which is the highest possible) and nothing in recent memory
3 below “excellent” (which is the next highest evaluation). He strongly opposes the COVID-
4 19 vaccine, and he has not taken it. He also opposes Defendants’ vaccine mandate and has
5 no intention of complying with it. Plaintiff Reble has requested a medical exemption from
6 Defendants’ federal employee vaccine mandate. Given the limited and strict approach
7 Defendants have applied to exemption requests, and reports that nearly all such requests
8 are being denied, Plaintiff Reble expects that his medical exemption request will be denied.

9 13. Plaintiff Phoenix Law Enforcement Association (“PLEA”) is the certified
10 representative pursuant to the City of Phoenix meet and confer ordinance for unit 4 rank
11 and file police officers and brings this action on behalf of itself and on behalf of the officers
12 it represents.

13 14. Plaintiff United Phoenix Firefighters Association Local 493 is the certified
14 bargaining representative for the firefighters for the City of Phoenix and brings this action
15 on behalf of itself and on behalf of the firefighters it represents.

16 15. Defendant Joseph R. Biden is the President of the United States. President
17 Biden is sued in his official capacity.

18 16. Defendant Alejandro Mayorkas is the Secretary of Homeland Security.
19 Secretary Mayorkas is sued in his official capacity.

20 17. Defendant United States Department of Homeland Security is a federal
21 agency.

22 18. Defendant Troy Miller serves as Senior Official Performing the Duties of
23 the Commissioner of U.S. Customs and Border Protection (“CBP”). Acting Commissioner
24 Miller is sued in his official capacity.

1 19. Defendant Tae Johnson serves as Deputy Director and Senior Official
2 Performing the Duties of Director of U.S. Immigration and Customs Enforcement. Acting
3 Director Johnson is sued in his official capacity.

4 20. Defendant Ur M. Jaddou serves as Director of U.S. Citizenship and
5 Immigration Services. Director Jaddou is sued in her official capacity.

6 21. Defendant United States Office of Personnel Management (“OPM”) is an
7 independent federal agency.

8 22. Defendant Kiran Ahuja is director of OPM and co-chair of the Safer Federal
9 Workforce Task Force. Director Ahuja is sued in her official capacity.

10 23. Defendant General Services Administration (“GSA”) is an independent
11 federal agency.

12 24. Defendant Robin Carnahan is administrator of GSA and co-chair of the
13 Safer Federal Workforce Task Force. She is sued in her official capacity.

14 25. Defendant Office of Management and Budget (“OMB”) is an office within
15 the Executive Office of the President of the United States.

16 26. Defendant Shalanda Young is Acting Director of the Office of Management
17 and Budget and is a member of the Safer Federal Workforce Task Force. She is sued in her
18 official capacity.

19 27. Defendant Safer Federal Workforce Task Force was established on January
20 20, 2021 by Executive Order 13991. The three co-chairs who oversee the SFWTF are: (1)
21 the Director of OPM; (2) the Administrator of GSA; and (3) the COVID-19 Response
22 Coordinator. The other named members of the SFWTF are (1) Director of the Federal
23 Protective Service; (2) the Director of the United States Secret Service; (3) the
24 Administrator of the Federal Emergency Management Agency; and (4) the Director of the
25 CDC.
26

1 28. Defendant Jeffrey Zients is co-chair of the Safer Federal Workforce Task
2 Force and is the Biden Administration's COVID-19 Response Coordinator. He is sued in
3 his official capacity.

4 29. Defendant L. Eric Patterson is Director of the Federal Protective Service and
5 is a member of the SFWTF. He is sued in his official capacity.

6 30. Defendant James M. Murray is Director of the United States Secret Service
7 and is a member of the SFWTF. He is sued in his official capacity.

8 31. Defendant Deanne Criswell is Director of the Federal Emergency
9 Management Agency and is a member of the SFWTF. She is sued in her official capacity.

10 32. Defendant Rochelle Walensky is Director of the Centers for Disease Control
11 and Prevention and is a member of the SFWTF and is also the head of the agency which
12 stands to exclude Arizona from some federal contracts on the basis of this vaccine mandate.
13 She is sued in her official capacity.

14 33. Defendant Centers for Disease Control and Prevention (the "CDC") is a
15 federal agency.

16 34. Defendant Federal Acquisition Regulatory Council ("FAR Council") is the
17 agency exclusively charged with creating "[g]overnment-wide procurement regulation[s]."
18 41 U.S.C. § 1303(a)(1). It is also responsible for "manag[ing], coordinat[ing], control[ing],
19 and monitor[ing] the maintenance of, issuance of, and changes in the Federal Acquisition
20 Regulation." 41 U.S.C. § 1303(d). The FAR Council issued guidance that is challenged by
21 this suit.

22 35. Defendants Mathew C. Blum, Lesley A. Field, Karla S. Jackson, Jeffrey A.
23 Koses, and John M. Tenaglia are members of the FAR Council on account of their roles in
24 their respective agencies. They are sued in their official capacities. Defendant Blum is the
25 Chair of the FAR Council. Defendant Field is the Acting Administrator for Federal
26 Procurement at the Office of Federal Procurement Policy ("OFPP") in OMB. Defendant

1 Jackson is the Assistant Administrator for Procurement at the National Aeronautics and
2 Space Administration. Defendant Koses is the Senior Procurement Executive at the
3 General Services Administration. Defendant Tenaglia is the Principal Director of Defense
4 Pricing and Contracting at the Department of Defense.

5 36. Defendant Department of Justice is the employing agency of Plaintiff Al
6 Reble.

7 37. Defendant Merrick Garland is Attorney General of the United States of
8 America. He is sued in his official capacity.

9 38. Defendant United States of America includes the departments and agencies
10 thereof.

11 39. All of these federal government Defendants have acted in the color of federal
12 law with their authority purportedly derived from Defendant United States of America.

13 40. Defendant City of Phoenix is a city in the State of Arizona. It is sued on the
14 basis of the claims asserted against it by Plaintiffs PLEA and United Phoenix Firefighters
15 Association Local 493 because the City is implementing the federal Defendants'
16 Contractor Mandate.

17 JURISDICTION AND VENUE

18 41. This Court has jurisdiction under 5 U.S.C. §§ 702–703 and 28 U.S.C.
19 §§ 1331 and 1361.

20 42. The Court is authorized to award the requested declaratory and injunctive
21 relief under 5 U.S.C. §§ 702 and 706, 28 U.S.C. § 1361, and 28 U.S.C. §§ 2201-2202.

22 43. Venue is proper within this District pursuant to 28 U.S.C. § 1391(e) because
23 (1) Plaintiffs reside in Arizona and no real property is involved and (2) “a substantial part
24 of the events or omissions giving rise to the claim occurred” in this District.
25
26

LEGAL AND FACTUAL BACKGROUND RELATED TO VACCINE MANDATES

Federalism And The Tenth Amendment

44. Under principles of federalism, the federal government has only enumerated powers and not the sort of general police power reserved *solely* to the States under the Tenth Amendment. *Printz v. United States*, 521 U.S. 898, 919 (1997) (“Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, § 8, which implication was rendered express by the Tenth Amendment's assertion that ‘[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.’”). “The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.” The Federalist No. 45 (James Madison). Thus, the “police power” is “inherent in the states” and is “reserved from the grant of powers to the federal government by the Constitution.” *United States v. Constantine*, 296 U.S. 287, 295–96 (1935). It is well-settled that the power to impose vaccine mandates, if any such power exists, is part of the police powers reserved to the States. *E.g. Zucht v. King*, 260 U.S. 174, 176 (1922) (“it is within the police power of a *state* to provide for compulsory vaccination” (emphasis added)).

The Procurement Act

45. The purpose of the Federal Property and Administrative Services Act (the “Procurement Act”) “is to provide the Federal Government with an economical and efficient system for” procurement. 40 U.S.C. § 101. The Procurement Act allows the President to “prescribe policies and directives that the President considers necessary to carry out” the Act, but requires that such policies “be consistent with” the Act. 40 U.S.C.

1 § 121(a). Such policies (and regulations established pursuant to them) are not valid unless
 2 there is “a nexus between the regulations and some delegation of the requisite legislative
 3 authority by Congress,” and “the reviewing court [must] reasonably be able to conclude
 4 that the grant of authority contemplates the regulations issued.” *Chrysler Corp. v. Brown*,
 5 441 U.S. 281, 304, 308 (1979).

6 46. There is no such nexus when such policies are “too attenuated to allow a
 7 reviewing court to find the requisite connection between procurement costs and social
 8 objectives.” *Liberty Mut. Ins. Co. v. Friedman*, 639 F.2d 164, 171 (4th Cir. 1981). There is
 9 also no such nexus when such policies are imposed on subcontractors, who have “no direct
 10 connection to federal procurement” and thus do “not lie ‘reasonably within the
 11 contemplation of’” the Procurement Act. *Id.* at 171–72. Furthermore, the Procurement Act
 12 does not confer on the President the power to impose policies that “conflict with another
 13 federal statute.” *Chamber of Com. of U.S. v. Reich*, 74 F.3d 1322, 1333 (D.C. Cir. 1996).

14 **The Procurement Policy Act**

15 47. The Office of Federal Procurement Policy Act (“Procurement Policy Act”) requires that “a procurement policy, regulation, procedure, or form (including an
 16 amendment or modification thereto) may not take effect until 60 days after it is published
 17 for public comment in the Federal Register ... if it—(A) relates to the expenditure of
 18 appropriated funds; and (B)(i) has a significant effect beyond the internal operating
 19 procedures of the agency issuing the policy, regulation, procedure, or form; or (ii) has a
 20 significant cost or administrative impact on contractors or offerors.” 41 U.S.C. § 1707(a).
 21 This requirement may only be “waived by the officer authorized to issue a procurement
 22 policy, regulation, procedure, or form if urgent and compelling circumstances make
 23 compliance with the requirements impracticable.” 41 U.S.C. § 1707(d).

24 48. Under 41 U.S.C. § 1303(a), only the FAR Council has authority to “issue and
 25 maintain . . . a single Government-wide procurement regulation, . . . known as the Federal
 26

Acquisition Regulation.” No other agency may issue government-wide procurement regulations. Individual executive agencies may only issue “regulations relating to procurement” that are “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.” *Id.*

The Emergency Use Authorization Statute

49. Under 21 U.S.C. § 360bbb-3, the Secretary of Health and Human Services “may authorize the introduction ... of a drug, device, or biological product intended for use in an actual or potential emergency” before such products receive full FDA approval. Such Emergency Use Authorizations (“EUAs”) are subject to strict requirements, including that “individuals to whom the product is administered are informed ... of the **option to accept or refuse administration of the product.**” 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(III) (emphasis added). The FDA has interpreted this provision of the EUA statute to mean that “[r]ecipients ***must* have an opportunity to accept or refuse the EUA product** and must be informed of any consequences of refusing administration of the product” and that this right to refuse can only be waived if the President makes a specific determination in writing, and only with respect to members of the armed forces.² When Congress adopted

² FDA, *Guidance Emergency Use Authorization of Medical Products*, 2007 WL 2319112, at *15 and n.16 (acknowledging that “Congress authorized the President to waive, under certain circumstances, the option for members of the armed forces to accept or refuse administration of an EUA product”) (emphasis added); *see also*, FDA, *Emergency Use Authorization of Medical Products and Related Authorities: Guidance for Industry and Other Stakeholders*, OMB Control No. 0910-0595 at 24 n.46 (Jan. 2017), <https://www.fda.gov/media/97321/download>; 10 U.S.C. § 1107a(a) (stating that the requirements of 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(III), as applied to the armed forces, “may be waived only by the President only if the President determines, in writing, that complying with such requirement is not in the interests of national security”); *Authorization of Emergency Use of Anthrax Vaccine Adsorbed for Prevention of Inhalation Anthrax by Individuals at Heightened Risk of Exposure Due to Attack With Anthrax; Availability*, 70 Fed. Reg. 5452-02, 5455 (Feb. 2, 2005) (creating EUA for anthrax vaccine for members of the armed forces, and stating that “[i]ndividuals who refuse anthrax

1 the statute, it interpreted it in the same way, explaining it as “the *right* ... to refuse
2 administration of a product.”³

3 **The Major Questions Doctrine**

4 50. Courts will not assume that Congress has assigned to Executive Branch
5 questions of “deep economic and political significance” unless Congress has done so
6 expressly. *See King v. Burwell*, 576 U.S. 473, 486 (2015); *Food & Drug Admin. v. Brown*
7 *& Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).

8 51. Defendants’ attempts to use the Procurement Act as justification for the
9 contractor mandate is akin to the Federal Government’s recent attempt at using the Public
10 Health Safety Act as justification for a far-reaching nationwide eviction moratorium. That
11 attempt was swiftly struck down by the Supreme Court, which held that “[w]e expect
12 Congress to speak clearly when authorizing an agency to exercise powers of ‘vast
13 economic and political significance.’” *Alabama Ass’n of Realtors v. Dep’t of Health &*
14 *Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (quoting *Utility Air Regulatory Group v. EPA*,
15 573 U.S. 302, 324 (2014)). This is particularly so when the federal government “intrudes
16 into an area that is the particular domain of state law.” *Id.* The Supreme Court’s “precedents
17 require Congress to enact exceedingly clear language if it wishes to significantly alter the
18 balance between federal and state power and the power of the Government over private
19 property.” *Id.* The Procurement Act contains no such language conferring on the President
20 the authority to impose nationwide public health measures.

21 **Non-Statutory Causes of Action and Sovereign Immunity**

22 52. When “a statute . . . makes no provision for judicial review. . . . [t]hat alone,
23 of course, is not decisive” as to whether federal courts have jurisdiction to review. “For the
24 silence of Congress as to judicial review is not necessarily to be construed as a denial of
25 the power of the federal courts to grant relief in the exercise of the general jurisdiction

26 vaccination will not be punished”).

³ H.R. Conf. Rep. No. 108-354, at 782 (2003) (emphasis added).

1 which Congress has conferred upon them.” *Estep v. United States*, 327 U.S. 114, 119-20
 2 (1946) (citations omitted). Thus, “[c]ourts have long recognized the existence of an implied
 3 cause of action through which plaintiffs may seek equitable relief to remedy a
 4 constitutional violation.” *Roman v. Wolf*, 977 F.3d 935, 941 (9th Cir. 2020) (citation
 5 omitted).

6 53. This is true also for actions challenging executive actions as *ultra vires*:
 7 “when Congress limits its delegation of power, courts infer (unless the statute clearly
 8 directs otherwise) that Congress expects this limitation to be judicially enforced. The
 9 passage of the APA has not altered this presumption. Prior to the APA’s enactment courts
 10 had recognized the right of judicial review of agency actions that exceeded authority, and
 11 nothing in the subsequent enactment of the APA altered that doctrine of review to repeal
 12 the review of *ultra vires* actions. When an executive acts *ultra vires*, courts are normally
 13 available to reestablish the limits on his authority.” *Sierra Club v. Trump*, 963 F.3d 874,
 14 891 (9th Cir.) *vacated on other grounds sub nom., Biden v. Sierra Club*, No. 20-138, 2021
 15 WL 2742775 (U.S. July 2, 2021) (cleaned up). Thus, “review is ordinarily available when
 16 an agency exceeds its delegation of authority,” *Id.* (citing *Chamber of Commerce of the*
 17 *United States v. Reich*, 74 F.3d 1322, 1325–26 (D.C. Cir. 1996)).

18 54. When challenging “the President’s statutory authority to issue [an] executive
 19 order,” if “a plaintiff is unable to bring his case predicated on either a specific or a general
 20 statutory review provision, he may still be able to institute a non-statutory review action.”
 21 *Id.* at 892 (quoting *Reich*, 74 F.3d at 1327). This is because “the responsibility of
 22 determining the limits of statutory grants of authority is a judicial function entrusted to the
 23 courts by Congress by the statutes establishing courts and marking their jurisdiction.” *Id.*
 24 (quoting *Reich*, 74 F.3d at 1327) (cleaned up). And even where a statute “expressly limit[s]
 25 judicial review . . . court[s] retain[] the ability to review whether [an agency] exceeded the
 26 authority delegated by the statute” because “the presumption of judicial review is

1 particularly strong where an agency is alleged to have acted beyond its authority.” *Id.*
 2 (quoting *Dart v. United States*, 848 F.2d 217, 219, 223-34 (D.C. Cir. 1988)).

3 55. Furthermore, sovereign immunity does not bar most claims for equitable
 4 relief against executive agencies because Congress “largely eliminat[ed] the federal
 5 sovereign immunity defense” when it amended 5 U.S.C. § 702 in 1976. *E. V. v. Robinson*,
 6 906 F.3d 1082, 1092 (9th Cir. 2018). As the Ninth Circuit has explained, “[o]n its face, the
 7 1976 amendment is an unqualified waiver of sovereign immunity in actions seeking
 8 nonmonetary relief against legal wrongs for which governmental agencies are accountable”
 9 and “waives sovereign immunity **in all actions seeking relief from official misconduct**
 10 **except for money damages**. . . . Congress stated that ‘the time [has] now come to eliminate
 11 the sovereign immunity defense **in all equitable actions** for specific relief against a Federal
 12 agency or officer acting in an official capacity.’” *The Presbyterian Church (U.S.A.) v.*
 13 *United States*, 870 F.2d 518, 525 (9th Cir. 1989) (emphasis added) (quoting H.Rep. No.
 14 1656, 94th Cong., 2d Sess. 9, reprinted in 1976 U.S.Code Cong. & Admin.News 6121,
 15 6129). In a non-statutory cause of action seeking equitable relief, there is no requirement
 16 that the challenged action have been final agency action under the APA. “[T]he second
 17 sentence of § 702 waives sovereign immunity broadly for all causes of action that meet its
 18 terms, while § 704’s ‘final agency action’ limitation applies only to APA claims.” *Navajo*
 19 *Nation v. Dep’t of the Interior*, 876 F.3d 1144, 1172 (9th Cir. 2017).

20 56. Furthermore, for claims that do not fall within the APA’s waiver of sovereign
 21 immunity “a suit against a federal official for specific relief is not considered to be against
 22 the government, and thus is not barred by sovereign immunity, where the plaintiff alleges:
 23 (1) action by officers beyond their statutory powers or (2) even though within the scope of
 24 their authority, the powers themselves or the manner in which they are exercised are
 25 constitutionally void.” *E. V.*, 906 F.3d at 1091 (cleaned up).
 26

Due Process Rights To Bodily Integrity And To Refuse Medical Treatment

57. “[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). “[A] competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment.” *Cruzan by Cruzan v. Dir., Missouri Dep’t of Health*, 497 U.S. 261, 278 (1990). This right is rooted in “the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment.” *Washington v. Glucksberg*, 521 U.S. 702, 725 (1997). The “rights to determine one’s own medical treatment[] and to refuse unwanted medical treatment” are fundamental rights,” and individuals have “a fundamental liberty interest in medical autonomy.” *Coons v. Lew*, 762 F.3d 891, 899 (9th Cir. 2014) (as amended) (cleaned up).

58. “[D]ue process ... substantively protects a person’s rights to be free from unjustified intrusions to the body, to refuse unwanted medical treatment and to receive sufficient information to exercise these rights intelligently.” *Benson v. Terhune*, 304 F.3d 874, 884 (9th Cir. 2002) (citations omitted). Individuals thus have a “constitutional right to be free from state-imposed violations of bodily integrity.” *Plumeau v. Sch. Dist. No. 40 Cty. of Yamhill*, 130 F.3d 432, 438 (9th Cir. 1997). A “forcible injection ... into a nonconsenting person’s body represents a substantial interference with that person’s liberty.” *Washington v. Harper*, 494 U.S. 210, 229 (1990). The right to “bodily integrity” is “fundamental” and is “deeply rooted in this Nation’s history and tradition.” *Franceschi v. Yee*, 887 F.3d 927, 937 (9th Cir. 2018) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)). “Every violation of a person’s bodily integrity is an invasion of his or her liberty. The invasion is particularly intrusive if it creates a substantial risk of permanent injury and premature death. Moreover, any such action is degrading if it overrides a competent person’s choice to reject a specific form of medical treatment.” *Washington v. Harper*, 494 U.S. 210, 237 (1990) (Stevens, J., concurring in part).

1 59. Under the unconstitutional conditions doctrine, the government may not
 2 condition employment “on a basis that infringes [an employee’s] constitutionally protected
 3 interests.” *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *see also*, *Koontz v. St. Johns*
 4 *River Water Mgmt. Dist.*, 570 U.S. 595, 606 (2013) (“[T]he unconstitutional conditions
 5 doctrine forbids burdening the Constitution’s enumerated rights by coercively withholding
 6 benefits from those who exercise them....”); *Koontz v. St. Johns River Water Mgmt. Dist.*,
 7 570 U.S. 595, 604 (2013) (“[A]n overarching principle, known as the unconstitutional
 8 conditions doctrine, . . . vindicates the Constitution’s enumerated rights by preventing the
 9 government from coercing people into giving them up.”). The same rule applies to
 10 government contracts. *Bd. of Cty. Comm’rs, Wabaunsee Cty., Kan. v. Umbehr*, 518 U.S.
 11 668, 678 (1996).

12 **Government Vaccine Mandates Are Illegal Under Arizona Law**

13 60. Arizona law makes it illegal for state and local governments to impose
 14 vaccine mandates and restricts the power of private employers to impose them, including
 15 the following:

- 16 • “If an employer receives notice from an employee that the employee’s sincerely held
 17 religious beliefs, practices or observances prevent the employee from taking the
 18 COVID-19 vaccination, the employer shall provide a reasonable accommodation unless
 19 the accommodation would pose an undue hardship and more than a de minimus cost to
 20 the operation of the employer’s business.” A.R.S. § 23-206.
- 21 • “No person shall be required by this state, or any city, town or county to obtain a
 22 COVID-19 vaccine. . . .” Arizona Executive Order 2021-19; *see also* *Yes on Prop 200*
 23 *v. Napolitano*, 215 Ariz. 458, 467 ¶ 27 (Ariz. Ct. App. 2007) (in Arizona, “the Governor
 24 has the power to supervise executive branch officials,” and “a Governor’s order is
 25 binding on lower executive branch officials”) (citations omitted)).
 26

- “Any county, city, town or political subdivision official that implements a vaccine mandate contrary to the authorities outlined in this order, is in violation of A.R.S. §§ 36-114 and 36-184 and such actions are punishable by a class 3 misdemeanor and subject to legal action by individuals for violation of their rights under Arizona law.” Arizona Executive Order 2021-18.
- Arizona’s public health statute specifically forbids “impos[ing] on any person against his will any mode of treatment, provided that sanitary or preventive measures and quarantine laws are complied with by the person.” A.R.S. § 36-114 and -184(C).

The Vaccine Development And Approval Process

61. According to the CDC, usually “[v]accine licensing is a lengthy process that can take 10 years or longer” that involves “three phases of clinical trials with human subjects before they can be licensed for use in the general public.”⁴ A Phase 3 trial is the final phase before a vaccine is approved and involves a much larger test group than the first two phases. “Typically, these [phase 3] trials last several years” to allow researchers time to compare vaccine recipients “to those who have not received the vaccine” and thus discover potential side effects of the vaccine.⁵

62. Vaccines that have not yet been fully approved by the FDA may be approved under an Emergency Use Authorization that is less rigorous than the full approval process. For example, the FDA typically only requires two months’ worth of data from Phase 3 trials to approve an EUA.⁶

⁴ CDC, *Vaccine Safety: Overview, History, and How the Safety Process Works*, <https://www.cdc.gov/vaccinesafety/ensuringsafety/history/index.html>, (accessed Oct. 18, 2021).

⁵ *Id.*

⁶ FDA, *Emergency Use Authorization for Vaccines Explained*, <https://www.fda.gov/vaccines-blood-biologics/vaccines/emergency-use-authorization-vaccines-explained> (accessed Oct. 18, 2021).

63. The FDA’s process for full approval of COVID-19 vaccines has been significantly accelerated. For example, the Phase 3 trial data that the FDA used to grant “approval of the [Pfizer] COMIRNATY [vaccine] included participants 16 years of age and older who had been enrolled from July 27, 2020, and who were followed for ... follow-up through as late as March 13, 2021.”⁷ The FDA thus required less than eight months of Phase 3 trial data, rather than the period of several years normally used to observe side effects and adverse events.

Biden Administration Response to COVID-19

64. On January 20, 2021 President Biden signed an Executive Order (“EO”) 13991 (86 Fed. Reg. 7045), which established the Safer Federal Workforce Task Force (“SFWTF”) and tasked it with “provid[ing] 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 SFWTF is headed by three co-chairs: (1) the Director of OPM; (2) the Administrator of GSA; and (3) the COVID–19 Response Coordinator. The Director of OPM is also a member of the SFWTF. The EO also required that GSA “provide funding and administrative support for the” SFWTF. *Id.*

65. On September 9, 2021, President Biden announced his “new plan to *require* more Americans to be vaccinated” by imposing “new vaccination *requirements*” that “*require* all employers with 100 or more employees, that together employ over 80 million workers, to ensure their workforces are fully vaccinated or show a negative test at least once a week.” He also announced plans to “*requir[e]* vaccinations” of “those who work in hospitals, home healthcare facilities, or other medical facilities — a total of 17 million healthcare workers.” He further announced that he would “sign an executive order that will

⁷ FDA, Vaccines and Related Biological Products Advisory Committee September 17, 2021 Meeting Briefing Document, <https://www.fda.gov/media/152176/download>, (accessed Oct. 18, 2021).

1 now *require* all executive branch federal employees to be vaccinated — all. And I’ve
 2 signed another executive order that will *require* federal contractors to do the same.” And
 3 finally, he announced that he would “*require* all of nearly 300,000 educators in the federal
 4 paid program, Head Start program” to get vaccinated.⁸

5 66. President Biden listed as one of the main justifications for his new COVID
 6 mandates that “the FDA granted ... approval” for the COVID—19 vaccine and “[s]o, the
 7 time for waiting is over.”⁹

8 67. In reality, however, only the Pfizer Comirnaty vaccine—just one of the three
 9 COVID-19 vaccines subject to President Biden’s COVID-19 vaccine mandate—has been
 10 approved by the FDA. The other two available COVID-19 vaccines (manufactured by
 11 Moderna and by Johnson & Johnson) are not FDA-approved and are only available under
 12 EUAs.

13 68. Additionally, upon information and belief, the Comirnaty vaccine is not
 14 currently being distributed in the United States. For example, an NIH notice from
 15 September 13, 2021 states that “[a]t present, Pfizer does not plan to produce any
 16 [Comirnaty] product with these new NDCs and labels over the next few months while EUA
 17 authorized product is still available and being made available for U.S. distribution.”¹⁰ The
 18 only Pfizer COVID-19 vaccine actually available in the United States is the prior Pfizer–
 19 BioNTech COVID-19 version that is also only available pursuant to an EUA. Therefore,
 20 the only three COVID-19 vaccines available in the United States to satisfy President
 21 Biden’s vaccine demands are vaccines available only under EUAs, and which are therefore
 22 subject to the requirements of 21 U.S.C. § 360bbb-3.

23
 24 ⁸ *Supra* n. 1 (emphasis added).

25 ⁹ *Id.*

26 ¹⁰ National Institutes of Health, “Pfizer received FDA BLA license for its COVID-19 vaccine,” *DailyMed*, U.S. National Library of Medicine, (Sept. 13, 2021), <https://dailymed.nlm.nih.gov/dailymed/dailymed-announcements-details.cfm?date=2021-09-13> (accessed Oct. 20, 2021)

69. Following President Biden’s remarks, the White House released a webpage with further information about Defendants’ “COVID Plan.” The White House stated that “[t]he Department of Labor’s Occupational Safety and Health Administration (OSHA) ... will issue an Emergency Temporary Standard (ETS) to implement” the requirement that “all employers with 100 or more employees to ensure their workforce is fully vaccinated or require any workers who remain unvaccinated to produce a negative test result on at least a weekly basis.” The White House webpage also stated that the Centers for Medicare & Medicaid Services (CMS) would “require COVID-19 vaccinations for workers in most health care settings that receive Medicare or Medicaid reimbursement..., apply[ing] to approximately 50,000 providers and cover[ing] a majority of health care workers across the country.”¹¹

70. Even though natural immunity from prior COVID-19 infection is better than, or at least no worse than, immunity conferred by the vaccine,¹² Defendants have failed to provide for any exemptions for persons who have already been infected with COVID-19.

71. Before September 2021, Defendants’ consistent position had been that the federal government *lacks* the authority Defendants are now claiming to possess. For example, at a July 23, 2021 press briefing, Psaki acknowledged that imposing vaccine

¹¹ <https://www.whitehouse.gov/covidplan/> (accessed Sept. 10, 2021)

¹² E.g., Sivan Gazit, et al., “Comparing SARS-CoV-2 natural immunity to vaccine-induced immunity: reinfections versus breakthrough infections,” *medRxiv*, Aug. 25, 2021, <https://doi.org/10.1101/2021.08.24.21262415> (“This study demonstrated that natural immunity confers longer lasting and stronger protection against infection, symptomatic disease and hospitalization caused by the Delta variant of SARS-CoV-2, compared to the BNT162b2 two-dose vaccine-induced immunity.”); Kristen W. Cohen, et al., “Longitudinal analysis shows durable and broad immune memory after SARS-CoV-2 infection with persisting antibody responses and memory B and T cells,” *Cell Reports Medicine*, July 14, 2021, <https://doi.org/10.1016/j.xcrm.2021.100354> (“Here, we evaluate 254 COVID-19 patients longitudinally up to 8 months and find durable broad-based immune responses.”).

mandates is “not the role of the federal government; that is the role that institutions, private-sector entities, and others may take.... What our role is and what we are going to continue to do is make the vaccine available. We’re going to continue to work in partnership to fight misinformation. And we’re going to continue to advocate and work in partnership with local officials and — and trusted voices to get the word out.”¹³ Similarly, on December 4, 2020, in response to a question about whether COVID-19 vaccines should be made mandatory, then-President-Elect Biden said “[n]o, I don’t think it should be mandatory. I wouldn’t demand it to be mandatory.”¹⁴

The Contractor Mandate

72. On September 9, 2021, President Biden signed EO 14042 imposing on federal contractors “COVID [s]afety [p]rotocols” to be established and issued by the SFWTF by September 24, 2021.¹⁵ The EO did not explicitly make any provision for religious or medical exemptions to the “safety protocols.” While EO 14042 did not specifically call for a vaccine mandate, it did purport to delegate rulemaking authority to the SFWTF, OMB, and the Federal Acquisition and Regulatory Council (the “FAR Council”).

73. On September 24, 2021 the SFWTF released on its website guidance to federal agencies for implementing Defendants’ vaccine mandate on contractors and subcontractors (the “Contractor Mandate”).¹⁶ This guidance was never published to the

¹³ Jen Psaki, White House Press Briefing (July 23, 2021), <https://www.whitehouse.gov/briefing-room/press-briefings/2021/07/23/press-briefing-by-press-secretary-jen-psaki-july-23-2021/> (accessed Sept. 28, 2021)

¹⁴ Jacob Jarvis, “Fact Check: Did Joe Biden Reject Idea of Mandatory Vaccines in December 2020?,” *Newsweek* (Sept. 10, 2021), <https://www.msn.com/en-us/news/politics/fact-check-did-joe-biden-reject-idea-of-mandatory-vaccines-in-december-2020/ar-AAOiq5S>.

¹⁵ Exec. Order No. 14042, 86 Fed. Reg. 50985, “Ensuring Adequate COVID Safety Protocols for Federal Contractors,” (Sept. 9, 2021).

¹⁶ SFWTF, “COVID-19 Workplace Safety: Guidance for Federal Contractors and

1 Federal Register for public comment. Among other things, the guidance included the
 2 following:

- 3 • A deadline of December 8, 2021 for “covered contractor employees” to be fully
 4 vaccinated.
- 5 • A deadline of November 24, 2021 for employees of contractors or subcontractors to
 6 receive their final vaccination (or only vaccination, in the case of the Johnson &
 7 Johnson vaccine), because the guidance defines “fully vaccinated” to mean two
 8 weeks after receiving the requisite number of doses of an approved COVID-19
 9 vaccine. The guidance defines “fully vaccinated” to include vaccines approved only
 10 by EUA.
- 11 • A definition of the term “covered contractor employee” to “include[] employees of
 12 covered contractors who are not themselves working on or in connection with a
 13 covered contract” if they are working at the same location, thus imposing vaccine
 14 requirements on employees of contractors and subcontractors who are not even
 15 working on federal contracts.
- 16 • A requirement that the Federal Acquisition Regulatory Council (“FAR Council”)
 17 conduct rulemaking to amend the Federal Acquisition Regulation (“FAR”) to
 18 impose the Contractor Mandate.
- 19 • A deadline of October 8, 2021 for the FAR Council to develop a contract clause to
 20 implement the Contractor Mandate for agencies to include in contracts. The
 21 guidance also instructs the FAR Council to “recommend that agencies exercise their
 22 authority to deviate from the FAR” and use the vaccination mandate clause in
 23 contracts even before the FAR is amended.

24
 25
 26 Subcontractors,” (Sept 24, 2021),
https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf (accessed Oct. 21, 2021).

- 1 • A deadline of October 15, 2021 for agencies to include that contractual clause in
- 2 solicitations
- 3 • A deadline of November 14, 2021 after which awarded contracts must include that
- 4 contractual clause. For contracts entered into between October 15 and November 14
- 5 and for which the solicitation was issued before October 15, the guidance states that
- 6 agencies are encouraged to include the clause, but are not required to do so.
- 7 • A requirement that, for contracts awarded “prior to October 15 and where
- 8 performance is ongoing”, the vaccine mandate clause “must be incorporated at the
- 9 point at which an option is exercised or an extension is made.”
- 10 • Requirements that the Contractor Mandate must apply even to: 1) persons who have
- 11 already been infected with COVID-19; 2) workplace locations that are outdoors;
- 12 and 3) contractor employees who are working remotely full time.
- 13 • A statement asserting that the guidance supersedes legal requirements in States or
- 14 localities that prohibit vaccine mandates.

15 74. On September 28, 2021, Shalanda Young, the Acting Director of the Office
 16 of Management and Budget published a notice in the Federal Register¹⁷ in which Ms.
 17 Young made the conclusory contention that “compliance with COVID–19-related safety
 18 protocols improves economy and efficiency by reducing absenteeism and decreasing labor
 19 costs for contractors and subcontractors working on or in connection with a Federal
 20 Government contract.” She further stated that she had “determined that compliance by
 21 Federal contractors and subcontractors with the COVID–19-workplace safety protocols
 22 detailed in [the SFWTF] guidance will improve economy and efficiency by reducing
 23 absenteeism and decreasing labor costs for contractors and subcontractors working on or
 24 in connection with a Federal Government contract.”

25
 26

¹⁷ 86 Fed. Reg. 53691, 53692 (Sept. 28, 2021).

1 75. Ms. Young did not cite to any information or evidence that would support
2 the claims in her determination, nor did she explain how she reached her conclusion. Nor
3 did she mention, much less explain, why she had rejected any other alternatives, such as
4 weekly testing or exemptions for persons naturally immune to COVID-19 because of a
5 prior infection. Furthermore, Ms. Young's notice was not subject to public commenting.
6 Notably, however, Ms. Young's determination did not claim there were any urgent and
7 compelling circumstances in this case, and her Federal Register notice did not include a 41
8 U.S.C. § 1707(d) waiver of the Procurement Policy Act requirement that a procurement
9 policy may not take effect until 60 days after it is published for public comment in the
10 Federal Register. Nor did Ms. Young's notice invoke the good cause exception (5 U.S.C.
11 § 553(b)(3)(B)) to the APA's notice-and-comment requirements.

12 76. On September 30, 2021, the FAR Council issued Class Deviation Clause
13 252.223-7999 (the "FAR Deviation Clause"), along with accompanying guidance. The
14 FAR Deviation Clause cites EO 14042 as the single authority for the deviation and contains
15 little substantive content other than requiring federal contractors to follow SFWTF
16 Guidance posted on the SFWTF website at
17 <https://www.saferfederalworkforce.gov/contractors> and to follow any future amendments
18 to the guidance posted on the SFWTF website. In issuing the FAR Deviation Clause, the
19 FAR Council did not provide notice or opportunity for public comment, as required by 41
20 U.S.C. § 1707. A true and correct copy of the FAR Deviation Clause and guidance is
21 attached as Exhibit 1.

22 77. A deviation is a clause that is inconsistent with the FAR. FAR § 1.401. The
23 FAR prescribes procedures for making individual deviations and class deviations. *Id.* §§
24 1.403-04. Deviations are not an appropriate method for implementing a government-wide
25 procurement policy, and "[w]hen an agency knows that it will require a class deviation on
26 a permanent basis, it should propose a FAR revision." *Id.* § 1.404.

1 78. On November 10, 2021, the SFWTF issued updated contractor guidance.¹⁸
 2 The updated guidance substantially follows the prior guidance and is attached hereto as
 3 Exhibit 2. Among other things, the new guidance omits the previous guidance's
 4 "Frequently Asked Questions" ("FAQ") section and instead provides a link to a new
 5 version of the SFWTF contractor FAQ on the SFWTF website, at
 6 <https://www.saferfederalworkforce.gov/faq/contractors/>. Attached as Exhibit 3 is a true
 7 and correct copy of the SFWTF contractor FAQ that was captured on November 19, 2021.

8 79. On November 10, 2021, Defendant Young, Acting Director of the OMB,
 9 issued for publication in the Federal Register a notice titled "Determination of the Acting
 10 OMB Director Regarding the Revised Safer Federal Workforce Task Force Guidance for
 11 Federal Contractors and the Revised Economy & Efficiency Analysis." The notice was
 12 published in the Federal Register on November 16, 2021. 86 Fed. Reg. 63418 (Nov. 16,
 13 2021). Attached as Exhibit 4 is a true and correct copy of that notice (the "Second OMB
 14 Notice"). The Second OMB Notice attempts to justify the Contractor Mandate as
 15 promoting economy and efficiency in procurement. It also re-publishes the SFWTF
 16 contractor guidance of November 10, 2021. It also disclaims the applicability of the notice-
 17 and-comment requirements of 41 U.S.C. § 1707 and of the APA, but also claims that if
 18 they do apply, "urgent and compelling circumstances" justify departure from the
 19 requirements of Section 1707, and the "good cause" exception applies to the APA's
 20 requirements.

21 80. The Second OMB Notice makes only a weak, pretextual attempt to establish
 22 a nexus with economy and efficiency. Indeed, before it makes any mention of economy
 23 and efficiency, or even of procurement at all, it explicitly states that its actual main
 24 objective is to achieve public health goals, specifically, "to get more people vaccinated."

25
 26 ¹⁸

https://www.saferfederalworkforce.gov/downloads/Guidance%20for%20Federal%20Contractors_Safer%20Federal%20Workforce%20Task%20Force_20211110.pdf

1 86 Fed. Reg. at 63418. It claims, without evidence, that the Contractor Mandate will
 2 “decrease worker absence, reduce labor costs, and improve the efficiency of contracts and
 3 subcontractors. *Id.* It further makes the circular argument that, because some private
 4 businesses have imposed vaccine mandates, those private businesses’ vague justifications
 5 somehow also justify the federal government’s vague justifications *Id.* at 63421. This
 6 reasoning is upside-down, however, as the vast majority of businesses in the United States
 7 do *not* impose vaccine mandates. *See infra* ¶ 99. The fact that only a minority of businesses
 8 impose vaccine mandates thus reveals the pretextual nature of Defendants’ economy and
 9 efficiency claims. Furthermore, the Second OMB Notice claims that the Contractor
 10 Mandate will reduce the spread of COVID-19, yet the only evidence it cites in support of
 11 this claim is a study that was conducted before the Delta variant of COVID-19 became
 12 dominant and made no findings as to reductions in infection, but only found the Pfizer and
 13 Moderna vaccines reduce the severity of COVID-19 infection.¹⁹

14 81. The Second OMB Notice acknowledges that the Contractor Mandate will
 15 impose costs from “employees quitting” and also from “side effects from vaccination.” *Id.*
 16 at 63422. The Notice, however, makes no attempt to quantify these costs, and instead
 17 handwaves them away, claiming without evidence, that “we expect few employees to quit”
 18 and that vaccine side effects will be less costly than COVID-19 infection. *Id.* It claims that
 19 there are only “anecdotal reports” of employees quitting because of the Contractor Mandate
 20 and that “we know of no systematic evidence that this has been a widespread phenomenon,
 21 or that it would be likely to occur among employees of federal contractors.” *Id.* OMB *did*
 22 have, however “systematic evidence” that imposing the Contractor Mandate would likely
 23

24 ¹⁹Mark W. Tenforde, et al., “Sustained Effectiveness of Pfizer-BioNTech and Moderna
 25 Vaccines Against COVID-19 Associated Hospitalizations Among Adults — United States,
 26 March–July 2021,” 70 Morbidity and Mortality Weekly Report Aug. 27, 2021, pp. 1156–
 1162, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8389395/> (finding that
 “[p]rotection against severe COVID-19 resulting in hospitalization was sustained through
 24 weeks after vaccination with mRNA COVID-19 vaccines” and that “[c]ontinued
 monitoring of [vaccine effectiveness] against infection and severe disease is needed as the
 elapsed time since vaccination increases and new SARS-CoV-2 variants emerge”).

1 lead to loss of employees. The First Amended Complaint (“FAC”) in this case cited such
2 evidence. *See, e.g.*, Doc 14 ¶ 83. The FAC was served by certified mail on Defendant
3 Young and on OMB, who both received it on November 1. (*See* Doc. 61 at 16 and 22.).

4 82. The Second OMB Notice was also deficient in that it did not contain the full
5 SFWTF contractor guidance that is binding on contractors who accept contracts with the
6 FAR Deviation Clause. The Clause requires that “[t]he Contractor shall comply with all
7 guidance, **including guidance conveyed through Frequently Asked Questions**, as
8 amended during the performance of this contract, for contractor or subcontractor workplace
9 locations published by the Safer Federal Workforce Task Force (Task Force Guidance) at
10 <https://www.saferfederalworkforce.gov/contractors/>.” The Second OMB Notice did not
11 contain the FAQ, which is only posted on the SFWTF website and is subject to change at
12 any time.

13 83. The omission of the FAQ is significant, as most of the sweeping reach of the
14 Contractor Mandate is only made clear in the FAQ. For example, the FAQ clarifies that
15 the Contractor Mandate applies to “[e]mployees who perform duties necessary to the
16 performance of the covered contract, but who are not directly engaged in performing the
17 specific work called for by the covered contract, such as human resources, billing, and legal
18 review.” Exhibit 3 at 12-13. Thus, employees who never work directly on a federal
19 contract; who never directly work with an employee working on a federal government
20 contract; or who never work in the same building or location as an employee who works
21 directly on a federal government contract are subject to the Contractor Mandate. The FAQ
22 also shows the sweeping breadth of the “locations” to which the Guidance applies. For
23 example, it is in the FAQ that Defendants state that the Contractor Mandate applies “to
24 contractor or subcontractor workplace locations that are outdoors.” *Id.* at 9. It is also in the
25 FAQ where Defendants command that even if a contractor’s employee works in an entirely
26 separate floor or area or even building or site, the employee is working in a “covered

1 contractor workplace” “unless a covered contractor can affirmatively determine that none
 2 of its employees” in the separate area “will come into contact with a covered contractor
 3 employee.” *Id.* at 9-10. “Contact,” the FAQ continues, includes “interactions” in “common
 4 areas such as lobbies, security clearance areas, elevators, stairwells, meeting rooms,
 5 kitchens, dining areas, and parking garages.” *Id.* And the FAQ is where it is stated that if
 6 an employee is working completely remotely, but working on a covered federal contract,
 7 the employee still “must comply with the vaccination requirement ... even if the employee
 8 never works at either a covered contractor workplace or Federal workplace during the
 9 performance of the contract.” *Id.* at 10. Thus, it is through the FAQ, which has still never
 10 been published for notice and comment, that Defendants impose the most authoritarian and
 11 sweeping aspects of the Contractor Mandate, ensnaring within its grasp almost any
 12 employee of an organization with any kind of federal contract.

13 **Federal Attempts To Impose The Contractor Mandate On Arizona**

14 84. Federal authorities have already demanded that multiple Arizona State
 15 agencies, including public universities, implement the Contractor Mandate and require that
 16 their employees receive the COVI-19 vaccine. This creates a significant conflict, as
 17 mandates are illegal under State law. *See* ¶ 58.

18 85. The Arizona Board of Regents (“ABOR”) oversees the management,
 19 direction, and governance of Arizona’s three public universities: Arizona State University,
 20 Northern Arizona University, and the University of Arizona. All three universities are
 21 federal contractors, and for Fiscal Year 2021, their total federal revenues were
 22 \$1,207,926,800. Because they face the significant harm of losing more than a billion dollars
 23 if they do not submit to the Contractor Mandate, ABOR and the three universities have
 24 been actively engaged in efforts to comply with the Contractor Mandate. Attached as
 25 Exhibit 5 is a signed declaration from John Arnold, who is ABOR’s Executive Director
 26 that details these facts.

1 86. On October 18, 2021, Defendant GSA sent an email to the Arizona State
2 Retirement System (“ASRS”) demanding that ASRS implement the Contractor Mandate
3 on its employees. Statewide, ASRS has approximately 220 full-time equivalent employees
4 and 20 to 30 part-time contractors who would potentially be subject to the Contractor
5 Mandate. *See* Doc. 48-4, Declaration of Dawn Northup, which is hereby incorporated by
6 reference.

7 87. On November 2, 2021, the Equal Employment Opportunity Commission
8 (“EEOC”) requested that the Division of Civil Rights Section (“DCRS”) of the Arizona
9 Attorney General’s Office (“AGO”) renew a contract and workshare agreement whereby
10 EEOC provides about \$500,000 of funding to DCRS. However, the day before, on
11 November 1, 2021, EEOC had stated that “when the . . . contracts are executed, the
12 requirements of . . . Executive Order [14042] may take effect.” Statewide, the AGO has
13 1,010 employees who would potentially be subject to the Contractor Mandate. *See* Doc.
14 48-3 and 58-1, the First and Second Declarations of Rebekah Browder, which are hereby
15 incorporated by reference.

16 88. The Arizona Department of Transportation (“ADOT”) owns property that it
17 leases to the General Services Administration (“GSA”) for use by the Federal Motor
18 Carrier Safety Administration. The property is a port of entry in Nogales, Arizona,
19 designated as “State Port Annex” at N. Mariposa Road. GSA sent to ADOT a letter dated
20 October 14, 2021 stating that a contract modification imposing a vaccine mandate “is
21 ***mandatory*** and your acceptance is required in order to ensure compliance with E.O. 14042”
22 and that contract “modifications must be finalized by **November 14, 2021.**” (emphasis in
23 original.) Statewide, ADOT has approximately 3,650 employees who would potentially be
24 subject to the Contractor Mandate. Attached as Exhibit 6 is the Declaration of Sonya
25 Herrera, who is the Director of the Administrative Services Division of ADOT, further
26 detailing these facts.

1 89. On October 22, 2021, the CDC sent an email to the Arizona Department of
2 Health Services (“ADHS”) demanding that ADHS implement the Contractor Mandate and
3 requiring that ADHS “sign and return the modification via email to the Contracting Officer
4 of record by November 9, 2021.” Attached to the email was a spreadsheet that listed
5 covered contracts that CDC claimed were subject to its demand. Among those were two
6 ADHS contracts with the CDC with a total value of approximately \$520,000. Statewide,
7 ADHS has approximately 1,500 employees who would potentially be subject to the
8 Contractor Mandate. Attached as Exhibit 7 is a signed declaration from Kevin Ray, who is
9 Education and Health Section Chief Counsel in the State Government Division of the
10 Office of the Attorney General of Arizona, further detailing these facts.

11 90. The Arizona Department of Public Safety (“DPS”) has a contract with the
12 National Park Service (“NPS”) to provide laboratory testing. On November 2, 2021, NPS
13 sent an email to DPS demanding that DPS sign a contract modification to incorporate the
14 Contractor Mandate. Statewide, DPS has approximately 2,100 employees who would
15 potentially be subject to the Contractor Mandate. Attached as Exhibit 8 is the Declaration
16 of Daniel Bergin, who is Transportation Section Chief Counsel in the State Government
17 Division of the Office of the Attorney General of Arizona, further detailing these facts.

18 91. The Arizona Department of Corrections, Rehabilitation, and Reentry
19 (“ADCRR”) has a contract with the U.S. Forest Service through which inmates perform
20 work on Forest Service land. On September 28, 2021, Jeremy Plain, District Ranger for the
21 Tonto National Forest, sent an email to personnel at ADCRR stating that persons
22 performing under the contract would be required to comply with new COVID-19
23 “safeguards,” including mandatory “vaccine certification.” The email concluded by stating
24 that “[w]e are very thankful for the work that the AZDOC crews provide for us and we
25 would like to continue utilizing them, but we have to follow the above policy.” On
26 November 15, 2021, Kristine Yaw, Deputy Chief Procurement Officer at ADCRR, sent a

1 letter to Mr. Plain stating that ADCRR “cannot facilitate the requirements at this time.”
 2 Statewide, ADCRR has approximately 9,500 full-time equivalent employees who would
 3 potentially be subject to the Contractor Mandate. Attached as Exhibit 9 is the Declaration
 4 of Denel Pickering, who is the Chief Procurement Officer of ADCRR, further detailing
 5 these facts.

6 **The City of Phoenix And The Contractor Mandate**

7 92. On November 18, 2021, Defendant City of Phoenix, citing the Contractor
 8 Mandate, issued a notification informing its employees that they would be required to
 9 receive the COVID-19 vaccine by January 18, 2022 or face discipline, up to and including
 10 termination. Attached as Exhibit 10 is the Declaration of Michael Napier, which includes
 11 a copy of the notification from the City of Phoenix.

12 93. The imposition of a vaccine mandate by Defendant City of Phoenix is in
 13 violation of Arizona law, specifically A.R.S. §§ 23-206, § 36-114, and -184(C), and
 14 Arizona Executive Orders.2021-18 and -19.

15 94. Upon information and belief, a significant number of rank and file police
 16 officers and firefighters of Defendant City of Phoenix have expressed concerns over the
 17 mandate and will refuse to be vaccinated. These officers and firefighters will face
 18 significant discipline, up to and including termination.

19 **The Federal Employee Mandate**

20 95. On September 9, 2021 President Biden also signed an EO requiring that
 21 “[e]ach agency shall implement ... a program to *require* COVID-19 vaccination for all of
 22 its Federal employees” (the “Employee Mandate”).²⁰ The EO required the SFWTF to issue
 23 guidance for agencies by September 16, 2021, and made no explicit provision for any
 24 religious or medical exemptions to the vaccination requirement.

25
 26

²⁰ Exec. Order No. 14043, 86 Fed. Reg. 50989, “Requiring Coronavirus Disease 2019 Vaccination for Federal Employees,” (Sept. 9, 2021) (emphasis added).

1 96. On September 16, 2021 the SFWTF updated the “Frequently Asked
2 Questions” (“FAQ”) section of its website,²¹ ostensibly in an attempt to fulfill the EO’s
3 guidance requirement. Among other things, the updated FAQ included the following:

- 4 • A deadline of November 22, 2021 for federal employees to be “fully vaccinated”
5 and also after which new federal employees would need to be fully vaccinated
6 before starting work.
- 7 • A deadline of November 8, 2021 for employees to receive their final vaccination (or
8 only vaccination, in the case of the Johnson & Johnson vaccine), because the FAQ
9 defines “fully vaccinated” to mean “2 weeks after [employees] have received the
10 requisite number of doses of a[n approved] COVID-19 vaccine.” The FAQ defines
11 “fully vaccinated” as including vaccines approved only by EUA.
- 12 • Imposition of the Employee Mandate 1) for federal employees who are working
13 remotely full-time and thus do not pose any risk of exposing other federal employees
14 to COVID-19 and 2) for federal employees who have already been infected with
15 COVID-19 and thus already have natural immunity.
- 16 • A warning to agencies to allow exemptions from the Employee Mandate only “in
17 *limited circumstances* where the law requires an exception.” (emphasis added).

18 97. Attached as Exhibit 11 is a copy of the updated employee FAQ that was
19 captured on November 19, 2021. On information and believe, the SFWTF has never issued
20 official, formal guidance to agencies; has never published its guidance in the Federal
21 Register; and has not followed any notice-and-comment procedures before issuing its
22 guidance.

23
24
25

26 ²¹ <https://www.saferfederalworkforce.gov/faq/vaccinations/>

1 **The Mandates Will Have Deep Economic And Political Significance**

2 98. The U.S. Department of Labor recognizes that “workers employed by
3 federal contractors” comprise “approximately **one-fifth of the entire U.S. labor force.**”²²
4 Upon information and belief, this approximately reflects the proportions of the labor force
5 in Arizona subject to the Contractor Mandate.

6 99. Upon information and belief, the vaccination mandates will cause a
7 significant proportion of unvaccinated federal and contractor employees to resign to avoid
8 the mandates. The Society for Human Resource Management conducted a survey of
9 businesses subject to Defendants’ Mandates and found that “85 percent said the
10 anticipated requirement will make retaining employees more difficult. Eighty-nine percent
11 said some of their employees will quit due to the new mandate.”²³ Similarly, a leading
12 trade publication covering the construction industry has predicted that more than 40% of
13 employees in the construction industry, “when faced with the choice between the vaccine
14 and their job with a federal contractor, will quit and go to work for another contractor that
15 does not have such a mandate”²⁴ In a tight labor market, these resignations will greatly
16 hurt productivity of the federal workforce and thus impair economy and efficiency.

17 100. A recent survey from the Kaiser Family Foundation found that 72 percent of
18 unvaccinated workers say that they will quit rather than submit to a vaccine mandate.²⁵

19
20 ²² DOL, History of Executive Order 11246, Office of Contract Compliance Programs,
21 <https://www.dol.gov/agencies/ofccp/about/executive-order-11246-history> (last visited
22 Nov. 17, 2021) (emphasis added).

23 ²³ Allen Smith, “Survey: Vaccine-or-Testing Mandate Will Be Difficult to Implement,”
24 Society for Human Resource Management, (Oct. 15, 2021),
25 [https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-
26 law/pages/coronavirus-survey-vaccine-testing-mandate-challenges.aspx](https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/coronavirus-survey-vaccine-testing-mandate-challenges.aspx)

27 ²⁴ Engineering News-Record, “How Will President Biden’s Vaccine Workplace Mandate
28 impact you and your company?.” (Sept. 23, 2021), [https://www.enr.com/articles/52467-
29 temperature-check-president-bidens-vaccine-workplace-mandate](https://www.enr.com/articles/52467-temperature-check-president-bidens-vaccine-workplace-mandate) (accessed Sept. 24,
30 2021).

31 ²⁵ Chris Isidore et al., “72% of unvaccinated workers vow to quit if ordered to get
32 vaccinated,” CNN (Oct. 28, 2021), at [https://www.cnn.com/2021/10/28/business/covid-
33 vaccine-workers-quit/index.html](https://www.cnn.com/2021/10/28/business/covid-vaccine-workers-quit/index.html).

1 101. Before Defendants announced their planned mandates, only 16% of a sample
 2 of 400 large employers had imposed COVID-19 vaccine mandates. After Defendants
 3 announced their mandate plans, an additional 9% of the employers imposed mandates and
 4 13% developed future plans to impose mandates. Thus, as of October 1, 2021, only a 25%
 5 minority of large employers imposed vaccine mandates, and 60% had no plans to impose
 6 a mandate. Additionally, the employers said they expected to lose 2% and 8% of their
 7 employees because of vaccine mandates, either from employee resignations or
 8 terminations.²⁶ Upon information and belief, the percentage of small business that impose
 9 vaccine mandates, or that plan to impose such mandates, is even lower than 25%.

10 102. This employee resistance and sensitivity of the issues presented here was
 11 further evidenced by the recent experience of Southwest Airlines Company. Southwest
 12 Airlines had to cancel over 2000 flights over ten days in October as pilots refused to work
 13 in the wake of the company's vaccine mandate and the pilot's union's suit to stop it.²⁷
 14 "The key driver for such cancellations is likely the COVID-19 vaccine mandate for its
 15 employees. Southwest employees are expressing their concern in droves by
 16 simultaneously and strategically using their sick time benefits."²⁸ What's more, estimates
 17 indicated that such massive impact can be felt by the action of "just over 2 percent of their
 18 employees being unavailable. This illustrates how vulnerable the airline is to organized
 19 worker shortages even among a small group of potentially disgruntled employees."²⁹ And
 20

21 ²⁶ Matthew Boyle, "1 in 4 Large Firms Has Vaccine Mandate for Employees, With More
 22 Coming: Gartner," *Insurance Journal* (Oct. 1, 2021), at
<https://www.insurancejournal.com/news/national/2021/10/01/634795.htm>.

23 ²⁷ Sheldon H. Jacobson, *Southwest Airlines debacle is symptomatic of bigger pandemic*
 24 *problems*, The Hill, Oct. 18, 2021, [https://thehill.com/opinion/healthcare/577248-](https://thehill.com/opinion/healthcare/577248-southwest-airlines-debacle-is-symptomatic-of-bigger-pandemic-problems?rl=1)
[southwest-airlines-debacle-is-symptomatic-of-bigger-pandemic-problems?rl=1](https://thehill.com/opinion/healthcare/577248-southwest-airlines-debacle-is-symptomatic-of-bigger-pandemic-problems?rl=1).

25 ²⁸ *Id.*

26 ²⁹ *Id.*

1 the company would not have put a vaccine requirement in place but for the Biden
 2 administration's mandate, as Southwest's CEO Gary Kelly has "never been in favor of
 3 corporations imposing that kind of a mandate. I'm not in favor of that, never have been."³⁰
 4 In addition to being consumer airlines, "Southwest Airlines and American Airlines are
 5 among the carriers that are federal contractors and subject to" the government contractor
 6 mandate, so their employees may not utilize "regular Covid testing as an alternative to a
 7 vaccination" as other large, non-contractor business employees may.³¹ And while the
 8 airline claimed weather and air traffic control issues as its official justification for the
 9 unprecedented disruption in service, it was telling that in response, it dropped one of its
 10 major enforcement mechanisms for the mandate: forced unpaid leave.³²

11 103. According to Gallup, "[j]ust under one in five U.S. adults, 18%, can be
 12 described as vaccine resistant. These Americans say they would not agree to be vaccinated
 13 if a COVID-19 vaccine were available to them right now at no cost and that they are
 14 unlikely to change their mind about it. The percentage holding these views has been stable
 15 in recent months."³³

16 104. On average, federal government spending accounts for 20% to 25% of the
 17 U.S. economy, and has been even higher during the COVID-19 pandemic. Furthermore,
 18 by Defendants' own estimates, the contractor and subcontractor mandates will affect
 19

20 ³⁰ Emily Crane, *Southwest CEO says he's against vaccine mandates, blames Biden*, New
 21 York Post, Oct. 12, 2021, <https://nypost.com/2021/10/12/southwest-ceo-gary-kelly-blames-biden-for-vaccine-mandate>

22 ³¹ Leslie Josephs, *Southwest drops plan to put unvaccinated staff on unpaid leave starting in December*, CNBC, Oct. 19, 2021, <https://www.cnbc.com/2021/10/19/southwest-vaccine-mandate-unpaid-leave-exemptions.html>

23 ³² *Id.*

24 ³³ Jeffrey M. Jones, *About One in Five Americans Remain Vaccine Resistant*, Gallup (Aug.
 25 6, 2021), <https://news.gallup.com/poll/353081/one-five-americans-remainvaccine-resistant.aspx> (last visited Nov. 16, 2021).
 26

1 “millions” of individuals.³⁴ Defendants’ vaccine mandates thus have deep economic and
2 political significance.

3 **The Vaccine Mandates Harm The State Of Arizona**

4 105. Defendants’ actions directly injure the State’s sovereign, quasi-sovereign,
5 and proprietary interests by denying Arizona residents of the benefit of the Due Process
6 Clause.

7 106. Furthermore, because State agencies and political subdivisions qualify as
8 “government contractors,” *see* ¶¶ 82-89, the Contractor Mandate will harm the State of
9 Arizona in three ways. First, by requiring the State to violate the Constitution and Federal
10 and State law, *see* ¶¶ 42-58 and 148-213, or face the loss of federal funds and contracts.
11 Second, by causing State employees subject to the mandate to resign. In the current tight
12 labor market, this will cause significant harm to the State’s operations through the loss of
13 institutional knowledge and human capital. It will also cause the State to incur significant
14 recruitment, on-boarding, and training costs to replace lost employees. Third, because
15 vaccine mandates and public health more generally, are part of the police power reserved
16 to the States under the Tenth Amendment, the vaccine mandates harm the State’s sovereign
17 interests and concern in defending its statutes and seeing that they are faithfully executed.

18 107. On information and belief, a natural and predictable consequence of the
19 Contractor Mandate is that numerous employees may be fired, retire, or quit their jobs,
20 including employees of businesses within the State. This injures the State’s quasi-sovereign
21 interest in the economic well-being of its citizens. It further injures the State in that it will
22 likely increase the burden on the State’s unemployment insurance funds, and it will inflict
23 economic disruption on the State’s economy as a whole.

24 108. On information and belief, a natural and predictable consequence of the
25 Contractor Mandate is that employers who are critical to the supply chain, and are also
26

³⁴ <https://www.whitehouse.gov/covidplan/> (characterizing EO 14042 as a plan “[r]equiring [v]accinations for ... [m]illions of [c]ontractors”)

1 federal contractors, will likely lose significant numbers of employees. It is entirely
 2 predictable, therefore, that the Contractor Mandate will exacerbate current supply chain
 3 issues. As a result, prices will continue to rise and cause direct injuries to the State as a
 4 purchaser. It will also harm its quasi-sovereign interest in the economic well-being of its
 5 residents, who will suffer from further supply chain disruptions.³⁵

6 109. Because the Contractor Mandate claims to supersede all contrary State law
 7 Ex. 3 at 15, it injures Arizona's interest in setting its own laws regarding public health and
 8 workplace issues that would otherwise apply to contractors within Arizona's borders, as
 9 well as preempting State religious-liberty protections under the State Constitution and State
 10 statute.

11 110. The Contractor Mandate requires employees to prove vaccination status with
 12 documentation, and on information and belief, agencies of the State often possess such
 13 documentation. A predictable consequence of the Contractor Mandate is thus to increase
 14 the number of people seeking documentation from the Plaintiff States regarding
 15 vaccination status. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019). On
 16 information and belief, that will increase costs to the State.

17 111. The combination of these effects injures the State's sovereign, quasi-
 18 sovereign, and proprietary interests.

19 **The Vaccine Mandate Harms Plaintiff Al Reble**

20 112. Because Plaintiff Al Reble is not eligible for a religious exemption and
 21 because his medical exemption will almost certainly be denied, he will either be subject to
 22 dismissal from his employment, or will suffer serious violations of his constitutional rights
 23

24
 25 ³⁵ See Spencer Kimball, "Business Groups Ask White House to Delay Biden COVID
 26 Vaccine Mandate Until After the Holidays," CNBC (Oct. 25, 2021),
<https://www.cnbc.com/2021/10/25/businesses-ask-white-house-to-delay-biden-covid-vaccine-mandate-until-after-holidays.html> ("Worried that President Joe Biden's Covid vaccine mandate for private companies could cause a mass exodus of employees, business groups are pleading with the White House to delay the rule until after the holiday season.").

1 to bodily integrity and to refuse medical treatment. Furthermore, the vaccine mandate will
 2 infringe his right under the EUA statute to refuse the vaccines.

3 **The Vaccine Mandate Harms Plaintiff PLEA and United Phoenix Firefighters**
 4 **Association Local 493, and Their Members**

5 113. Plaintiffs PLEA and United Phoenix Firefighters Association Local 493, as
 6 well as their members, are faced with a Catch-22 of either facing significant discipline, up
 7 to and including termination, or having to suffer serious violations of their constitutional
 8 rights to bodily integrity and to refuse medical treatment. Furthermore, the vaccine
 9 mandate will infringe their rights under the EUA statute to refuse the vaccines.

10 **ADDITIONAL LEGAL AND FACTUAL BACKGROUND RELATED TO**
 11 **CLAIMS REGARDING CERTAIN DEFENDANTS' PAROLE POLICIES³⁶**

12 114. Driven by President Biden's campaign promises of lax immigration
 13 enforcement and loose border security, Defendants have created a crisis at the southern
 14 border leading to an unprecedented wave of unlawful immigration into the U.S.

15 115. Furthermore, federal immigration law requires that all arriving aliens, even
 16 those claiming asylum, be detained pending a decision as to whether they have a valid basis
 17 to enter the United States. *See* 8 U.S.C. § 1225(b)(2)(A); *id.* § 1225(b)(1)(B). This
 18 requirement applies "whether or not" the alien presents himself at a "designated port of
 19 arrival" or crosses the border illegally. *Id.* § 1225(a)(1)

20 116. As the Supreme Court recently explained, there is only one "circumstance[]"
 21 under which" these arriving aliens "may be released" from detention: when the federal
 22 government exercises its "temporary parole" authority. *Jennings v. Rodriguez*, 138 S. Ct.
 23 830, 844 (2018) (discussing 8 U.S.C. § 1182(d)(5)(A)). But that authority may be used
 24

25
 26 ³⁶ Because the allegations in this portion of the Complaint (Paragraphs 112-147) relate only
 to claims brought by Plaintiffs Brnovich and the State of Arizona, they are only being
 asserted by those Plaintiffs, and the other Plaintiffs take no position as to these paragraphs.

1 “only on a case-by-case basis” and only for “urgent humanitarian reasons or significant
2 public benefit.” 8 U.S.C. § 1182(d)(5)(A).

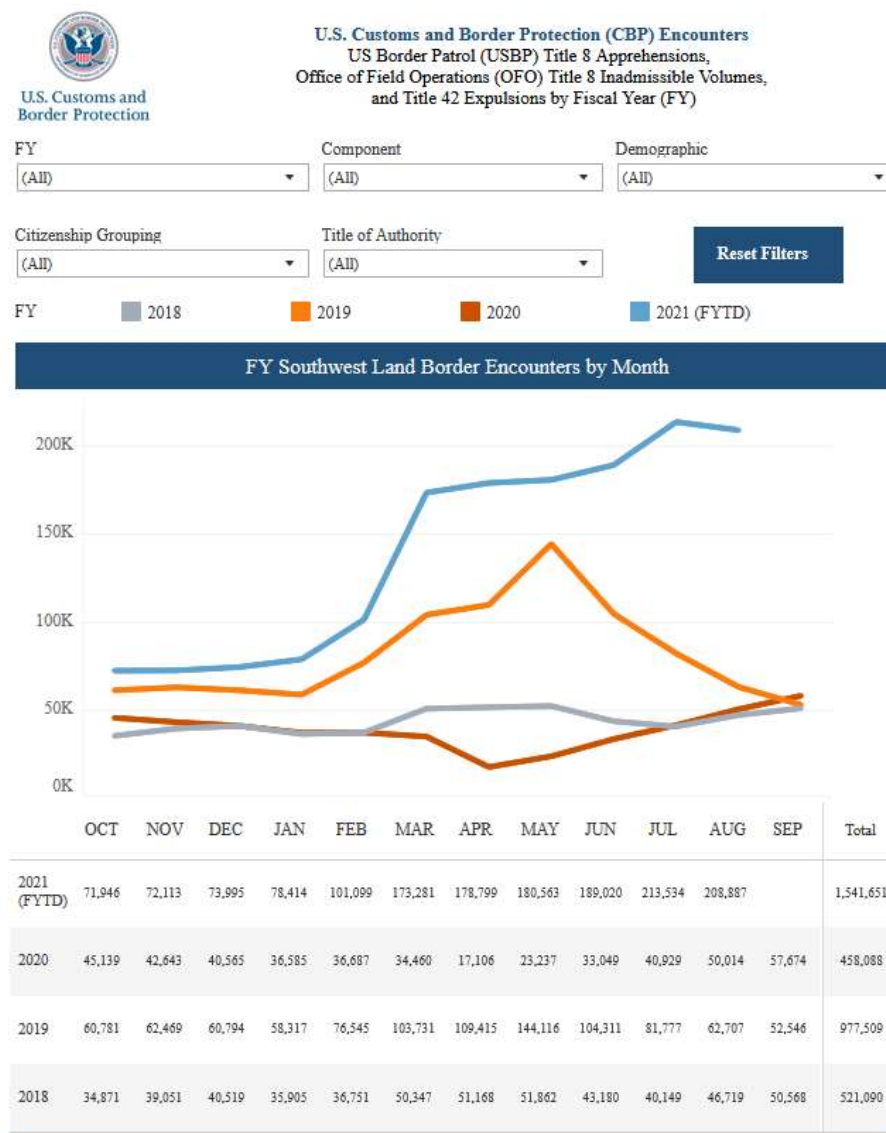
3 117. The Biden Administration is ignoring these requirements. It has released at
4 least 225,000 illegal border crossers since taking office,³⁷ including “[a]bout 50,000”
5 whom the government released without initiating immigration court proceedings as
6 required by law.³⁸ This practice was apparently authorized by “[g]uidance sent to border
7 patrol ... from agency leadership,” which has not been made public, and which appears to
8 claim broad “prosecutorial discretion” to ignore the requirements of the immigration
9 laws.³⁹

10 118. Defendants’ favorable treatment of unauthorized aliens appears to be having
11 an effect. As Table 1 (taken from Defendants’ own website) shows, DHS encounters with
12 unauthorized aliens are at their highest level in years, and continually increasing.

24 ³⁷ <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics> (U.S. Border Patrol
25 – Dispositions and Transfers tab).

26 ³⁸ <https://www.axios.com/migrant-release-no-court-date-ice-dhs-immigration-33d258ea-2419-418d-abe8-2a8b60e3c070.html>.

³⁹ <https://www.axios.com/border-patrol-rio-grande-valley-release-migrant-families-67e8cdc1-d549-47e1-aba3-8baca26025d8.html>

Table 1: CPB Encounters With Unauthorized Aliens By Month

Source: <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>

119. Recent reporting has confirmed DHS's own statistics: "U.S. authorities detained more than 1.7 million migrants along the Mexico border during the 2021 fiscal year that ended in September, and arrests by the Border Patrol soared to the highest levels

1 ever recorded, according to unpublished U.S. Customs and Border Protection data
 2 obtained by The Washington Post.”⁴⁰

3 120. While the Biden Administration has offered an array of shifting excuses,
 4 those have continually been disproved, for example: “Illegal crossings began rising last
 5 year but skyrocketed in the months after President Biden took office. As CBP arrests
 6 increased this past spring, Biden described the rise as consistent with historic seasonal
 7 norms. But the busiest months came during the sweltering heat of July and August, when
 8 more than 200,000 migrants were taken into custody.”⁴¹

9 **The Immigration And Nationality Act**

10 121. “[T]he Immigration and Nationality Act (“INA”) ... establishes a
 11 comprehensive scheme for aliens’ exclusion from and admission to the United States.”
 12 *Moorhead v. United States*, 774 F.2d 936, 941 (9th Cir. 1985). When aliens arrive in the
 13 United States, either at a port of entry or when caught crossing the border illegally, they
 14 are subject to 8 U.S.C. § 1225. Section 1225(b)(1) applies to aliens who are inadmissible
 15 due to fraud, misrepresentation, or lack of valid documentation. *See Jennings*, 138 S. Ct.
 16 at 837. These aliens are ordered removed “without further hearing or review,” unless they
 17 indicate an intention to apply for asylum. 8 U.S.C. § 1225(b)(1)(A)(i). In that case, an
 18 immigration officer conducts an interview to determine if the alien has a credible fear of
 19 persecution. § 1225(b)(1)(B)(ii). If the alien makes that showing, he “shall be detained for
 20 further consideration of the application for asylum.” *Id.* (emphasis added),

21 122. Aliens not subject to Section 1225(b)(1) are governed by Section 1225(b)(2),
 22 which requires that, unless an alien is “clearly and beyond a doubt entitled to be admitted,”
 23 the alien “*shall* be detained” pending further immigration proceedings. § 1225(b)(2); *see*
 24 *Jennings*, 138 S. Ct. at 837. Because Congress has mandated detention under both
 25

26 ⁴⁰ https://www.washingtonpost.com/national/border-arrests-record-levels-2021/2021/10/19/289dce64-3115-11ec-a880-a9d8c009a0b1_story.html

⁴¹ *Id.*

1 subsection (b)(1) and subsection (b)(2), arriving aliens—other than those who are clearly
 2 and beyond a doubt entitled to be admitted—are to be released only pursuant to the
 3 government’s parole authority, which is described in 8 U.S.C. § 1182(d)(5)(A).

4 123. This parole authority may be used only “on a case-by-case basis” and only
 5 for “urgent humanitarian reasons or significant public benefit.” 8 U.S.C. § 1182(d)(5)(A).
 6 Other than parole, there are “no other circumstances under which aliens detained under
 7 § 1225(b) may be released.” *Jennings*, 138 S. Ct. at 844; *see also* 8 C.F.R. § 208.30(f)(2)
 8 (explaining that Section 1182(d)(5) is the only basis for releasing an alien to which Section
 9 1225(b)(1) applies); 8 C.F.R. § 212.5 (describing some of DHS’s parole practices).

10 124. Notably, the government’s parole authority previously was much broader,
 11 and could then be used “for emergent reasons or for reasons deemed strictly in the public
 12 interest.” Congress, however, substantially narrowed this provision in 1996, adding the
 13 “case-by-case” requirement, changing “emergent reasons” to “urgent humanitarian
 14 reasons,” and changing “strictly in the public interest” to require a “significant public
 15 benefit.” *See* Omnibus Consolidated Appropriations Act of 1997, 110 Stat. 3009–689; *see*
 16 *also Cruz-Miguel v. Holder*, 650 F.3d 189, 199 n.15 (2d Cir. 2011) (explaining that “this
 17 change was animated by concern that parole under § 1182(d)(5)(A) was being used by the
 18 executive to circumvent congressionally established immigration policy”).

19 125. Mandatory detention aside, the government is also required to initiate
 20 removal proceedings against these aliens. The government does so by serving the alien
 21 with a charging document, which is the document that initiates proceedings in immigration
 22 court. For ordinary removal proceedings, this document is called a “notice to appear.” *See*
 23 8 C.F.R. § 1239.1(a).⁴²

24
 25 ⁴² *See*

26 <https://www.justice.gov/sites/default/files/eoir/legacy/2013/01/22/Expedited%20Removal%20-%20English%20%2817%29.pdf>, at 1–2 (discussing other similar charging documents).

126. For aliens falling under Section 1225(b)(1) who do not seek to claim asylum, an immigration officer “shall order the alien removed ... without further hearing or review.” 8 U.S.C. § 1225(b)(1)(A)(i). For aliens who claim asylum but fail the credible-fear screening, immigration officers likewise “shall order the alien removed ... without further hearing or review.” *Id.* at § 1225(b)(1)(B)(iii)(I). And even for aliens who pass a credible fear screening, they still must be served with a charging document. USCIS admits this.⁴³ The same is true of aliens falling under Section 1225(b)(2). These aliens must be “detained for a proceeding under Section 1229a,” 8 U.S.C. § 1225(b)(2)(A), which is the statutory provision governing ordinary removal proceedings. *See Jennings*, 138 S. Ct. at 837.

Defendants Have Created A Crisis At The Border

127. Defendants have dismantled much of the country’s border enforcement infrastructure, for example, 1) by imposing a near-moratorium on alien removals through a memorandum issued on January 20, 2021, through interim guidance issued by DHS on February 18, 2021, and then through similar permanent guidance issued on September 30, 2021; 2) by abandoning the Migrant Protection Protocols (MPP) requiring that aliens from third countries requesting asylum at the border with Mexico must wait in Mexico while awaiting adjudication of their asylum application⁴⁴; and 3) by abandoning construction of already-planned and funded border wall and fencing. Defendants’ actions have led to an

⁴³ *See* <https://www.uscis.gov/sites/default/files/document/memos/NTA%20PM%20%28Approved%20as%20final%2011-7-11%29.pdf>, at 2 (explaining that serving a notice to appear on aliens who pass a credible-fear screening is required by 8 C.F.R. § 208.30(f)). The Biden Administration has expressly adopted this November 2011 guidance. *See* https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf, at 5.

⁴⁴ Defendants’ attempt to abandon MPP was enjoined by a district court, and both the Fifth Circuit and U.S. Supreme Court have denied the federal government’s requests for a stay pending appeal. *See Biden v. Texas*, No. 21A21, 2021 WL 3732667 (Aug. 24, 2021); *State v. Biden*, No. 21-10806, 2021 WL 3674780, at *1 (5th Cir. Aug. 19, 2021).

1 enormous increase in attempted border crossings by eliminating disincentives to being
2 caught.

3 128. DHS's own statistics reveal the unprecedented surge of unlawful migration
4 and the collapse of DHS's control of the border. July 2021 had the highest number of
5 encounters in *decades*—"the highest monthly encounter number since Fiscal Year
6 2000."⁴⁵ DHS data show that the number of border encounters in July 2021 was more than
7 five times the July 2020 and July 2018 numbers, and roughly 2.5 times July 2019.⁴⁶ DHS
8 itself has admitted that it is "encountering record numbers of noncitizens ... at the border"
9 that "have strained DHS operations and caused border facilities to be filled beyond their
10 normal operating capacity."⁴⁷

11 129. Reporting by the Washington Post on October 20 reveals internal DHS data
12 showing that apprehensions at the southwest border "soared to the highest levels ever
13 recorded."⁴⁸

14 130. Secretary of Homeland Security Alejandro Mayorkas acknowledged in
15 August 2021 that the Department of Homeland Security has lost control of the border,
16 lamenting that the current situation is "unsustainable," that it "cannot continue," that the
17 system is getting close to "breaking," and that "we're going to lose."⁴⁹

18 **Defendants' Violations Of The INA Relating To Parole**

20
21 ⁴⁵ Declaration of David Shahouljian (DHS Assistant Secretary for Border and Immigration
Policy) at 1-2, *Huisha-Huisha v. Gaynor*, No. 21-cv-100 (D.D.C. Aug. 2, 2021)

22 ⁴⁶ <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>

23 ⁴⁷ *Supra*, n. 45.

24 ⁴⁸ [https://www.washingtonpost.com/national/border-arrests-record-levels-
2021/2021/10/19/289dce64-3115-11ec-a880-a9d8c009a0b1_story.html](https://www.washingtonpost.com/national/border-arrests-record-levels-2021/2021/10/19/289dce64-3115-11ec-a880-a9d8c009a0b1_story.html)

25 ⁴⁹ Edmund DeMarche, Emma Colton, and Bill Melugin, "Mayorkas says border crisis
26 'unsustainable' and 'we're going to lose' in leaked audio," *Fox News* (Aug. 13, 2021),
<https://www.foxnews.com/politics/mayorkas-leaked-audio-border>.

131. Defendants are systematically violating the detention and removal requirements of Section 1225. Moreover, they are also ignoring the INA’s limitations on the authority to parole aliens into the United States. For the entire month of December 2020—President Trump’s last full month in office—the Border Patrol released into the interior only 17 aliens after arresting them crossing the Southwest border and serving them with a notice to appear.⁵⁰ By July 2021, that number had risen to over 60,000, and the total number of unlawful aliens that Border Patrol has released at the border since President Biden took office is over 225,000.⁵¹

132. Releasing this many arriving aliens into the interior necessarily means that the government is violating Congress’s commands in the INA. If immigration officials are simply releasing these aliens, they are violating the mandatory detention provisions in Section 1225. If they are, instead, paroling each of these individuals, they are not limiting the use of parole to “case-by-case bas[e]s” nor to situations presenting “urgent humanitarian reasons or significant public benefit.” 8 U.S.C. § 1182(d)(5)(A).

133. It is also unclear whether the numbers reported by CBP include the approximately “50,000 migrants who crossed the southern border illegally” and were released without even being served with a notice to appear.⁵² For these unlawful aliens, and likely many more, the government has instead served them with a “notice to report,” a document nowhere mentioned in statute or regulation, which apparently functions as

⁵⁰ <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics> (U.S. Border Patrol – Dispositions and Transfers tab).

⁵¹ The low number in December 2020 was not caused by COVID-19, as the number in January 2020 was only 76. *See* <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics-fy-2020> (U.S. Border Patrol – Dispositions and Transfers tab). In addition, because the total number of releases reported here likely does not include releases by other DHS components, the total is probably even larger.

⁵² <https://www.axios.com/migrant-release-no-court-date-ice-dhs-immigration-33d258ea-2419-418d-abe8-2a8b60e3c070.html>

1 “immigration enforcement by the honor system.”⁵³ Predictably, although the notice to
 2 report asks these aliens to turn themselves into an ICE office within 60 days, approximately
 3 80% fail to do so.⁵⁴

4 134. Border Patrol documents that were leaked to the press in October 2021 show
 5 that Defendants have released “[a]t least 160,000 illegal immigrants ... into the U.S. [since
 6 March 2021], often with little to no supervision.” The documents also show that
 7 Defendants have made “broad use of limited parole authorities to make more than 30,000
 8 eligible for work permits since August [2021]” and that since August 6, 2021, “the
 9 administration has released an additional 40,000 illegal immigrants on their own
 10 recognizance.”⁵⁵

11 135. Beyond Defendants’ failed honor-system policy, serving a notice to report
 12 has other significant consequences. Most importantly, once a charging document is served,
 13 an alien who fails to appear for his removal proceedings and instead absconds can be
 14 “ordered removed *in absentia*.” *Texas v. Biden*, __ F. Supp. 3d __, 2021 WL 3603341, at
 15 *4 (N.D. Tex. 2021). After this occurs, the alien can be quickly and easily removed
 16 whenever DHS locates him because he already has a final order of removal. By contrast,
 17 DHS cannot obtain a final order of removal for an alien who declines to report following
 18 issuance of a notice to report—again, because this document has no legal significance and
 19 is nowhere to be found in statute or regulation.

20 136. And, as further explained below, even aliens who are served with charging
 21 documents frequently do not appear for their removal proceedings. The Biden
 22

23 ⁵³ [https://www.nationalreview.com/corner/immigration-enforcement-on-the-honor-](https://www.nationalreview.com/corner/immigration-enforcement-on-the-honor-system)
 24 [system](https://www.nationalreview.com/corner/immigration-enforcement-on-the-honor-system)

24 ⁵⁴ *Id.*

25 ⁵⁵ Bill Melugin and Adam Shaw, “Leaked Border Patrol docs show mass release of illegal
 26 immigrants into US by Biden administration,” *Fox News*, August 13, 2021
 ([https://www.foxnews.com/politics/leaked-border-patrol-docs-release-immigrants-us-](https://www.foxnews.com/politics/leaked-border-patrol-docs-release-immigrants-us-biden-administration)
[biden-administration](https://www.foxnews.com/politics/leaked-border-patrol-docs-release-immigrants-us-biden-administration)).

Administration is thus giving tens-of-thousands of aliens per month, in essence, license to disappear into the interior of the United States.

137. DHS’s illegal use of its parole to promote open-border policies is consistent with multiple other violations of immigration mandates by the Biden Administration, as courts have repeatedly held. *See, e.g., Texas v. United States*, --- F. Supp. 3d ---, 2021 WL 2096669, at *38 (S.D. Tex. 2021) (finding the government in violation of the mandatory removal provision in 8 U.S.C. § 1231(a)(1)(A)); *Texas v. United States*, --- F. Supp. 3d ---, 2021 WL 3683913, at *42 (S.D. Tex. 2021) (finding the government in violation of the mandatory detention provisions in 8 U.S.C. §§ 1231(a)(2) & 1226(c)).⁵⁶

138. The Administration has even been found to have violated Section 1225(b)’s detention requirements, the same requirements Arizona claims the government is violating here. *See Texas v. Biden*, 10 F.4th 538, 552 (5th Cir. 2021) (denying a stay because “the Government has not come close to showing that it is likely to succeed in challenging” the conclusion that it violated 8 U.S.C. § 1225).⁵⁷

139. In those cases, the Biden Administration insisted it lacked the resources to comply with its duties. *See, e.g., Mot. for Stay at 4, Texas*, 2021 WL 3683913 (claiming that “ICE lacks the resources, including appropriated funds and bedspace, to detain all noncitizens potentially implicated by the injunction”).

140. Meanwhile, the Biden Administration is going out of its way to make its bad-faith protests about limited resources closer to reality. For example, the Administration has

⁵⁶ A panel of the Fifth Circuit stayed that preliminary injunction in part, but declined to stay the injunction insofar as it required the federal government not to release aliens subject to those two statutes. *See Texas v. United States*, --- F.4th ---, 2021 WL 4188102, at *3 (5th Cir. 2021).

⁵⁷ The Supreme Court also denied the government a stay. *See Biden v. Texas*, --- S. Ct. ---, 2021 WL 3732667 (Aug. 24, 2021)

1 asked Congress to reduce the number of immigration detention beds available to it.⁵⁸ It has
2 justified this request in part based on “recent decreases in interior enforcement activity.”⁵⁹

3 141. Similarly, the Administration has eliminated programs designed to reduce
4 the taxing of immigration resources and detention space. For example, on its first day in
5 office, the Biden Administration suspended the Migrant Protection Protocols. *Biden*, 2021
6 WL 3603341 at *7. This DHS program “returned some aliens temporarily to Mexico during
7 the pendency of their removal proceedings.” *Id.* at *1. As CBP’s statistics show, the
8 Migrant Protection Protocols were effective at eliminating the illegal release of arriving
9 aliens at the border because aliens remained in Mexico pending adjudication of their
10 asylum claims rather than occupying DHS detention capacity.⁶⁰ *See also Biden*, 2021 WL
11 3603341 at *5 (discussing an October 2019 assessment of the program, in which DHS
12 found this policy “effective[]” and an “indispensable tool in addressing the ongoing crisis
13 at the southern border”). Unlike the Biden Administration’s release policies, this program
14 is expressly authorized by the immigration laws, which provide that “[i]n the case of an
15 alien ... who is arriving on land (whether or not at a designated port of arrival) from a
16 foreign territory contiguous to the United States,” DHS “may return the alien to that
17 territory pending a [removal] proceeding.” 8 U.S.C. § 1225(b)(2)(C).

18 142. And President Biden has revoked Executive Orders expressly aimed at
19 eliminating “catch and release,” a colloquialism for the unlawful practices at issue here.
20 *See, e.g.,* Exec. Order No. 14,010, Creating a Comprehensive Regional Framework to
21

22 ⁵⁸ <https://apnews.com/article/joe-biden-health-immigration-coronavirus-pandemic-4d7427ff67d586a77487b7efec58e74d>; Congressional Research Service, *DHS Budget Request Analysis: FY2022*, at 13 (noting that DHS’s FY 2022 request “includes a \$78 million decrease, representing a reduction in support costs for 1,500 individuals in the average population of adult detainees from FY 2021 (reducing that average to 30,000)).

23 ⁵⁹ https://www.dhs.gov/sites/default/files/publications/u.s._immigration_and_customs_enforcement.pdf, at 43

24 ⁶⁰ <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics> (U.S. Border Patrol – Dispositions and Transfers tab); <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics-fy-2020> (same)

1 Address the Causes of Migration, 86 Fed. Reg. 8267, 8270 (Feb. 2, 2021) (revoking, among
 2 others, Executive Order 13767, which directed DHS to “terminat[e] ... the practice
 3 commonly known as ‘catch and release,’ whereby aliens are routinely released into the
 4 United States shortly after their apprehension for violations of immigration law,” and
 5 revoking the Presidential Memorandum of April 6, 2018, entitled “Ending ‘Catch and
 6 Release’ at the Border of the United States and Directing Other Enhancements to
 7 Immigration Enforcement”).

8 143. Finally, DHS has the power to “reprogram and transfer millions of dollars
 9 into, out of, and within its account used to fund its detention system.”⁶¹ The Biden
 10 Administration has, of course, not sought to do so.

11 **The Border Crisis Harms The State of Arizona**

12 144. States “bear[] many of the consequences of unlawful immigration.” *Arizona*
 13 *v. United States*, 567 U.S. 387, 397 (2012). They are, however, limited in their ability to
 14 “engage in” their own immigration “enforcement activities.” *Id.* at 410. Arizona thus relies
 15 significantly on the federal government to fulfill its duties under the immigration laws,
 16 particularly when Congress has created mandatory obligations or otherwise limited the
 17 federal government’s discretion.

18 145. As a border state, Arizona is acutely affected by modifications in federal
 19 policy regarding immigration. Arizona is required to expend its scarce resources when
 20 DHS fails to carry out its statutory duty to detain or remove aliens as provided by law. This
 21 includes resources expended by Arizona’s law enforcement community.

22 146. Arizona bears substantial costs of incarcerating unauthorized aliens, which
 23 amounts to tens of millions of dollars each year, as reflected by Arizona’s State Criminal
 24

25
 26 ⁶¹ *Immigration Detenting: Opportunities Exist to Improve Cost Estimates*, United States
 Government Accountability Office (April 2018), <https://www.gao.gov/assets/gao-18-343.pdf>.

1 Assistance Program (“SCAAP”) requests, the great majority of which are not reimbursed
2 by the federal government.

3 147. Defendants’ actions encourage a greater influx of unauthorized aliens into
4 Arizona, further increasing law enforcement costs in Arizona, including costs related to
5 coordinated activity between federal and state law enforcement agencies in the pursuit of
6 suspected unauthorized aliens.

7 148. Federal law also requires that emergency medical services be provided to
8 unlawfully present aliens. 42 C.F.R. § 440.255(c). Arizona emergency medical providers
9 deliver millions of dollars in medical services to unlawfully present aliens each year. These
10 costs are not fully reimbursed by the federal government or the aliens themselves. While
11 these costs are impactful in typical years, the COVID-19 pandemic makes the potential for
12 harm to Arizona through additional emergency healthcare costs to unauthorized aliens
13 exceptionally high. Defendants’ failure to detain or remove aliens, and Defendants’
14 unlawful use of parole to allow hundreds of thousands of aliens to enter the United States,
15 necessarily increases the number of unlawfully present aliens in Arizona who are subject
16 to receiving such medical care at the expense of Arizona’s healthcare institutions.

17 149. Defendants’ failures to remove or detain aliens, and Defendants’ unlawful
18 use of parole to allow hundreds of thousands of aliens to enter the United States, will
19 increase Arizona’s costs of providing emergency medical care to these individuals who
20 would otherwise be removed or detained. Additionally, Defendants’ actions encourage a
21 greater influx of unauthorized aliens into Arizona, further increasing the population of
22 unauthorized aliens for whom Arizona must bear the cost of emergency medical care.

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26

CLAIMS FOR RELIEF

COUNT I

BY ALL PLAINTIFFS EXCEPT AL REBLE

Violation of the Procurement Act

(Asserted Under 40 U.S.C. §§ 101 and 121,

5 U.S.C. §§ 702, 704, and 706, and as a non-statutory cause of action)

150. The allegations in the preceding paragraphs are reincorporated herein.

151. There is no nexus between Defendant's vaccine mandates and the Procurement Act's purpose of providing an "economical and efficient system" of procurement, 40 U.S.C. § 101 and in fact will have a deleterious effect on economy and efficiency by causing large-scale resignations of unvaccinated employees of federal contractors.

152. The purpose of the Procurement Act is *not* to impose a sweeping vaccination mandate on broad swaths of the American people or to use the federal procurement system as a proxy for implementing a nationwide public health mandate.

153. Defendants' attempt to impose sweeping controls on one-fourth of the economy via procurement is a question of deep economic and political significance, and Congress did not intend, nor does the Procurement Act allow, the President to exercise such sweeping authority under the guise of "procurement" in the absence of clear and explicit congressional authorization. Such arrogation of power violates the Major Questions Doctrine. This is because had Congress intended to give the Executive or its agencies discretion to decide which kinds of vaccinations for what malaises should be mandatory to which categories of people, then Congress would have legislated to that effect. After all, Congress does not upend or even "alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468

1 (2001). “It is especially unlikely that Congress would have delegated this decision to” the
2 Executive (especially the SFWTF), which lacks “expertise in crafting” sensible rules “of
3 this sort” in the absence of clear statutory guidance. *King*, 576 U.S. at 486 (citing *Gonzales*
4 *v. Oregon*, 546 U.S. 243, 266–67 (2006)). Nowhere do the federal procurement statutes
5 authorize the President to take over more than one-quarter of our national economy—and
6 to do so flying solo, without congressional authorization. And in the absence of such
7 authorization, the President certainly is not entitled, with the stroke of his own pen, to
8 displace state law or preclude state authority in an area of State police powers such as
9 public health.

10 154. Before the executive branch may regulate a major policy question of “great
11 and economic and political significance”—such as mandating vaccination for every
12 employee of every federal contractor in the country—Congress must “speak clearly” to
13 assign the authority to implement such a policy. *Ala. Ass’n of Realtors v. Dep’t of Health*
14 *& Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (citing *Util. Air Regul. Grp. v. E.P.A.*, 573
15 U.S. 302, 324 (2014)). When the federal government intrudes on a traditional state
16 function, it must clearly articulate the scope of the intrusion and the rationale behind its
17 unprecedented action, which it has not done here. *Gregory v. Ashcroft*, 501 U.S. 452, 463–
18 64 (1991).

19 155. Furthermore, the Contractor Mandate unequivocally and severely will
20 damage economy and efficiency because it will lead to a mass exodus of the employees of
21 federal contractors.

22 156. The reach of the Contractor Mandate is too broad to be consistent with the
23 Procurement Act. Even assuming that more vaccinated employees would promote
24 efficiency “by reducing absenteeism and decreasing labor costs,” as OMB said, 86 Fed.
25 Reg. 53,692, and even assuming that the Contractor Mandate would not cause widespread
26 resignations or dismissals of employees, the Contractor Mandate’s overbreadth makes

1 plain that its real purpose is not to achieve economy and efficiency, since it applies to
 2 employees who work remotely and employees who have the most fleeting interactions with
 3 employees working on federal contracts. Such breadth is unnecessary to prevent the spread
 4 of COVID-19, and so completely unconnected with any possible rationale relating to
 5 economy and efficiency.

6 157. Additionally, the Contractor Mandate's application to subcontractors has no
 7 direct connection to federal procurement and thus lies outside the Procurement Act.

8 158. And because even vaccinated individuals can spread COVID-19, the
 9 contractor vaccine mandate, insofar as it seeks to promote economy and efficiency by
 10 limiting the spread of the virus is not appropriately tailored to achieve its goals.

11 159. Defendants' mandate on sub-contractors has no direct connection to federal
 12 procurement and thus does not lie reasonably within the contemplation of the Procurement
 13 Act.

14 160. Defendants' vaccine mandates for contractors and subcontractors are
 15 therefore unlawful under the Procurement Act.

16 **COUNT II**

17 **BY ALL PLAINTIFFS EXCEPT AL REBLE**

18 **Violation of Procurement Policy Act**

19 **(Asserted Under 41 U.S.C. § 1707(a),**

20 **5 U.S.C. §§ 702, 704, and 706, and as a non-statutory cause of action)**

21 161. The allegations in the preceding paragraphs are reincorporated herein.

22 162. The SFWTF contractor FAQ, the FAR Deviation Clause, and the Second
 23 OMB Notice each qualify as a procurement "policy" and a procurement "procedure" under
 24 41 U.S.C. § 1707(a).

25 163. The SFWTF FAQ, the FAR Deviation Clause, and the Second OMB Notice
 26 relate to the expenditure of appropriated funds; have a significant effect beyond internal

1 operating procedures; and impose a significant cost and administrative impact on
2 contractors and offerors.

3 164. Defendants failed to publish for public comment in the Federal Register the
4 SFWTF Contractor FAQ and FAR Deviation Clause as required by 41 U.S.C. § 1707. Nor
5 did Defendants provide the required 60-day comment period before they became effective.
6 *Id.*

7 165. No authorized officer ever waived the requirements of the Procurement
8 Policy Act as applied to the SFWTF Contractor FAQ or the FAR Deviation Clause, or to
9 the vaccine mandates contained therein.

10 166. Defendants failed to comply with the requirements of the Procurement
11 Policy Act when issuing the SFWTF contractor FAQ and FAR Deviation Clause. The
12 SFWTF FAQ and the FAR Deviation Clause are therefore unlawful. Inasmuch as the
13 SFWTF FAQ and the FAR Deviation Clause are integral parts of the Contractor Mandate,
14 the entire mandate is unlawful and “may not take effect.” 41 U.S.C. § 1707. Furthermore,
15 the Second OMB Notice did not properly waive the notice-and-comment requirements of
16 41 U.S.C. § 1707 and therefore also “may not take effect.”

17 **COUNT III**

18 **BY ALL PLAINTIFFS**

19 **Violation of the EUA Statute**

20 **(Asserted Under 21 U.S.C. § 360bbb-3,**

21 **5 U.S.C. §§ 702, 704, and 706, and as a non-statutory cause of action)**

22 167. The allegations in the preceding paragraphs are reincorporated herein.

23 168. The vaccines available to federal contractors and employees to satisfy
24 Defendants’ vaccine mandates are only available under EUAs and are thus subject to the
25 requirements of 21 U.S.C. § 360bbb-3.
26

1 requirements, to the extent that any such power exists, is a police power reserved to the
2 States.

3 177. Defendants, through the Contractor Mandate, have exercised power far
4 beyond what was delegated to the federal government by Constitutional mandate or
5 congressional action.

6 178. Neither Article II of the U.S. Constitution nor any act of Congress authorizes
7 the federal agencies of the executive branch to implement the Contractor Mandate, which
8 to the extent any power exists to implement, traditionally falls under the police power left
9 to the states under the Tenth Amendment.

10 179. The Tenth Amendment explicitly preserves the “residuary and inviolable
11 sovereignty,” of the states. *Printz v. United States*, 521 U.S. 898, 918–19 (1997) (quoting
12 The Federalist No. 39, at 245 (J. Madison)).

13 180. By interfering with the traditional balance of power between the states and
14 the federal government and by acting pursuant to *ultra vires* federal action, Defendants
15 violated this “inviolable sovereignty,” and thus, the Tenth Amendment.

16 181. Therefore, the Contractor Mandate was adopted pursuant to an
17 unconstitutional exercise of authority by Defendants and must be invalidated.

18 **COUNT VI**

19 **BY ALL PLAINTIFFS EXCEPT AL REBLE**

20 **Violation of Anti-Commandeering Doctrine**

21 **(Asserted Under the Tenth Amendment of the United States Constitution,**
22 **5 U.S.C. § 702, and as a non-statutory cause of action)**

23 182. The allegations in the preceding paragraphs are reincorporated herein.

24 183. The Tenth Amendment provides that: “The powers not delegated to the
25 United States by the Constitution, nor prohibited by it to the States, are reserved to the
26 States respectively, or to the people.”

184. That amendment, along with basic structural features of the Constitution, deprives Congress of “the power to issue direct orders to the governments of the States.” *Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018). The Constitution thus does not tolerate the federal government dragooning State officers “into administering federal law.” *Printz v. United States*, 521 U.S. 898, 928 (1997)

185. The contractor vaccine mandate violates the anti-commandeering doctrine by requiring agencies and political subdivisions of the State to enforce the Contractor Mandate against its own employees—including, most egregiously, employees that have nothing to do with federal contracts or those who are working remotely—and against its subcontractors.

COUNT VII

BY ALL PLAINTIFFS EXCEPT AL REBLE

Non-Delegation and Violation of Separation of Powers

(Asserted Under Article I, Section 8 of the United States Constitution,
5 U.S.C. § 702, and as a non-statutory cause of action)

186. The allegations in the preceding paragraphs are reincorporated herein.

187. To the extent Defendants argue that the Contractor Mandate is authorized, such authorization would violate the Constitution’s nondelegation principles.

188. The Contractor Mandate exceeds congressional authority.

189. Pursuant to Article I, Section 1 of the United States Constitution, Congress is vested with all legislative powers, but Congress must act pursuant to the enumerated powers granted to it by Article I.

190. The Constitution does not empower Congress to require anyone who deals with the federal government to get vaccinated. It is not a “proper” exercise of Congress’s authority to mandate that every employee who touches a federal contract or comes in

1 contact with another employee who touches such a contract, has to be vaccinated because
2 the action here falls outside the scope of an Article I enumerated power.

3 191. Defendants, through the Contractor Mandate, have exercised power that
4 Congress does not possess under the Constitution and, therefore, cannot delegate to other
5 branches of the federal government.

6 **COUNT VIII**

7 **BY ALL PLAINTIFFS EXCEPT AL REBLE**

8 **Agency Action Not in Accordance with Law and in Excess of Authority, Arbitrary** 9 **and Capricious Agency Action, and Notice-and-Comment Failure in Violation of** 10 **the APA**

11 **(Contractor Mandate)**

12 **(Asserted Under the APA, 5 U.S.C. §§ 702, 704, and 706)**

13 192. The allegations in the preceding paragraphs are reincorporated herein.

14 193. Under the APA, a court must “hold unlawful and set aside agency action”
15 that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with
16 law” or “in excess of statutory ... authority, or limitations, or short of statutory right.” 5
17 U.S.C. § 706(2)(A), Pursuant to 5 U.S.C. § 553, agencies must publish “a notice of
18 proposed rulemaking in the Federal Register before promulgating a rule that has legal
19 force.” *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S.Ct.
20 2367, 2384 (2020); 5 U.S.C. § 553(b).

21 194. Pursuant to 48 C.F.R. 1.501, “significant revisions” to the FAR must be made
22 through notice-and-comment procedures. DOD, NASA, and the General Services
23 Administration must jointly conduct the notice-and-comment process. *Id.*

24 195. Instead of amending the FAR to implement this significant revision, the FAR
25 Council issued a purported “class deviation” without engaging in the notice-and-comment
26 process. *See*, 5 U.S.C. § 553.

1 196. Proper “class deviations” must fit within one of the discrete definitions set
2 forth in 48 C.F.R 1.401.

3 197. Here, however, the FAR Deviation Clause fits none of the definitions.

4 198. Instead, the FAR Deviation Clause is in the nature of a rule within the
5 meaning of the APA because it is “an agency statement of general or particular applicability
6 and future effect designed to implement, interpret, or prescribe law or policy.” 5 U.S.C. §
7 551(4).

8 199. The FAR Council violated the APA by failing to comply with the notice-and-
9 comment requirements for rulemaking.

10 200. The OMB Determination adopting the Task Force guidance is contrary to
11 law for at least four reasons.

12 201. First, the OMB Determination violates 41 U.S.C. § 1303(a) because it is a
13 government-wide procurement regulation, which only the FAR Council may issue.

14 202. EO 14042 apparently seeks to circumvent § 1303 by delegating the
15 President’s Procurement Act power to the OMB Director.

16 203. That attempt is unlawful because the President has no authority to issue
17 regulations under § 1303—only the FAR Council may issue government-wide
18 procurement regulations. *See, Centralizing Border Control Policy Under the Supervision*
19 *of the Attorney General*, 26 Op. OLC 22, 23 (2002) (“Congress may prescribe that a
20 particular executive function may be performed only by a designated official within the
21 Executive Branch, and not by the President.”).

22 204. Second, and relatedly, the OMB rule is contrary to law because the
23 Procurement Act does not grant the President the power to issue orders with the force or
24 effect of law. Congress authorized the President to “prescribe policies and directives that
25 the President considers necessary to carry out.” 40 U.S.C. § 121(a).
26

1 205. “[P]olicies and directives” describe the President’s power to direct the
2 exercise of procurement authority throughout the government. It does not authorize the
3 President to issue regulations himself.

4 206. Congress knows how to confer that power, as it authorized the GSA
5 Administrator, in the same section of the statute, to “prescribe regulations.” *Id.* § 121(c);
6 *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (“[W]hen the legislature
7 uses certain language in one part of the statute and different language in another, the court
8 assumes different meanings were intended.”).

9 207. And Congress has given the President the power to “prescribe regulations”
10 in other contexts, typically in the realm of foreign affairs and national defense. *See, e.g.*,
11 18 U.S.C. § 3496 (“The President is authorized to prescribe regulations governing the
12 manner of executing and returning commissions by consular officers.”); 32 U.S.C. § 110
13 (“The President shall prescribe regulations, and issue orders, necessary to organize,
14 discipline, and govern the National Guard.”).

15 208. Third, even if the Procurement Act authorized the President to issue orders
16 with the force or effect of law, it would not authorize approval of the SFWTF guidance.
17 The President appears to assume that the Procurement Act’s prefatory statement of purpose
18 authorizes him to issue any order that he believes promotes “an economical and efficient”
19 procurement system. 40 U.S.C. § 101.

20 209. In doing so, the President mistakenly construes the prefatory purpose
21 statement for a grant of authority. *D.C. v. Heller*, 554 U.S. 570, 578 (2008) (“[A]part from
22 [a] clarifying function, a prefatory clause does not limit or expand the scope of the operative
23 clause.”).

24 210. And even if the Procurement Act did authorize the President to issue binding
25 procurement orders solely because they may promote economy and efficiency, the OMB
26 Determination does not adequately do so. Providing the federal government with an

1 “economical and efficient system for” procurement is not a broad enough delegation to
2 impose a national-scale vaccine mandate that Congress has not separately authorized.

3 211. Further, the executive order is divorced from the practical needs of
4 procurement. In order to maintain a steady and predictable flow of goods and services—
5 and the advancement of science and technology through research and development—the
6 federal procurement system requires a stable and reliable workforce to timely perform
7 work required under tens of thousands of federal contracts and funding agreements. The
8 Contractor Mandate disrupts the stability and reliability of the contractor workforce by
9 forcing contractors to potentially fire unvaccinated and non-exempt covered employees,
10 many of whom are highly skilled and essential to the work.

11 212. Because the OMB Determination violates § 1303(a), seeks to exercise a
12 delegated power the President does not possess, and relies on a misreading of the
13 Procurement Act, it is contrary to law.

14 213. Pursuant to 48 C.F.R. 1.402, “[u]nless precluded by law, executive order, or
15 regulation, deviations from the FAR may be granted [] when necessary to meet the specific
16 needs and requirements of each agency.”

17 214. The Contractor Mandate and the OMB Determination were implemented
18 with no express findings, no explanation, and no consideration of the distinct and diverse
19 universe of federal agencies.

20 215. The Contractor Mandate and the OMB Determination impose universal and
21 uniform requirements without regard to the particularized needs and circumstances of each
22 federal agency and are therefore arbitrary and capricious in violation of the APA.
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COUNT IX

BY PLAINTIFFS BRNOVICH AND STATE OF ARIZONA ONLY

Agency Action Not in Accordance with Law and in Excess of Authority

(Defendants’ Parole Policies)

(Asserted Under 5 U.S.C. §§ 702, 704, and 706)

216. The allegations in the preceding paragraphs are reincorporated herein.

217. Under the APA, a court must “hold unlawful and set aside agency action” that is “not in accordance with law” or “in excess of statutory ... authority, or limitations, or short of statutory right.” See 5 U.S.C. § 706(2)(A), (C).

218. Defendants’ policy—whether codified in writing or not⁶²—of refusing to detain arriving aliens is contrary to the mandatory detention provisions in 8 U.S.C. § 1225(b)(1)–(2). And if Defendants claim to be exercising their parole authority, their policy is contrary to 8 U.S.C. § 1182 because that authority is neither being used “on a case-by-case basis” nor limited to situations presenting “urgent humanitarian reasons or significant public benefit.” 8 U.S.C. § 1182(d)(5)(A).

219. Nor does any regulation authorize Defendants’ policy. 8 C.F.R. § 212.5—the principal parole regulation—says nothing about the mass release of arriving aliens. And even if there were a regulation authorizing that conduct, it would be invalid given the plain text of Sections 1225(b) and 1182(d)(5)(A).

220. Moreover, for the reasons described in ¶¶ 123–24, Defendants are required at a minimum to issue charging documents to arriving aliens released into the interior and initiate removal proceedings, which the Biden Administration has failed to do at least 50,000 times since taking office.

⁶² An unwritten policy is subject to APA challenge just as a written policy is. *See Brotherhood of Locomotive Eng’rs v. Fed. R.R. Admin.*, 972 F.3d 83, 100 (D.C. Cir. 2020) (collecting authorities).

221. Defendants, therefore, have “gone beyond what Congress has permitted [them] to do.” *City of Arlington v. FCC*, 569 U.S. 290, 298 (2013). They have no “power to act unless and until Congress” gives it to them. *Nat. Res. Def. Council v. Nat’l Highway Traffic Safety Admin.*, 894 F.3d 95, 112 (2d Cir. 2018). And they are especially powerless to disregard express statutory commands. *League of Women Voters of the U.S. v. Newby*, 838 F.3d 1, 9–12 (D.C. Cir. 2016).

COUNT X

BY PLAINTIFFS BRNOVICH AND STATE OF ARIZONA ONLY

Arbitrary and Capricious Agency Action in Violation of the APA

(Defendants’ Parole Policies)

(Asserted Under 5 U.S.C. §§ 702, 704, and 706)

222. The allegations in the preceding paragraphs are reincorporated herein.

223. 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).

224. Defendants’ policy is arbitrary and capricious for several reasons, including because it ignores costs to the States, a “centrally relevant factor when deciding whether to regulate.” *Michigan v. EPA*, 576 U.S. 743, 752–53 (2015).

225. Defendants have also failed to explain their “extreme departure from prior practice,” *E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838, 858 (N.D. Cal. 2018), as required by the APA. *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020).

226. Moreover, Defendants have neither accounted for Arizona’s reliance interests nor considered lesser alternatives, each of which renders Defendants’ policy arbitrary and capricious. *Regents*, 140 S. Ct. at 1913.

227. Finally, insofar as Defendants claim their policy is justified by resource constraints, this rationale is pretextual given the Biden Administration’s calculated strategy

1 of reducing immigration resources and detention capacity. *See Dep't of Commerce v. New*
 2 *York*, 139 S. Ct. 2551, 2573–74 (2019).

3 **COUNT XI**

4 **BY PLAINTIFFS BRNOVICH AND STATE OF ARIZONA ONLY**

5 **Failure to Comply with Notice-and Comment Requirements in Violation of the** 6 **APA**

7 **(Defendants' Parole Policies)**

8 **(Asserted Under 5 U.S.C. §§ 702, 704, and 706)**

9 228. The allegations in the preceding paragraphs are reincorporated herein.

10 229. The APA requires notice of, and comment on, agency rules that “affect
 11 individual rights and obligations.” *Chrysler Corp. v. Brown*, 441 U.S. 281, 303 (1979); *see*
 12 5 U.S.C. § 553.

13 230. Even assuming Defendants have discretion to depart from the clear
 14 requirements of the INA with respect to arriving aliens, a sea change of this magnitude
 15 required notice and comment. *See Jean v. Nelson*, 711 F.2d 1455, 1483 (11th Cir. 1983)
 16 (holding that a significant new, binding government policy regarding immigration
 17 detention is subject to notice and comment).⁶³

18
 19
 20
 21
 22
 23
 24
 25 ⁶³ The Eleventh Circuit granted rehearing en banc of that decision and did not reach the
 26 merits of the APA claims. *See Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984) (en banc). But the reason the en banc court did not address the notice-and-comment argument is because the federal government conducted notice and comment in response to the panel opinion. *Id.* at 984.

COUNT XII

BY PLAINTIFFS BRNOVICH AND STATE OF ARIZONA ONLY

**Agency Action Unlawfully Withheld or Unreasonably Delayed in Violation of the
APA**

(Defendants' Parole Policies)

(Asserted Under 5 U.S.C. §§ 702, 704, and 706)

231. The allegations in the preceding paragraphs are reincorporated herein.

232. At a minimum, Defendants' near-blanket refusal to comply with the mandatory-detention provisions in Section 1225 and the limits on their parole authority in Section 1182, as well as their failure to serve charging documents and initiate removal proceedings as required by law qualifies as agency action unlawfully withheld or unreasonably delayed, in violation of 5 U.S.C. § 706(1).

COUNT XIII

BY PLAINTIFFS BRNOVICH AND STATE OF ARIZONA ONLY

Violation of the INA and the Constitution

(Defendants' Parole Policies)

(Asserted Under The INA, The Constitution,

5 U.S.C. § 702, and as a non-statutory cause of action)

233. The allegations in the preceding paragraphs are reincorporated herein.

234. The APA aside, the federal government cannot ignore federal statutes, and the Constitution—including the separation of powers doctrine and the Take Care Clause—provides a separate cause of action to challenge the conduct described in Count VII. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

PRAYER FOR RELIEF

Plaintiffs respectfully request that this Court enter judgment:

- 1 A. Declaring unconstitutional, pursuant to 28 U.S.C. § 2201, Defendants' COVID-19
2 vaccine mandates on federal contractors because they violate the Tenth Amendment
3 of the Constitution, principles of federalism, and the anti-commandeering doctrine;
- 4 B. Declaring unconstitutional, pursuant to 28 U.S.C. § 2201, Defendants' COVID-19
5 vaccine mandates on federal employees and contractors because the mandates violate
6 Due Process under the Fifth Amendment of the Constitution;
- 7 C. Declaring, pursuant to 28 U.S.C. § 2201, that the SFWTF contractor FAQ, FAR
8 Deviation Clause, and Second OMB Notice are unlawful under 41 U.S.C. § 1707(a);
- 9 D. Declaring, pursuant to 28 U.S.C. § 2201 that the Contractor Mandate is unlawful under
10 40 U.S.C. §§ 101 and 121;
- 11 E. Declaring, pursuant to 28 U.S.C. § 2201, that Defendants' requirements that federal
12 employees, contractors, and sub-contractors must accept administration of EUA
13 vaccines is unlawful under 21 U.S.C. § 360bbb-3;
- 14 F. Declaring unlawful the Biden Administration's policy of releasing arriving aliens
15 subject to mandatory detention, of paroling aliens without engaging in case-by-case
16 adjudication or abiding by the other limits on that authority, and of failing to serve
17 charging documents or initiate removal proceedings against plainly inadmissible aliens
18 who are being released into the interior of the United States, and declaring that these
19 policies were issued without observance of procedure required by law;
- 20 G. Enjoining Defendants from imposing COVID-19 vaccination requirements on federal
21 contractors, sub-contractors, and employees;
- 22 H. Enjoining Defendants from issuing any COVID-19 contractor vaccine requirements,
23 guidance, or contract clauses without first following the required notice-and-comment
24 procedures of the Procurement Policy Act and the APA;
- 25 I. Enjoining Defendants from releasing arriving aliens subject to mandatory detention,
26 of paroling aliens without engaging in case-by-case adjudication or abiding by the

1 other limits on that authority, and of failing to serve charging documents or initiate
2 removal proceedings against plainly inadmissible aliens who are being released into
3 the interior of the United States;

4 J. Awarding Plaintiffs costs of litigation, including reasonable attorneys' fees, under the
5 Equal Access to Justice Act, 28 U.S.C. § 2412; and

6 K. Granting any and all other relief as the Court finds appropriate.

7 RESPECTFULLY SUBMITTED this 20th of December, 2021.

8
9 **MARK BRNOVICH**
10 **ATTORNEY GENERAL**

11 By: /s/ James K. Rogers

12 Joseph A. Kanefield (No. 15838)

13 Brunn W. Roysden III (No. 28698)

14 Drew C. Ensign (No. 25463)

15 James K. Rogers (No. 27287)

16 *Attorneys for Plaintiffs Mark Brnovich and the*
17 *State of Arizona*

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19 By: /s/ Jack Wilenchik (with permission)

20 Jack Wilenchik (No. 029353)

21 *Attorney for Plaintiff Al Reble*

22 **NAPIER, BAILLIE, WILSON, BACON &**
23 **TALLONE, P.C.**

24 By: /s/ Cassidy Bacon (with permission)

25 Michael Napier (No. 002603)

26 Eric R. Wilson (No. 030053)

Cassidy L. Bacon (No. 031361)

Attorneys for Plaintiff PLEA and United Phoenix
Firefighters Association Local 493

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of December, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Arizona using the CM/ECF filing system. Counsel for all Defendants, who have appeared, are registered CM/ECF users and will be served by the CM/ECF system pursuant to the notice of electronic filing.

/s/ James K. Rogers
*Attorney for Plaintiffs Mark Brnovich, in his
official capacity as Attorney General of Arizona;
and the State of Arizona*

Exhibit 1

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 2

Safer Federal Workforce Task Force
COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors
Updated November 10, 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 January 18, 2022. 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

Frequently Asked Questions regarding this Guidance can be found here:

<https://www.saferfederalworkforce.gov/faq/contractors/>

All Task Force Guidance, FAQs, and additional information for Federal contractors and subcontractors can be found here:

<https://www.saferfederalworkforce.gov/contractors/>

Exhibit 3

 An official website of the United States government [Here's how you know](#) ▼



The .gov means it's official.

Federal government websites often end in .gov or .mil. Before sharing sensitive information, make sure you're on a federal government site.



The site is secure.

The **https://** ensures that you are connecting to the official website and that any information you provide is encrypted and transmitted securely.

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MENU

Federal Contractors

Vaccination and Safety Protocols **NEW**



Q: 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 in the Task Force's [Guidance for Federal Contractors and Subcontractors](#), 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.

NEW Q: Is there sample signage that a covered contractor can post at entrances to covered contractor workplaces providing information on safety protocols?

A: Yes. Covered contractors should post signage at entrances to covered contractor workplaces providing information on safety protocols for fully vaccinated and not fully vaccinated individuals and instruct individuals to follow the appropriate workplace safety protocols while at the covered contractor workplace. Sample signage for areas

of high or substantial levels of community transmission can be found [here](#). Sample signage for areas of low or moderate levels of community transmission can be found [here](#).

Q: 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.

Q: If a covered contractor can access a covered contractor employee's vaccination documentation, consistent with relevant privacy laws, does the covered contractor need to require the employee to show or provide documentation?

A: No. If, consistent with all relevant privacy laws, a covered contractor can access its employee's vaccination documentation directly, such as when the contractor previously requested the employee to provide vaccination documentation, has existing documentation from an employee vaccination program, or can access information through a State's immunization database, the covered contractor does not need to require its employee to show or provide documentation.

Q: 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.

Q: 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.

Q: Do all requests for accommodation need to be resolved by the covered contractor by the time that covered contractor employees begin work on a covered contract or at a covered workplace?

A: No. The covered contractor may still be reviewing requests for accommodation as of the time that covered contractor employees begin work on a covered contract or at a covered workplace. While accommodation requests are pending, the covered contractor must require a covered contractor employee with a pending accommodation request to follow workplace safety protocols for individuals who are not fully vaccinated as specified in the Task Force [Guidance for Federal Contractors and Subcontractors](#).

Q: When a covered contractor employee is not vaccinated because a covered contractor has provided the employee with an accommodation, what workplace safety protocols must the employee follow while in a Federal workplace?

A: The Federal agency will determine the workplace safety protocols that individuals who are not fully vaccinated must follow while in a Federal workplace. As noted in Task Force [guidance](#), in most circumstances individuals who are not fully vaccinated need to follow applicable masking, physical distancing, and testing protocols. However, there may be circumstances in which an agency determines that the nature of a covered contractor employee's job responsibilities at a Federal workplace, or the

location of their work at a Federal workplace, requires heightened safety protocols. Further, in some cases, an agency may determine that the nature of a covered contractor employee's responsibilities at a Federal workplace are such that no safety protocol other than vaccination is adequate—in that case, covered contractor employees who are not fully vaccinated would be unable to perform the requisite work at the Federal workplace. Such circumstances do not relieve the contractor from meeting all contractual requirements.

In order for agencies to assess appropriate safety measures for contractor employees in Federal workplaces, contractors subject to a contractual requirement for maintaining COVID-19 workplace safety protocols pursuant to Executive Order 14042 should generally notify their contracting officers when one of their employees who works onsite at a Federal workplace has received an exception to the requirement to be fully vaccinated.

Q: If a covered contractor employee requests an accommodation, and that accommodation is denied by the covered contractor, how long should the contractor employee be afforded to be fully vaccinated?

A: Covered contractors should establish a timeline for a covered contractor employee whose request for an accommodation is denied to promptly become fully vaccinated.

Q: Can a covered contractor grant a covered contractor employee an extension to the deadline for vaccination due to a documented medical necessity even if the contractor employee does not meet the legal definition of “disability” to be entitled to an accommodation?

A: Even in cases where the covered contractor employee does not meet the legal definition of “disability” to be entitled to an accommodation under the Rehabilitation Act, in some limited circumstances a covered contractor may grant the contractor employee an extension to a vaccination deadline based upon other medical considerations. For example, as explained in a separate FAQ, the CDC [recommends](#) delaying COVID-19 vaccination for at least 90 days after receiving monoclonal antibodies or convalescent plasma for COVID-19 treatment. Covered contractors that receive documented medical reasons that may not qualify as a disability but that necessitate a delay in vaccination can grant a covered contractor employee an extension, but covered contractors should specify, consistent with the nature of the medical necessity, by what date the contractor employee must be fully vaccinated.

Covered contractors should take note that an individual's medical need should be considered on a case-by-case basis, including any medical evaluation that addresses the individual's particular circumstance.

Q: What medical conditions does the CDC consider a contraindication to vaccination with COVID-19 vaccines?

A: The CDC considers a history of the following medical conditions to be [contraindications](#) to vaccination with COVID-19 vaccines:

- Severe allergic reaction (e.g., anaphylaxis) after a previous dose or to a component of the COVID-19 vaccine; and
- Immediate allergic reaction of any severity to a previous dose or known (diagnosed) allergy to a component of the COVID-19 vaccine.

If an individual is allergic to a component of one or more COVID-19 vaccines, that individual may not be allergic to components in all COVID-19 vaccines.

UPDATED Q: Are there circumstances that the CDC recommends delaying vaccination for COVID-19?

A: Yes. In the following circumstances, the CDC [recommends](#) delaying vaccination for COVID-19 for adults:

- Vaccination of people with known current SARS-CoV-2 infection should be delayed until the person has recovered from the acute illness (if the person had symptoms), and they have met [criteria](#) to discontinue isolation.
- People with a history of multisystem inflammatory syndrome in adults (MIS-A) should consider delaying vaccination until they have recovered from their illness and for 90 days after the date of diagnosis of MIS-A.
- Vaccination should be delayed for 90 days after receiving monoclonal antibodies or convalescent plasma for COVID-19 treatment.
- Whenever possible, mRNA COVID-19 vaccination doses (including the primary series and an additional dose) or the single dose Johnson and Johnson (J&J)/Janssen vaccine should be completed at least two weeks before initiation or resumption of immunosuppressive therapies, but timing of COVID-19 vaccination should take into consideration current or planned immunosuppressive therapies and optimization of both the patient's medical condition and response to vaccine. A

patient's clinical team is best positioned to determine the degree of immune compromise and appropriate timing of vaccination.

- People who develop myocarditis or pericarditis after a dose of an mRNA COVID-19 vaccine should delay receiving a subsequent dose. People who choose to receive a subsequent dose should wait until myocarditis has completely resolved.
- People who have a history of myocarditis or pericarditis unrelated to mRNA COVID-19 vaccination may receive any currently FDA-approved or FDA-authorized COVID-19 vaccine after the episode of myocarditis or pericarditis has completely resolved. This includes resolution of symptoms attributed to myocarditis or pericarditis, as well as no evidence of ongoing heart inflammation or sequelae as determined by the person's clinical team, which may include a cardiologist, and special testing to assess cardiac recovery.

This is not an exhaustive list of the circumstances in which clinical considerations may recommend in favor of delaying vaccination.

In circumstances in which delay pursuant to these clinical considerations means that a covered contractor employee is not fully vaccinated as of the vaccination requirement implementation date of January 18, 2022 or at the time that covered contractor employees begin work on a covered contract or at a covered workplace, the covered contractor should require that individual to become fully vaccinated promptly after clinical considerations no longer recommend delay.

During the period in which vaccination is delayed, a covered contractor employee must follow applicable masking and physical distancing protocols for not fully vaccinated individuals. There may be circumstances in which an agency determines that the nature of a covered contractor employee's job responsibilities at a Federal workplace, or the location of their work at a Federal workplace, requires heightened safety protocols. In some cases, an agency may determine that the nature of a covered contractor employee's responsibilities at a Federal workplace are such that no safety protocol other than vaccination is adequate—in that case, covered contractor employees who are not fully vaccinated would be unable to perform the requisite work at the Federal workplace. Such circumstances do not relieve the contractor from meeting all contractual requirements.

Q: Is vaccination for COVID-19 recommended for people who are trying to get pregnant or might become pregnant in the future?

A: Yes. The CDC has [stated](#) that COVID-19 vaccination is recommended for people who are trying to get pregnant now or might become pregnant in the future, as well as their partners.

Q: Does the CDC recommend that an individual delay vaccination due to pregnancy?

A: The CDC recommends COVID-19 vaccination for [people who are pregnant, breastfeeding, trying to become pregnant now, or trying to become pregnant in the future](#). The American College of Obstetricians and Gynecologists and Society for Maternal-Fetal Medicine [recommend](#) that all pregnant individuals be vaccinated against COVID-19. However, a covered contractor may allow a covered contractor employee to delay vaccination based on the contractor employee's particular medical circumstances, consistent with the covered contractor's process for reviewing delay requests.

Q: Can a covered contractor employee delay a COVID-19 vaccine because they have recently received another vaccine, such as the seasonal influenza vaccine?

A: COVID-19 vaccines may be administered without regard to timing of other vaccines. This includes simultaneous administration of COVID-19 vaccine and other vaccines on the same day.

Q: Can a covered contractor employee who participates in a clinical trial for a COVID-19 vaccine be considered fully vaccinated?

A: 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 2 weeks after they have completed the vaccine series. Currently, the U.S.-based AstraZeneca and Novavax COVID-19 vaccines meet these criteria. More information is available [here](#).

Q: Can a covered contractor employee who has received a heterologous primary vaccine series be considered fully vaccinated?

A: Individuals can be considered fully vaccinated ≥ 2 weeks after receipt of the last dose if they have received any combination of two doses of an FDA approved or

authorized or WHO emergency use listed COVID-19 two-dose series. For these purposes, the second dose in a two dose heterologous series must have been received no earlier than 17 days (21 days with a 4-day grace period) after the first dose.

Q: 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](#).

Q: 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 **UPDATED**

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Q: Does the Task Force [Guidance for Federal Contractors and Subcontractors](#) apply to outdoor contractor or subcontractor workplace locations?

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

Q: 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.

Q: 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.

UPDATED Q: Are the workplace safety protocols enumerated in the Task Force [Guidance for Federal Contractors and Subcontractors](#) the same irrespective of whether the work is performed at a covered contractor workplace or at a Federal workplace?

A: Yes. The Task Force 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 January 18, 2022, 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.

Q: How does the Task Force [Guidance for Federal Contractors and Subcontractors](#) 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 of Task Force Guidance for Federal Contractors

Q: By when must the requirements of [Executive Order 14042](#) 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.

Q: Must the requirements of [Executive Order 14042](#) 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.

Q: Does the Task Force [Guidance for Federal Contractors and Subcontractors](#) apply to small businesses?

A: Yes, the requirement to comply with the Task Force 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.

Q: What steps are being taken to promote consistent application of the

requirements of Executive Order 14042 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 the Task Force guidance for contractor and subcontractor workplace locations. Prior to rulemaking, the FAR Council has developed a clause and recommended 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.

Q: Can agencies incorporate vaccination requirements into contracts that are not covered by Executive Order 14042 (Ensuring Adequate COVID Safety Protocols for Contractors)?

A: Yes. Consistent with applicable law, agencies are strongly encouraged to incorporate a clause requiring compliance with the Task Force Guidance for Federal Contractors and Subcontractors into contracts that are not covered or directly addressed by Executive Order 14042 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 the Task Force Guidance into existing contracts and contract-like instruments prior to the date upon which the order requires inclusion of the clause.

Q: If the Safer Federal Workforce Task Force updates its Guidance for Federal Contractors and Subcontractors 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.

Q: 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.

Q: Do the workplace safety protocols in the Task Force [Guidance for Federal Contractors and Subcontractors](#) apply to covered contractor employees who perform work outside the United States?

A: No. The workplace safety protocols in the Task Force 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.

Q: If a corporate affiliate of a covered contractor does not otherwise qualify as a covered contractor, are the employees of that affiliate considered covered contractor employees subject to COVID-19 workplace safety protocols for Federal contractors established through Task Force Guidance?

A: For purposes of Task Force Guidance, business concerns, organizations, or individuals are affiliates of each other if, directly or indirectly: (i) either one controls or has the power to control the other; or (ii) a third party controls or has the power to control both.

Indicia of control include, but are not limited to, interlocking management or ownership, identity of interests among family members, shared facilities and equipment, or common use of employees.

An employee of a corporate affiliate of a covered contractor is considered a covered contractor employee if the employee performs work at a covered contractor workplace.

Q: If the workplace where a covered contractor's employees perform work on or in connection with a covered contract is a location owned, leased, or otherwise controlled by a corporate affiliate of a covered contractor that does not otherwise qualify as a covered contractor under Task Force guidance, is the workplace considered a covered contractor workplace?

A: For purposes of Task Force Guidance, business concerns, organizations, or individuals are affiliates of each other if, directly or indirectly: (i) either one controls or has the power to control the other; or (ii) a third party controls or has the power to control both.

Indicia of control include, but are not limited to, interlocking management or ownership, identity of interests among family members, shared facilities and equipment, or common use of employees.

If 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 at a workplace controlled by a corporate affiliate of that covered contractor, that workplace is considered a covered contractor workplace.

Compliance



Q: What steps should a covered contractor take if a covered contractor employee refuses to be vaccinated?

A: A covered contractor should determine the appropriate means of enforcement with respect to its employee at a covered contractor workplace who refuses to be vaccinated and has not been provided, or does not have a pending request for, an accommodation. This may include the covered contractor using its usual processes for enforcement of workplace policies, such as those addressed in the contractor's employee handbook or collective bargaining agreements.

One model for enforcement among employees with respect to non-compliance with a vaccination requirement is that being followed by Federal agencies. Guidance for Federal agencies is to utilize an enforcement policy that encourages compliance, including through a limited period of counseling and education, followed by additional disciplinary measures if necessary. Removal occurs only after continued noncompliance. Guidance for Federal agencies is that employees should not be placed on administrative leave while the agency is pursuing an adverse action for refusal to be vaccinated but will be required to follow safety protocols for employees who are not fully vaccinated when reporting to agency worksites.

During the time period of enforcement, the covered contractor must ensure the covered contractor employee at a covered contractor workplace is following all workplace safety protocols for individuals who are not fully vaccinated.

An agency may determine that a covered contractor employee who refuses to be vaccinated in accordance with a contractual requirement pursuant to EO 14042 will be denied entry to a Federal workplace, consistent with the agency's workplace safety

protocols.

Q: What steps should an agency take if a covered contractor does not comply with the requirements in the Task Force's [Guidance for Federal Contractors and Subcontractors](#)?

A: Covered contractors are expected to comply with all requirements set forth in their contract. Where covered contractors are working in good faith and encounter challenges with compliance with COVID-19 workplace safety protocols, the agency contracting officer should work with them to address these challenges. If a covered contractor is not taking steps to comply, significant actions, such as termination of the contract, should be taken.

Q: Does this clause apply in States or localities that seek to prohibit compliance with any of the workplace safety protocols set forth in the Task Force [Guidance for Federal Contractors and Subcontractors](#)?

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

Q: 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 the Task Force [Guidance for Federal Contractors and Subcontractors](#)?

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

Q: 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 [Executive Order 14042](#). When the clause is incorporated into a subcontract, a subcontractor is required to comply with the Task

Force [Guidance for Federal Contractors and Subcontractors](#) 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.

Q: May the prime contractor assume the subcontractor is complying with the clause?

A: Yes, unless the prime contractor has credible evidence otherwise.

Onsite Contractor Employees and Federal Workplace Safety Protocols

Q: Do fully vaccinated federal employees, onsite contractor employees, or visitors need to wear a mask or physically distance in federal buildings or on federal lands?

A: In areas of high or substantial transmission, fully vaccinated people need to wear a mask in public indoor settings, except for limited exceptions discussed in the [model safety principles issued by the Safer Federal Workforce Task Force on September 13, 2021](#).

In areas of low or moderate transmission, in most settings fully vaccinated people generally do not need to wear a mask or physically distance in federal buildings or on federal lands, except where called for by Federal, State, local, Tribal, or territorial laws, rules, and regulations.

Fully vaccinated individuals might choose to wear a mask regardless of the level of transmission for a variety of reasons.

CDC's guidance for mask-wearing and physical distancing in specific settings, including [healthcare](#), [transportation](#), [correctional and detention facilities](#), and [schools](#), should be followed as applicable. Agencies should communicate with employee representatives and satisfy any applicable collective bargaining obligations prior to implementing changes to policies regarding mask wearing and physical distancing.

Q: Do federal employees, onsite contractor employees, and visitors who are not fully vaccinated need to wear a mask or physically distance in federal buildings

or on federal lands?

A: Yes, people who are not fully vaccinated need to continue to wear a mask and physically distance consistent with CDC guidance and the requirements set forth in Executive Order 13991 and OMB Memorandum M-21-15 and the [model safety principles issued by the Safer Federal Workforce Task Force on September 13, 2021](#).

Q: Is symptom screening required before agency onsite employees, onsite contractor employees, and visitors come to the workplace?

A: If federal employees, onsite contractor employees, or visitors have symptoms consistent with COVID-19, they should not enter a federal workplace.

Federal employees and contractors working on site should regularly complete virtual or in-person health checks (ask about symptoms, close contact with someone with SARS-CoV-2 infection, and SARS-CoV-2 testing and diagnosis status). The agency will use this information to assess the individual's risk level and to determine whether the individual should be allowed entry to the workplace. Visitors may be asked to complete symptom screening before entering a federal facility. In developing these tools, agencies may adapt the one developed by [CDC](#).

Q: Are onsite contractor employees participating in an agency testing program limited in their ability to work onsite in between tests?

A: No, provided that they have met any applicable testing requirement and have not tested positive for COVID-19, onsite contractor employees participating in an agency testing program are not limited in their ability to work onsite between tests, although they must comply with all relevant safety protocols. However, if the onsite contractor employee has come into close contact with a person with COVID-19 during this time, they should follow CDC guidelines for testing and quarantine and not enter a worksite. Similarly, if they have symptoms consistent with COVID-19, they should not enter a worksite.

Agencies should develop a procedure for addressing circumstances in which onsite contractor employees miss their required test, which may include restricting the individual's access to worksites if they have not obtained a test within a period of time specified by the agency.

A contractor employee's failure to comply with testing requirements may result in that individual being denied entry to a federal building. Such circumstances do not relieve

the contractor from meeting all contractual requirements.

Q: Should agencies inquire regarding the vaccination status of onsite contractor employees?

A: Prior to contractor employees being subject to a contractual requirement to be vaccinated, agencies need to ask about the vaccination status of those onsite contractor employees. Onsite contractor employees must attest to the truthfulness of the response they provide. If an onsite contractor employee chooses not to provide a response, they will be treated as not fully vaccinated for the purpose of agency safety protocols. In requesting this information, agencies should comply with any applicable federal laws, including requirements under the Privacy Act and the Paperwork Reduction Act.

Q: Do onsite contractor employees need to provide proof of a negative COVID-19 test?

A: Prior to being subject to a contractual requirement to be vaccinated, onsite contractor employees who are not fully vaccinated or who decline to provide information about their vaccination status must provide proof of a negative COVID-19 test from no later than the previous 3 days prior to entry to a federal building. If a contractor employee is regularly tested pursuant to an agency testing program, then they do not need to provide proof of a negative COVID-19 test from no later than the previous 3 days prior to entry to a federal building unless required to by the agency testing program.

Q: How should an agency ask onsite contractor employees about their vaccination status?

A: Prior to being subject to a contractual requirement to be vaccinated, onsite contractor employees should be provided with the Certification of Vaccination form when they enter a federal building or federally controlled indoor worksite.

Unless an agency has an existing system of records notice that permits it to collect and maintain this information on its contractor employees, agencies will direct onsite contractor employees to complete the Certification of Vaccination form and keep it with them during their time on federal premises—they may be asked to show the form upon entry to a federal building or federally controlled indoor worksite and to a federal employee who oversees their work.

Prior to being subject to a contractual requirement to be vaccinated, onsite contractor employees who are not fully vaccinated (or who decline to disclose vaccination status) are required to show proof of a negative COVID-19 test result from within the previous 3 days before entry to a federal building or federally controlled indoor worksite. If a contractor employee is regularly tested pursuant to an agency testing program, then they do not need to provide proof of a negative COVID-19 test from no later than the previous 3 days prior to entry to a federal building unless required to by the agency testing program.

Agencies may email Certification of Vaccination form to contractor employees in advance of their time on-site or utilize a unique tool or application to share the form with contractor employees and enable them to easily complete it, but the agency will not maintain Certification of Vaccination forms from contractor employees at this time unless an agency has a system of records notice that covers its collection of this information from onsite contractor employees. Any such collection, storage, or maintenance of the attestation disclosure forms may implicate the Privacy Act and Paperwork Reduction Act.

Prior to having a contractual requirement for its employees to be vaccinated and if authorized and consistent with the terms of the contract, an agency may work with a contractor to facilitate compliance by its onsite employees with the agency's safety protocols, such as by having the company attest that all onsite contractor employees are fully vaccinated.

Q: What type of negative COVID-19 test result must an onsite contractor employee who is not fully vaccinated show documentation of in order to enter a federal building?

A: Agencies may determine what types of tests an onsite contractor employee who is not subject to a contractual requirement to be vaccinated can show documentation of in order to enter a federal building, provided that the tests are authorized by the U.S. Food and Drug Administration to detect current infection and produce a dated result.

Q: If an agency has a system of records notice that covers its collection of information on vaccination status from onsite contractor employees, can the agency collect that information?

A: Yes, if an agency has a system of records notice that covers its collection of the requisite information—as reflected in the [Certification of Vaccination form](#)—from onsite

contractor employees consistent with the Privacy Act, it may do so. The agency should ensure such a collection is also consistent with the Paperwork Reduction Act. The agency should provide a means for individuals to update their vaccination status over time.

Q: Are agencies required to establish different safety protocols for fully vaccinated and not fully vaccinated individuals?

A: Yes. [Fully vaccinated individuals](#) do not need to physically distance or have restrictions on their official travel (although they still must comply with any local requirements and relevant CDC guidance for fully vaccinated individuals while traveling). Fully vaccinated individuals in areas of substantial or high transmission (see the [CDC COVID-19 Data Tracker County View](#)) need to wear a mask in public indoor settings. Fully vaccinated individuals in areas of low or moderate transmission do not need to wear a mask, unless required by state or local regulations or laws.

Fully vaccinated individuals might choose to wear a mask regardless of the level of transmission for a variety of reasons.

Some onsite contractor employees may not yet be subject to a contractual requirement to be vaccinated. Individuals who are not fully vaccinated or who decline to provide information about their vaccination status must wear masks regardless of community transmission level, physically distance, and comply with travel requirements for not fully vaccinated individuals

Prior to being subject to a contractual requirement to be vaccinated, onsite contractor employees who are not fully vaccinated or who decline to provide information about their vaccination status must provide proof of a negative COVID-19 test from no later than the previous 3 days prior to entry to a federal building. If a contractor employee is regularly tested pursuant to an agency testing program, then they do not need to provide proof of a negative COVID-19 test from no later than the previous 3 days prior to entry to a federal building unless required to by the agency testing program.



For questions or comments, email the Safer Federal Workforce Task Force at SaferFederalWorkforce@gsa.gov



Exhibit 4

Dated: November 11, 2021.

Jessica L. Wechter,

Special Assistant to the President, Legal Services Corporation.

[FR Doc. 2021-25037 Filed 11-12-21; 11:15 am]

BILLING CODE 7050-01-P

OFFICE OF MANAGEMENT AND BUDGET

Determination of the Acting OMB Director Regarding the Revised Safer Federal Workforce Task Force Guidance for Federal Contractors and the Revised Economy & Efficiency Analysis

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

ACTION: Notice of determination; request for comments.

SUMMARY: The Director of the Office of Management and Budget (“OMB”) determines that compliance by Federal contractors and subcontractors with the COVID-19 workplace safety protocols detailed in the Safer Federal Workforce Task Force (“Safer Federal Workforce Task Force” or the “Task Force”) guidance (the “Guidance”) to be issued on November 10, 2021, will promote economy and efficiency in Federal contracting by reducing absenteeism and decreasing labor costs for contractors and subcontractors working on or in connection with a Federal Government contract, and the Director approves the guidance. This notice accordingly rescinds and supersedes the Director’s prior notice issued on September 24, 2021.

DATES: To be ensured consideration, comments must be received on or before December 16, 2021.

ADDRESSES: You should submit comments via the Federal eRulemaking Portal at <https://www.regulations.gov/>. Follow the instructions for submitting comments.

Please be advised OMB will post all comments received that relate to this notice of determination on <https://www.regulations.gov> without making any change to the comments or redacting any information.

All comments posted are available and accessible to the public. So, do not include any information you would not like to be made publicly available, such as Social Security numbers, personal addresses, telephone numbers, and email addresses. It is the responsibility of the commenter to safeguard personal information.

FOR FURTHER INFORMATION CONTACT: Cristin Dorgelo, 725 17th Street NW,

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: Section 2 of Executive Order 14042 (“Executive Order 14042” or the “order”) requires that, before Federal contractors and subcontractors must adhere to any guidance from the Task Force, the Director of OMB must approve such guidance and 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 Task Force’s COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors, scheduled for issuance on November 10, 2021 (reproduced in relevant part in Part I below), as well as the economy-and-efficiency analysis presented in Part II below, and exercising the President’s authority under the Federal Property and Administrative Services Act (see 3 U.S.C. 301) delegated to me through Executive Order 14042, I approve the Guidance and have determined that the COVID-19-workplace safety protocols detailed in that Guidance will promote economy and efficiency in Federal contracting if adhered to by Government contractors and subcontractors. This notice accordingly rescinds and supersedes my prior notice issued on September 24, 2021. 86 FR 53691.

This notice consists of the following sections. Part I consists of revised Guidance from the Task Force. Part II consists of an economic analysis of the COVID-19-workplace safety protocols detailed in such Guidance and the effect on economy and efficiency in Federal procurement. Part III addresses procedural requirements.

Part I. Safer Federal Workforce Task Force Guidance

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, 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 Task Force, provided that the Director of 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.

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.

A. Definitions

Community transmission—means the level of community transmission as set forth in the CDC COVID-19 Data Tracker County View.¹

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 FR 38816, 38887 (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.² 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.³

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.⁴

Mask—means any mask that is consistent with CDC recommendations.⁵ 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.

B. Requirements

Covered contractors are responsible for ensuring that covered contractor employees comply with the workplace

³ CDC, Interim Clinical Considerations for Use of COVID-19 Vaccines, <https://www.cdc.gov/vaccines/covid-19/clinical-considerations/covid-19-vaccines-us.html>.

⁴ CDC, People who received COVID-19 vaccine as part of a clinical trial in the United States, <https://www.cdc.gov/vaccines/covid-19/clinical-considerations/covid-19-vaccines-us.html#vaccinated-part-clinical-trial>.

⁵ CDC, Types of Masks and Respirators (Sept. 23, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/types-of-masks.html>.

¹ CDC, COVID-19 Integrated County View, <https://covid.cdc.gov/covid-data-tracker/#county-view>.

² CDC, When You’ve Been Fully Vaccinated (last updated Oct. 15, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated.html>.

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 January 18, 2022. 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.⁶ 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.⁷ 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

Frequently Asked Questions regarding this Guidance can be found here: <https://www.saferfederalworkforce.gov/faq/contractors/>.

All Task Force Guidance, FAQs, and additional information for Federal contractors and subcontractors can be found here: <https://www.saferfederalworkforce.gov/contractors/>.

Part II. Economy-and-Efficiency Analysis

The following analysis outlines the ways in which the Guidance set forth in Part I will promote economy and efficiency in Federal procurement.

The Guidance requires vaccination of covered contractor employees, except in limited circumstances where an employee is legally entitled to an accommodation. It imposes requirements related to masking and physical distancing in covered contractor workplaces. And it requires covered contractors to designate a person or persons to coordinate COVID-19 workplace safety efforts at covered contractor workplaces.

The Guidance is issued pursuant to Executive Order 14042, which the President promulgated, in part, under the Federal Property and Administrative Services Act (FPASA). The FPASA, 40 U.S.C. 101 *et seq.* provides that the President “may prescribe policies and directives that the President considers necessary to carry out” the Act, which

includes a purpose of “provid[ing] the Federal Government with an economical and efficient system for . . . [p]rocuring and supplying property and nonpersonal services.” 40 U.S.C. 101(1), 121(a).

This analysis of the economic impact of the Guidance is based on OMB’s subject matter expertise and OMB’s review and analysis of the academic literature on interventions to prevent the spread of COVID-19.

As explained below, the overall effect of enacting these protocols for Federal contractors and subcontractors will be to decrease the spread of COVID-19, which will in turn decrease worker absence, save labor costs on net, and thereby improve efficiency in Federal contracting. Indeed, numerous private companies have undertaken vaccine mandates that were announced or take effect before the Federal Government’s mandate on Federal contractors takes effect and private companies have also imposed masking and physical distancing requirements at their workplaces. Just as these private businesses have concluded that vaccination, masking, and physical distancing requirements will make their operations more efficient and competitive in the market, we have concluded that the Guidance will realize economy and efficiency in Federal contracting.

A. COVID-19 Infection Imposes Significant Costs on Contractors and the Federal Government

The primary goal of the safety protocols is to reduce the spread of COVID-19 among contractor employees. COVID-19 is a highly communicable disease that tends to spread between people who are indoors, sharing space, and in close quarters—conditions common in typical workplaces.⁸ There is also evidence that COVID-19 can be spread by asymptomatic individuals. One study estimated that more than half of transmissions come from individuals who do not have symptoms (Johansson et al., 2021). Individuals who do not have symptoms are likely to continue to report to work and therefore may spread the disease to their coworkers. As such, safety protocols applied even in the absence of observable illness among employees can meaningfully reduce the spread of COVID-19. Moreover, because employees working at a single workplace will regularly come into contact, safety protocols applied to all

⁶ OSHA, Recommended Practices for Safety and Health Programs, <https://www.osha.gov/safety-management>.

⁷ CDC, COVID-19 Integrated County View, <https://covid.cdc.gov/covid-data-tracker/#county-view>.

⁸ See U.S. Environmental Protection Agency, Indoor Air and Coronavirus (COVID-19), <https://www.epa.gov/coronavirus/indoor-air-and-coronavirus-covid-19>.

employees in a workplace can meaningfully reduce the spread of COVID-19.

The CDC recommends that individuals remain isolated for ten days after symptom onset, which would mean workers who catch the virus can miss up to eight days of work.⁹ Furthermore, those individuals could infect other workers, who would also miss eight days of work. Additional exposed workers would likely need to quarantine and would also miss work.

Workers unable to work generate substantial costs on employers. An imperfect proxy for the cost to an employer of a foregone hour of work is the worker's hourly pay. We calculate the average hourly wage for a Federal contractor to be approximately \$31.51, making the average pay for eight days \$2,016.¹⁰ Wages are higher in Washington, DC, Maryland and Virginia, where many contractors are located, ranging from \$33.36 in Virginia to \$42.83 in Washington, DC, making the average pay for eight days in those areas \$2,135 and \$2,741, respectively. Such costs are substantial and, if borne by contractors, such costs would be expected to be passed on to the Federal Government, either in direct cost or lower quality, including delays.

Fortunately, vaccines, masks, and physical distancing have all been proven to reduce the prevalence of COVID-19 infection, and vaccines have been shown to greatly reduce the severity of breakthrough infections. And vaccines, masking, and physical distancing are all low-cost interventions.

B. COVID-19 Vaccination Reduces Net Costs

Requiring any workers who have not yet done so to receive a COVID-19 vaccine would generate meaningful efficiency gains for Federal contractors. COVID-19 vaccines provide strong and persistent protection against infection, illness, and hospitalization (see Tenforde, et al., 2021 and references). Reducing the number of infected people mechanically reduces transmission, and some preliminary evidence also indicates that vaccines also reduce transmission by people who contract "breakthrough" infections (Ke, et al.,

2021). The vaccine requirement in the Guidance buttresses other workplace-specific safety protocols and provides protection against infection outside of the workplace, increasing the likelihood that the full set of protocols will prevent infection and illness and preserve the productivity of people working on or in connection with Federal contracts.¹¹

Because vaccines are widely available for free, the cost of implementing a vaccine mandate is largely limited to administrative costs associated with distributing information about the mandate and tracking employees' vaccination status. Such costs are likely to be small.¹² Other costs of vaccination include employees quitting and using sick time when experiencing side effects from vaccination. However, based on experiences shared by private companies detailed below, we expect few employees to quit because of the vaccine mandate, and side effects lead to significantly less sick leave than COVID-19 infection. And unlike COVID-19 infection, side effects are not contagious to other employees.

Consistent with the view that COVID-19 vaccines promote economy and efficiency, numerous private companies have undertaken vaccine mandates that were announced or take effect before the Federal Government's mandate on Federal contractors takes effect. Led originally by companies like United Airlines and Tyson Foods, a wide and growing swath of private companies have determined that vaccine mandates are net beneficial to their companies.¹³

While anecdotal reports suggest that vaccine mandates may lead some workers to quit their jobs rather than comply, which could create some cost associated with replacing them, we know of no systematic evidence that this has been a widespread phenomenon, or that it would be likely

to occur among employees of Federal contractors. In fact, the experience of private companies is to the contrary. For example, United Airlines reported in October 2021 that 99.7 percent of the airline's workforce complied with the vaccination requirements, Tyson Foods reported more than 96 percent of its workforce is now vaccinated, and healthcare providers such as California's Kaiser Permanente reported placing only two percent of employees on administrative leave for failing to comply with vaccine requirements.¹⁴ And finally, even if some non-negligible number of workers were to quit rather than comply with a vaccine mandate, the cost of replacing those workers would be a one-time cost, while the benefits of increased vaccination (including among replacement workers, who would be vaccinated) would be long-lasting.

C. Masking and Physical Distancing Reduces Net Costs

COVID-19 is generally thought to be spread by respiratory particles and aerosols.¹⁵ Masking and physical distancing have proven effective in reducing the spread of COVID-19. One study found that communities with the greatest physical distancing had a 31 percent lower risk of COVID-19 than communities with poor physical distancing, and that communities where individuals reported always using face masks outside of the home, even with poor physical distancing, had 62 percent reduced risk of COVID-19 compared to communities where face masks were never worn (Kwon et al., 2020). Another study found that full population masking reduces transmission of the virus by 25.8 percent (Leech et al., 2021). Similarly, a study of masking and ventilation improvements in Georgia schools found that COVID-19 incidence was 37 percent lower in schools where masks were required and 39 percent lower in schools with improved ventilation

¹¹ Note that the other safety protocols discussed above will still be appropriate even after the vaccine requirement is implemented, e.g., to protect against breakthrough infections and emerging variants of the virus, or for the benefit of workers who may be unable to receive a vaccine for medical or religious reasons, until such time as public health conditions improve and CDC guidance related to masking and physical distancing changes.

¹² For example, the Occupational Safety and Health Administration estimated that providing information would take ten minutes per firm (84 FR 61476 cl. 3) and that tracking employees' vaccination status would take five minutes per employee (id. 84 FR 61488 cl. 2).

¹³ The Major Companies Requiring Workers to Get COVID Vaccines, *Fortune* (Aug. 23, 2021), <https://fortune.com/2021/08/23/companies-requiring-vaccines-workers-vaccination-mandatory/>. See greater discussion on page 12 of the White House Vaccination Requirements Report (Oct. 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/10/Vaccination-Requirements-Report.pdf>.

¹⁴ COVID Vaccine Some 5 Percent of Unvaccinated Adults Have Quit Their Jobs Over a Mandate Survey Shows CNBC (Oct. 28, 2021), <https://www.cnbc.com/2021/10/28/covid-vaccine-some-5percent-of-unvaccinated-adults-have-quit-their-jobs-over-a-mandate-survey-shows.html>; How Tyson Foods Got 60,500 Workers to Get the Coronavirus Vaccine Quickly, *N.Y. Times* (Nov. 4, 2021), <https://www.nytimes.com/2021/11/04/business/tyson-vaccine-mandate.html>. Vaccine mandates stoked fears of labor shortages. But hospitals say they're working, *Washington Post* (Oct. 16, 2021), <https://www.washingtonpost.com/health/2021/10/16/hospital-covid-vaccine-mandate/>.

¹⁵ CDC, Prevent Getting Sick: How COVID Spreads (last updated July 14, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>.

⁹ See Centers for Disease Control and Prevention, Recommendations for Ending Isolation (last updated Sept. 14, 2021), https://www.cdc.gov/coronavirus/2019-ncov/hcp/duration-isolation.html#anchor_1631308518116.

¹⁰ This calculation uses the distribution of NAICS codes in the contractor population and average salary of those NAICS codes from the Occupational Employment and Wage Statistics program at the Bureau of Labor Statistics, <https://www.bls.gov/oes/>.

(Gettings et al., 2021). This research shows that masking, physical distancing, and improved ventilation will all reduce the likelihood that COVID-19 spreads among the contractor workforce. These preventative measures will decrease worker absence and allow contract workers to continue their work without the need to take time off to recover from COVID-19. Thus, mask wearing and physical distancing are likely to reduce the spread of COVID-19 within contractor workplaces, reducing worker absence and maintaining productivity.

The costs of masking and physical distancing are minimal. For example, contractors may have to pay for masks for their employees. Masks can cost as little as \$0.13 per mask and would need to be provided only to employees who do not already have their own masks.¹⁶ Physical distancing can often be done without additional costs. Numerous private companies like Walmart require all employees to wear masks and physically distance, embodying a judgment that these mitigation measures promote economy and efficiency in the workplace.¹⁷

D. Conclusion

For these reasons, it is OMB's expert opinion that the Guidance will promote economy and efficiency in Federal Government procurement. All plans for economic recovery and growth are predicated on the need to prevent additional spread of the COVID-19 virus and facilitate vaccinations, and no employer, whether public or private, can expect to see increased productivity or economic efficiency without a healthy workforce. The safety protocols that are set forth by the Safer Federal Workforce Task Force are meant to ensure that COVID-19 does not easily spread within the workplace, so that Federal contractor employees can continue to be productive.

E. References

- Gettings, Jenna, Michaila Czarnik, Elana Morris et al. 2021. "Mask Use and Ventilation Improvements to Reduce COVID-19 Incidence in Elementary Schools—Georgia, November 16–December 11, 2020." *Morbidity and Mortality Weekly Report* 70(21): 779–784.
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Transmission from People Without COVID-19 Symptoms." *JAMA Network Open* 4(1): e2035057.

- Ke, Ruian, Pamela Martinez, Rebecca Lee Smith, et al. 2021. "Longitudinal analysis of SARS-CoV-2 vaccine breakthrough infections reveal limited infectious virus shedding and restricted tissue distribution." Preprint, <https://www.medrxiv.org/content/10.1101/2021.08.30.21262701v1>.
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- Leech, Gavin, Charlie Rogers-Smith, Jonas B. Sandbrink et al. 2021. "Mass mask-wearing notably reduces COVID-19 transmission." *medRxiv*.
- Tenforde, Mark W., Wesley H. Self, Eric A. Naioti, et al. 2021. "Sustained Effectiveness of Pfizer-BioNTech and Moderna Vaccines Against COVID-19 Associated Hospitalizations Among Adults—United States, March–July 2021." *Morbidity and Mortality Weekly Report* 70(34): 1156–1162.

Part III. Procedural Requirements

A. Public Contract Requirements Under Public Law 111-350

I am making my determination pursuant to a Presidential delegation under 3 U.S.C. 301. That determination is therefore not subject to the procedural requirements of Public Law 111-350, codified at 41 U.S.C. 1707. *See NRDC, Inc. v. U.S. Dep't of State*, 658 F. Supp. 2d 105, 109 & n.5, 111 (D.D.C. 2009) (when an agency acts pursuant to 3 U.S.C. 301, the agency "stands in the President's shoes" and that action is "not reviewable under the APA"); *Detroit Int'l Bridge Co. v. Canada*, 189 F. Supp. 3d 85, 100 (D.D.C. 2016) ("Several cases have concluded that an agency's action on behalf of the President, involving discretionary authority committed to the President, is 'presidential' and unreviewable under the APA."). To the extent that 41 U.S.C. 1707 is applicable to my determination set forth in this document, there are urgent and compelling circumstances that justify departing from the notice-and-comment and delayed-effective-date requirements in 41 U.S.C. 1707.

The notice-and-comment and delayed-effective-date requirements of subsections (a) and (b) of 41 U.S.C. 1707 "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). This statutory exception is implemented in FAR section 1.501-3, which provides that "[a]dvance comments need not be solicited when urgent and compelling

circumstances make solicitation impracticable prior to the effective date of the coverage, such as when a new statute must be implemented in a relative short period of time."

Urgent and compelling circumstances justify waiving the notice-and-comment requirement for this notice. This is a once in a generation pandemic, which has already resulted in more than 46,405,253 cases of COVID-19, hospitalized more than 3,283,045 Americans, and taken more than 752,196 American lives. The pandemic continues to present an imminent threat to the health and safety of the American people, including due to the emergence of the B.1.617.2 (Delta) variant, which is a variant of concern that spreads more easily than previously discovered variants of SARS-CoV-2. This threat reaches all Americans, including those working for Federal contractors and subcontractors. The Guidance directly addresses this imminent threat by requiring vaccination. The CDC has determined that the best way to slow the spread of COVID-19, including preventing infection by the Delta variant, is for individuals to get vaccinated. According to the CDC, vaccinated individuals are 5 times less likely to be infected and 10 times less likely to experience hospitalization or death due to COVID-19 than unvaccinated individuals. The Guidance thus promotes the most important, urgent public health measure to slow the spread of COVID-19 among Federal contractors and subcontractors—which is critical to avoiding worker absence and unnecessary labor costs that could hinder the efficiency of federal contracting.

The minimum delay required by subsections (a) and (b) of 41 U.S.C. 1707 is also incompatible with a fundamental purpose of issuing this determination. The Guidance set forth in Part I changes the vaccination deadline for Federal contractors from December 8, 2021, to January 18, 2022. If the determination implementing this change were required to comply with subsections (a) and (b) of 41 U.S.C. 1707 (requiring 30 days for comment, and another 30 days to become effective), the earliest possible effective date for this determination would be January 9, 2022. But waiting until January for this determination to become effective would prevent the change in deadlines from having practical effect, as Federal contractors and subcontractors would still be legally obligated to meet the December 8, 2021, vaccination deadline until this determination became effective. That alone establishes urgent and compelling

¹⁶ Mask costs were taken from a search of Amazon and would likely be lower for a contractor who would be able to order in bulk.

¹⁷ The Major Companies Requiring Workers to Get COVID Vaccines, *Fortune* (Aug. 23, 2021), <https://fortune.com/2021/08/23/companies-requiring-vaccines-workers-vaccination-mandatory/>.

circumstances to warrant making this determination immediately effective.

Additionally, even if there were no prior deadline that contractors and subcontractors were obligated to meet, urgent and compelling circumstances would still exist because the broader economy-and-efficiency purpose of this determination would be severely undermined by the minimum delay required under subsections (a) and (b) of 41 U.S.C. 1707. As an initial matter, such a delay would interfere with an important purpose of the Task Force Guidance—aligning the vaccination deadline for Federal contractors with the vaccination deadline for private companies under recent regulatory actions. In particular, the Occupational Safety and Health Administration (OSHA) issued an Emergency Temporary Standard (ETS) requiring employers with 100 or more employees to ensure their workers are fully vaccinated or tested for COVID-19 on at least a weekly basis, and the Centers for Medicare & Medicaid Services (CMS) issued a rule requiring health care workers at facilities participating in Medicare and Medicaid to be fully vaccinated. 86 FR 61402; 86 FR 61555. Those rules set a deadline of January 4, 2022, for employees to receive their final COVID-19 vaccination dose—*i.e.*, January 18, 2022, for a fully vaccinated covered workforce. The Task Force’s decision to set the same deadline for Federal contractors and subcontractors will make it easier for private employers to administer successful vaccination policies across their workforce and will allow Federal contractors and subcontractors to implement their requirements on the same timeline as other employers in their industries.¹⁸ For example, a large employer covered by the ETS may have some but not all of their workplaces covered by the vaccination requirement for Federal contractors and subcontractors. For such an employer, that would mean some workplaces are governed by the ETS and some by the Task Force Guidance. Or, an employer may have some workers covered by the CMS rule, and other workers covered by the vaccination requirement for Federal contractors and subcontractors. For employers in these circumstances, having the same

deadline across all requirements will promote consistency and administrability of public health standards, and eliminate potential confusion and frustration that disparate deadlines could produce. It could also avoid needless costs in having multiple systems of records and internal accountability established for different deadlines. Ensuring that private employers do not need to meet different compliance dates across different Federal vaccination policies is thus important to the success of their vaccination programs and to promoting economy and efficiency in Federal procurement.

Moreover, in order for such alignment to be effective, employers require regulatory certainty in the near-term. An immediately effective notice gives contractors and subcontractors a clear understanding not only of their responsibilities under Federal law but also the deadline for complying with those responsibilities. By contrast, absent an immediately effective determination of that deadline, such employers would have to wait until comments are received and a determination is finalized to know with certainty the deadline for ensuring that their covered employees are fully vaccinated. That would cause much of the administrability problems and frustration that alignment is intended to avoid, undermining the critical efforts to curb the spread of COVID-19 among Federal contractors and subcontractors and preventing alignment of the relevant deadlines.

Compliance with the procedural requirements of 41 U.S.C. 1707(a) and 1707(b) would fundamentally undermine the effort to provide private companies with aligned deadlines and regulatory certainty, as outlined above. As noted above, under those requirements the earliest effective date for this determination would be January 9, 2022. Simply put, that is far too late to provide regulatory certainty for Federal contractors, as that is *past* the date that covered employees of covered Federal contractors must receive their final COVID-19 vaccination dose (January 4, 2022), and it is less than ten days before the deadline for covered contractor employees to be fully vaccinated (January 18, 2022). Thus, compliance with the procedural requirements of 41 U.S.C. 1707(a) and 1707(b) would undermine the success of the Federal Government’s vaccination efforts and economy and efficiency in Federal procurement.

Thus, to the extent that it is found that my determination is subject to the procedural requirements in 41 U.S.C.

1707, I have concluded that urgent and compelling circumstances exist under section 1707(d). The requirements of this notice are accordingly effective immediately upon filing with the **Federal Register**. Additionally, to the extent that it is found that my determination is subject to the procedural requirements in 41 U.S.C. 1707, this determination is temporary, consistent with section 1707(e). And regardless of whether this determination is subject to the procedural requirements in 41 U.S.C. 1707, I am soliciting comment on all subjects of this determination, which would also be consistent with sections 1707(c) and (e), if those provisions applied.

B. Administrative Procedure Act

My determination is not subject to the procedural rulemaking requirements of the Administrative Procedure Act (APA).

As noted above, this determination is pursuant to a delegation from the President under 3 U.S.C. 301. When any agency acts pursuant to such a delegation, the agency “stands in the President’s shoes” and its actions “cannot be subject to judicial review under the APA.” *NRDC v. State*, 658 F. Supp. 2d at 109 & n.5, 111.

Even if the APA were applicable, the notice-and-comment requirements of 5 U.S.C. 553 exempt “a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.” 5 U.S.C. 553(a)(2). This determination relates to procurement and contractors—*i.e.*, “contracts” under section 553(a)(2)—and is thus exempt from the APA’s notice-and-comment requirements.

Moreover, even if the notice-and-comment requirements of 5 U.S.C. 553 were applicable, the good-cause exception is satisfied here. 5 U.S.C. 553(b)(3)(B) waives notice-and-comment requirements if “the agency for good cause finds” that compliance would be “impracticable, unnecessary, or contrary to the public interest.” Notice and comment is impracticable in situations where delay would result in harm. *See, e.g., Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012). Applicable procedures are “[i]mpracticable” if “the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rule-making proceedings” or negotiated rulemaking. *N.J., Dep’t of Envtl. Prot. v. EPA*, 626 F.2d 1038, 1046 (D.C. Cir. 1980) (quoting S. Doc. No. 248, at 200 (1946)); *see also United States v. Cotton*, 760 F. Supp. 2d 116, 129 (D.D.C. 2011). Such “good cause” would also exempt an agency from the delayed effective

¹⁸ Unlike the vaccination deadline for covered employees of Federal contractors, the vaccination deadline for Federal employees under Executive Order 14043 does not require alignment with private companies, because there is no subset of private companies also subject to Executive Order 14043. Thus, the exigencies of combatting the global pandemic require maintaining the current vaccination deadline for Federal employees of November 22, 2021.

date under 5 U.S.C. 553(d). For the reasons explained above, notice-and-comment rulemaking and a delayed effective date would be impracticable, because the resulting delay in the effective date would not provide Federal contractors and subcontractors sufficient time to ensure compliance in time for the January 18, 2022, vaccination deadline.

* * * * *

Shalanda Young,

Acting Director.

[FR Doc. 2021-24949 Filed 11-10-21; 4:15 pm]

BILLING CODE 3110-01-P

NATIONAL CREDIT UNION ADMINISTRATION

Sunshine Act Meetings

TIME AND DATE: 10:00 a.m., Thursday, November 18, 2021.

PLACE: Due to the COVID-19 Pandemic, the meeting will be open to the public via live webcast only. Visit the agency's homepage (www.ncua.gov) and access the provided webcast link.

STATUS: This meeting will be open to the public.

MATTERS TO BE CONSIDERED:

1. Board Briefing, Share Insurance Quarterly Report.
2. NCUA's 2022-2026 Strategic Plan.
3. NCUA Rules and Regulations, Service Facilities.
4. Board Briefing, NCUA's Modernized Examination Tools.
5. Board Briefing, Update to NCUA's Response to the COVID-19 Pandemic.

CONTACT PERSON FOR MORE INFORMATION: Melane Conyers-Ausbrooks, Secretary of the Board, Telephone: 703-518-6304.

Melane Conyers-Ausbrooks,

Secretary of the Board.

[FR Doc. 2021-25032 Filed 11-12-21; 11:15 am]

BILLING CODE 7535-01-P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Arts

Arts Advisory Panel Meetings

AGENCY: National Endowment for the Arts.

ACTION: Notice of meetings.

SUMMARY: Pursuant to the Federal Advisory Committee Act, as amended, notice is hereby given that 17 meetings of the Arts Advisory Panel to the National Council on the Arts will be

held by teleconference or videoconference.

DATES: See the **SUPPLEMENTARY INFORMATION** section for individual meeting times and dates. All meetings are Eastern time and ending times are approximate:

ADDRESSES: National Endowment for the Arts, Constitution Center, 400 7th St. SW, Washington, DC 20506.

FOR FURTHER INFORMATION CONTACT:

Further information with reference to these meetings can be obtained from Ms. Sherry P. Hale, Office of Guidelines & Panel Operations, National Endowment for the Arts, Washington, DC 20506; haless@arts.gov, or call 202/682-5696.

SUPPLEMENTARY INFORMATION: The closed portions of meetings are for the purpose of Panel review, discussion, evaluation, and recommendations on financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency. In accordance with the determination of the Chairman of September 10, 2019, these sessions will be closed to the public pursuant to subsection (c)(6) of section 552b of title 5, United States Code.

The upcoming meetings are:
Our Town (review of applications): This meeting will be closed.

Date and time: December 2, 2021; 11:00 a.m. to 1:00 p.m.

Our Town (review of applications): This meeting will be closed.

Date and time: December 2, 2021; 2:30 p.m. to 4:30 p.m.

Arts Education (review of applications): This meeting will be closed.

Date and time: December 3, 2021; 11:30 a.m. to 1:30 p.m.

Arts Education (review of applications): This meeting will be closed.

Date and time: December 3, 2021; 2:30 p.m. to 4:30 p.m.

Our Town (review of applications): This meeting will be closed.

Date and time: December 3, 2021; 11:00 a.m. to 1:00 p.m.

Presenting and Multidisciplinary Works (review of applications): This meeting will be closed.

Date and time: December 6, 2021; 2:00 p.m. to 4:00 p.m.

Museums (review of applications): This meeting will be closed.

Date and time: December 7, 2021; 11:30 a.m. to 1:30 p.m.

Museums (review of applications): This meeting will be closed.

Date and time: December 7, 2021; 2:30 p.m. to 4:30 p.m.

Presenting and Multidisciplinary Works (review of applications): This meeting will be closed.

Date and time: December 7, 2021; 2:00 p.m. to 4:00 p.m.

Museums (review of applications): This meeting will be closed.

Date and time: December 8, 2021; 11:30 a.m. to 1:30 p.m.

Presenting and Multidisciplinary Works (review of applications): This meeting will be closed.

Date and time: December 8, 2021; 2:00 p.m. to 4:00 p.m.

Arts Education (review of applications): This meeting will be closed.

Date and time: December 9, 2021; 1:30 p.m. to 3:30 p.m.

Local Arts Agencies (review of applications): This meeting will be closed.

Date and time: December 9, 2021; 1:00 p.m. to 3:00 p.m.

Local Arts Agencies (review of applications): This meeting will be closed.

Date and time: December 9, 2021; 3:30 p.m. to 5:30 p.m.

Presenting and Multidisciplinary Works (review of applications): This meeting will be closed.

Date and time: December 9, 2021; 2:00 p.m. to 4:00 p.m.

Folk and Traditional Arts (review of applications): This meeting will be closed.

Date and time: December 14, 2021; 1:00 p.m. to 3:00 p.m.

Folk and Traditional Arts (review of applications): This meeting will be closed.

Date and time: December 16, 2021; 1:00 p.m. to 3:00 p.m.

Dated: November 10, 2021.

Sherry P. Hale,

Staff Assistant, National Endowment for the Arts.

[FR Doc. 2021-24928 Filed 11-15-21; 8:45 am]

BILLING CODE 7537-01-P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50-201; NRC-2021-0175]

New York State Energy Research and Development Authority; Irradiated Nuclear Fuel Processing Plant; Western New York Nuclear Service Center

AGENCY: Nuclear Regulatory Commission.

ACTION: License amendment; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has issued an

Exhibit 5

Declaration of John Arnold

In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the following statements are true:

1. I am the Executive Director of the Arizona Board of Regents, a public body established by the Arizona Constitution that oversees the management, direction, and governance of Arizona's three public universities: Arizona State University, Northern Arizona University, and the University of Arizona. This declaration is based on my personal knowledge and the Board's records, which include university budget requests submitted to the Arizona Joint Legislative Budget Committee and to the Governor's Office of Strategic Planning and Budgeting.

2. All three universities are federal contractors. For fiscal year 2021, total federal revenues (restricted federal funds and federal indirect cost recovery funds) were \$1,207,926,800. These numbers come from the most recent university budget requests and are available on the Office of the Arizona Governor Strategic Planning and Budgeting [website](#).

3. As federal contractors, the universities are required by Presidential [Executive Order 14042](#) ("Ensuring Adequate COVID Safety Protocols for Federal Contractors") to comply with the [Guidance](#) published by the Safer Federal Workforce Task Force. That guidance provides that the federal contractor vaccination mandate applies to "individuals working on or in connection with a

Federal Government contract or contract-like instrument . . . including contractor or subcontractor employees in covered contractor workplaces who are not working on a Federal Government contract or contract-like instrument.” Given the amount and scope of federal contract work at the universities, the vaccination mandate therefore applies across our various campuses and other workplaces.

4. As a result, ABOR and the three universities are actively engaged in efforts to comply with the vaccination mandate by the January 2022 deadline, including communicating the requirement to current, incoming, and prospective employees; gathering proof of vaccination; and reviewing requests for accommodations from individuals who cannot be vaccinated for medical or religious reasons.

5. I certify under oath, based on my personal knowledge, information, and belief, and under penalty of perjury, that the information stated here is accurate.

Dated: November 16, 2021

A handwritten signature in black ink, appearing to read "John Arnold", written over a horizontal line.

John Arnold
Executive Director
Arizona Board of Regents

Exhibit 6

MARK BRNOVICH
ATTORNEY GENERAL
(Firm State Bar No. 14000)

WILENCHIK & BARTNESS PC

Joseph A. Kanefield (No. 15838)
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Attorney for Plaintiff John Doe

*Attorneys for Plaintiffs Mark Brnovich and
the State of Arizona*

**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Mark Brnovich, in his official capacity as
Attorney General of Arizona; and the State
of Arizona,

Plaintiffs,

v.

Joseph R. Biden in his official capacity
as President of the United States;
Alejandro Mayorkas in his official
capacity as Secretary of Homeland
Security; United States Department of
Homeland Security; Troy Miller in his
official capacity as Senior Official
Performing the Duties of the
Commissioner of U.S. Customs and
Border Protection; Tae Johnson in his
official capacity as Senior Official
Performing the Duties of Director of
U.S. Immigration and Customs
Enforcement; Ur M. Jaddou in her
official capacity as Director of U.S.
Citizenship and Immigration Services;
United States Office of Personnel
Management; Safer Federal Workforce
Task Force ("SFWTF"); Kiran Ahuja in

No. 2:21-cv-01568-MTL

**DECLARATION OF SONYA
HERRERA**

1 her official capacity as director of the
2 Office of Personnel Management and as
3 co-chair of the SFWTF; General
4 Services Administration; Robin
5 Carnahan in her official capacity as
6 administrator of the General Services
7 Administration and as co-chair of the
8 SFWTF; Office of Management and
9 Budget; Shalanda Young in her official
10 capacity as Acting Director of the Office
11 of Management and Budget and as a
12 member of the SFWTF; and Jeffrey
13 Zients in his official capacity as co-chair
14 of the SFWTF and COVID-19 Response
15 Coordinator; L. Eric Patterson in his
16 official capacity as Director of the
17 Federal Protective Service and member
18 of the SFWTF; James M. Murray in his
19 official capacity as Director of the
20 United States Secret Service and
21 member of the SFWTF; Deanne
22 Criswell in her official capacity as
23 Director of the Federal Emergency
24 Management Agency and member of the
25 SFWTF; Rochelle Walensky in her
26 official capacity as Director of the
27 Centers for Disease Control and
28 Prevention and member of the SFWTF;
Defendant Centers for Disease Control
and Prevention; the Federal Acquisition
Regulatory Council; Mathew C. Blum,
in his official capacity as Chair of the
Federal Acquisition Regulatory Council
and Acting Administrator of the Office
of Federal Procurement Policy, Office of
Management and Budget; Lesley A.
Field, in her official capacity as a
member of the Federal Acquisition
Regulatory Council and Acting
Administrator for Federal Procurement
at the Office of Federal Procurement
Policy, Office of Management and
Budget; Karla S. Jackson, in her official
capacity as a member of the Federal

1 Acquisition Regulatory Council and
2 Assistant Administrator for Procurement
3 at the National Aeronautics and Space
4 Administration; Jeffrey A. Koses, in his
5 official capacity as a member of the
6 Federal Acquisition Regulatory Council
7 and Senior Procurement Executive at the
8 General Services Administration; John
9 M. Tenaglia in his official capacity as a
10 member of the Federal Acquisition
11 Regulatory Council and Principal
12 Director of Defense Pricing and
13 Contracting at the Department of
14 Defense; the United States of America

15 Defendants.

16
17 I, Sonya Herrera, declare as follows:

18 1. I am the Director of the Administrative Services Division of the Arizona
19 Department of Transportation (“ADOT”).

20 2. ADOT is a multimodal transportation agency serving one of the fastest-
21 growing areas of the country. ADOT is responsible for planning, building and operating a
22 complex highway system in addition to building and maintaining bridges, interstate and
23 international ports of entry, and the Grand Canyon Airport.

24 3. ADOT owns two parcels of property that it leases to the General Services
25 Administration (“GSA”) for use by the Federal Motor Carrier Safety Administration: a
26 port of entry in Nogales, Arizona (“Nogales port of entry”), and a port of entry in San
27 Luis, Arizona (“San Luis port of entry”). In October 2021, GSA sent to ADOT a letter
28 dated October 14, 2021 stating that a modification to the Nogales port of entry lease
imposing a vaccine mandate “is **mandatory** and your acceptance is required in order to
ensure compliance with E.O. 14042” and that contract “modifications must be finalized
by **November 14, 2021.**” (Exhibit A at 1, emphasis in original.) GSA has not made a
similar demand to amend the San Luis port of entry lease.

Exhibit A



Oct 14, 2021

TRANSPORTATION, ARIZONA DEPARTMENT OF
206 S 17th Ave, Rm 133
Phoenix, AZ 85007

Subject: Contract Modification - LAZ01488 - New FAR Clause for Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors

Dear GSA Lease Holder,

GSA appreciates the hard work and dedication of our contractors. The health and safety of GSA 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 GSA contracts via a bilateral modification.

If you hold a GSA contract for services, construction, or a leasehold interest in property that exceeds the simplified acquisition threshold (SAT), the contract modification is **mandatory** and your acceptance is required in order to ensure compliance with E.O. 14042.

If you hold a contract at or below the SAT or a contract only for products, GSA strongly encourages you to accept the modification.

For IDIQ contracts that exceed the SAT to be eligible to receive new orders resulting from a request for quote, contract modifications must be finalized by **November 14, 2021**. You will not be eligible for any new order after that date, until your contract has been modified.

For Federal Supply Schedule contracts, except for contracts only for products, to be able to receive new orders, modifications must be finalized by **November 14, 2021**. No

new orders may be placed until the modification has been finalized. Note, restrictions (e.g., removal from GSA Advantage!, eBay) may be placed on your Schedule contract if a signed modification is not finalized before **November 14, 2021**.

For all contracts above the SAT, except for products only, GSA does not have authority to exercise options, extend, or renew your contract until the modification has been finalized.

Please return your signed contract modification as soon as possible and no later than **November 14, 2021**.

For lessors that exceed the SAT, please return your signed lease contract modification as soon as possible and no later than **November 14, 2021**.

If you have any questions, please call the National Customer Service Center at 1-866-727-8363 (Staffed 8 am-4 pm CST with voicemail available for after hours)

Thank you

PBS Office of Leasing

GENERAL SERVICES ADMINISTRATION PUBLIC BUILDINGS SERVICE LEASE AMENDMENT	Lease Amendment No. EOX TO LEASE NO. LAZ01488
ADDRESS OF PREMISES STATE PORT ANNEX N Mariposa Rd NOGALES, AZ 85621	PDN Number: NA

THIS AMENDMENT is made and entered into between **TRANSPORTATION, ARIZONA DEPARTMENT OF**
whose address is: 206 S 17th Ave, Rm 133
Phoenix, AZ
85007

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.

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 October 15, 2021 as follows:

The following FAR Clause 52.223-99, ENSURING ADEQUATE COVID-19 SAFETY PROTOCOLS FOR FEDERAL CONTRACTORS (OCT 2021) (DEVIATION), is hereby incorporated into the Lease:

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

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:

Name: _____
Title: _____
Entity: TRANSPORTATION, ARIZONA DEPARTMENT OF
Date: _____

Name: _____
Title: Lease Contracting Officer
General Services Administration, Public Buildings Service
Date: _____

WITNESSED FOR THE LESSOR BY:

Name: _____
Title: _____
Date: _____

(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)

INITIALS: _____ & _____
LESSOR GOVT

Exhibit 7

MARK BRNOVICH
ATTORNEY GENERAL
(Firm State Bar No. 14000)

WILENCHIK & BARTNESS PC

Joseph A. Kanefield (No. 15838)
Brunn (Beau) W. Roysden III (No. 28698)
Drew C. Ensign (No. 25463)
James K. Rogers (No. 27287)
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Attorney for Plaintiff John Doe

*Attorneys for Plaintiffs Mark Brnovich and
the State of Arizona*

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Mark Brnovich, in his official capacity as
Attorney General of Arizona; and the State
of Arizona,

Plaintiffs,

v.

Joseph R. Biden in his official capacity
as President of the United States;
Alejandro Mayorkas in his official
capacity as Secretary of Homeland
Security; United States Department of
Homeland Security; Troy Miller in his
official capacity as Senior Official
Performing the Duties of the
Commissioner of U.S. Customs and
Border Protection; Tae Johnson in his
official capacity as Senior Official
Performing the Duties of Director of
U.S. Immigration and Customs
Enforcement; Ur M. Jaddou in her
official capacity as Director of U.S.
Citizenship and Immigration Services;
United States Office of Personnel
Management; Safer Federal Workforce
Task Force ("SFWTF"); Kiran Ahuja in

No. 2:21-cv-01568-MTL

DECLARATION OF KEVIN RAY

1 her official capacity as director of the
2 Office of Personnel Management and as
3 co-chair of the SFWTF; General
4 Services Administration; Robin
5 Carnahan in her official capacity as
6 administrator of the General Services
7 Administration and as co-chair of the
8 SFWTF; Office of Management and
9 Budget; Shalanda Young in her official
10 capacity as Acting Director of the Office
11 of Management and Budget and as a
12 member of the SFWTF; and Jeffrey
13 Zients in his official capacity as co-chair
14 of the SFWTF and COVID-19 Response
15 Coordinator; L. Eric Patterson in his
16 official capacity as Director of the
17 Federal Protective Service and member
18 of the SFWTF; James M. Murray in his
19 official capacity as Director of the
20 United States Secret Service and
21 member of the SFWTF; Deanne
22 Criswell in her official capacity as
23 Director of the Federal Emergency
24 Management Agency and member of the
25 SFWTF; Rochelle Walensky in her
26 official capacity as Director of the
27 Centers for Disease Control and
28 Prevention and member of the SFWTF;
Defendant Centers for Disease Control
and Prevention; the Federal Acquisition
Regulatory Council; Mathew C. Blum,
in his official capacity as Chair of the
Federal Acquisition Regulatory Council
and Acting Administrator of the Office
of Federal Procurement Policy, Office of
Management and Budget; Lesley A.
Field, in her official capacity as a
member of the Federal Acquisition
Regulatory Council and Acting
Administrator for Federal Procurement
at the Office of Federal Procurement
Policy, Office of Management and
Budget; Karla S. Jackson, in her official
capacity as a member of the Federal

1 Acquisition Regulatory Council and
2 Assistant Administrator for Procurement
3 at the National Aeronautics and Space
4 Administration; Jeffrey A. Koses, in his
5 official capacity as a member of the
6 Federal Acquisition Regulatory Council
7 and Senior Procurement Executive at the
8 General Services Administration; John
9 M. Tenaglia in his official capacity as a
10 member of the Federal Acquisition
11 Regulatory Council and Principal
12 Director of Defense Pricing and
13 Contracting at the Department of
14 Defense; the United States of America
15
16 Defendants.

17 I, Kevin Ray, declare as follows:

18 1. I am an attorney licensed to practice law in Arizona. I am Section Chief
19 Counsel of the Education & Health Section of the State Government Division of the
20 Office of the Attorney General of Arizona.

21 2. The Arizona Department of Health Services ("ADHS") is an agency of the
22 State of Arizona. Its mission is to promote, protect, and improve the health and wellness
23 of individuals and communities in Arizona. The Attorney General's Office represents
24 ADHS.

25 3. On October 22, 2021, ADHS received an email from the CDC demanding
26 that ADHS implement the federal COVID-19 Contractor Mandate and requiring that
27 ADHS "sign and return the modification via email to the Contracting Officer of record by
28 November 9, 2021." Attached to the email was a spreadsheet that listed covered contracts
that CDC claimed were subject to its demand. Among those were two ADHS contracts
with the CDC with a total value of approximately \$520,000. The first contract,
HHSD200201792567I, involves the CDC's Vital Statistics Cooperative Program. The

1 second contract, 75D30121P11105, was for data processing, hosting, and related
2 services.

3 4. ADHS has not signed the CDC's demanded contract modifications because
4 COVID-19 vaccine mandates are not permitted under Arizona law. Because it appears
5 that federal agencies will not renew contracts or enter into new contracts with any entity
6 that does not accept the Contractor Mandate, ADHS stands to lose significant future
7 revenue the federal contracts it otherwise would have entered into.

8 5. ADHS employs approximately 1,500 persons.

9 6. Attached hereto as **Exhibit A** is a true and correct copy of the October 22,
10 2021 email from CDC.

11 7. Attached hereto as **Exhibit B** is a true and correct copy of the proposed
12 contract modification that was attached to the October 22, 2021 email from CDC.

13 8. The October 22, 2021 CDC email also included an attachment that was an
14 Excel spreadsheet listing approximately 3,440 CDC contracts from across the United
15 States that are subject to the CDC's demand for contract modification. Because this
16 spreadsheet would be more than 600 pages long if attached to this declaration, it has been
17 omitted.

18
19 I declare under penalty of perjury that the foregoing is true and correct to the best
20 of my knowledge, and that this declaration was issued on November 19, 2021, in
21 Phoenix, Arizona.

22
23 
24 Kevin Ray

Exhibit A

----- Forwarded message -----

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

Date: Fri, Oct 22, 2021 at 8:52 AM

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

To: cbarker@deloitte.com <cbarker@deloitte.com>, skihumbawatts@deloitte.com <skihumbawatts@deloitte.com>, marc@delucabiotech.com <marc@delucabiotech.com>, sparo@dhha.org <sparo@dhha.org>, Belknap, Robert (CDC dhha.org) <robert.belknap@dhha.org>, lbrand@bcgiso.com <lbrand@bcgiso.com>, lindaw@utah.gov <lindaw@utah.gov>, Ttufa, A (CDC doh.as) <a.tufa@doh.as>, dfleshman@thedesagroup.com <dfleshman@thedesagroup.com>, ralph.brinks@ddz.uni-duesseldorf.de <ralph.brinks@ddz.uni-duesseldorf.de>, mmartin@2mresearchservices.com <mmartin@2mresearchservices.com>, lisa_ashcraft@abtassoc.com <lisa_ashcraft@abtassoc.com>, jsimancas@dexisonline.com <jsimancas@dexisonline.com>, erica.marsh@dfusioninc.com <erica.marsh@dfusioninc.com>, kdmd@gmail.com <kdmd@gmail.com>, kandrade@dslab.com <kandrade@dslab.com>, mike.szkola@us.stago.com <mike.szkola@us.stago.com>, alex.flynn@us.stago.com <alex.flynn@us.stago.com>, lpippen@ambrahealth.com <lpippen@ambrahealth.com>, abaytops@onefederalsolution.com <abaytops@onefederalsolution.com>, tahern@bu.org <tahern@bu.org>, marco@brooksenvironmentalsol.com <marco@brooksenvironmentalsol.com>, PRAMS District of Columbia (CDC dc.gov) <pamela.oandasan@dc.gov>, bids@dsitech.com <bids@dsitech.com>, georgem@diversifiedair.com <georgem@diversifiedair.com>, nicolas.speroni@dlt.com <nicolas.speroni@dlt.com>, ed.abbot@dlt.com <ed.abbot@dlt.com>, justin.rorrer@dlt.com <justin.rorrer@dlt.com>, mae@dnastar.com <mae@dnastar.com>, aleister.j.saunders@drexel.edu <aleister.j.saunders@drexel.edu>, dvesra@drtrstrategies.com <dvesra@drtrstrategies.com>, gmcdermott@drtrstrategies.com <gmcdermott@drtrstrategies.com>, tarbaney@drysystemstech.com <tarbaney@drysystemstech.com>, latasha.woods@duke-energy.com <latasha.woods@duke-energy.com>, duke-ccr@duke.edu <duke-ccr@duke.edu>, wendell.beres@duke.edu <wendell.beres@duke.edu>, wendell <beres@duke.edu>, rob.caudle@duke.edu <rob.caudle@duke.edu>, ballen2@chenega.com <ballen2@chenega.com>, rmccashin@chenega.com <rmccashin@chenega.com>, <rmccashin@chenega.com>

contracts.managmenet@mcc.duke.edu <contracts.managmenet@mcc.duke.edu>, scott.palmer@duke.edu <scott.palmer@duke.edu>, myke@dynamic-corp.com <myke@dynamic-corp.com>, annie.shin@dynamicssystemsinc.com <annie.shin@dynamicssystemsinc.com>, bgonzales@dynavax.com <bgonzales@dynavax.com>, swilson@dynex.com <swilson@dynex.com>, jlittle@elittlecom.com <jlittle@elittlecom.com>, jgreen@kearneyco.com <jgreen@kearneyco.com>, dave.zorzi@kearneyco.com <dave.zorzi@kearneyco.com>, James.Watt@Eaglemedicalservicesllc.com <James.Watt@eaglemedicalservicesllc.com>, jwatt@eglobal.science <jwatt@eglobal.science>, mark.greenberg@eaglemedicalservicesllc.com <mark.greenberg@eaglemedicalservicesllc.com>, lynda.lehing@arkansas.gov <lynda.lehing@arkansas.gov>, anna.rogersartis@chenega.com <anna.rogersartis@chenega.com>, sami@communicatehealth.com <sami@communicatehealth.com>, mmartin@2mresearch.com <mmartin@2mresearch.com>, lmilavickas@2mresearch.com <lmilavickas@2mresearch.com>, asantilli@worksitemed.com <asantilli@worksitemed.com>, jwood@bioreference.com <jwood@bioreference.com>, toni_sandoval@abtassoc.com <toni_sandoval@abtassoc.com>, james.watt@eaglemedicalservicesllc.com <james.watt@eaglemedicalservicesllc.com>, amoberg@eapconsultants.com <amoberg@eapconsultants.com>, naida.gavrelis@erg.com <naida.gavrelis@erg.com>, dcpaddock@chenega.com <dcpaddock@chenega.com>, bmelnick@ebsco.com <bmelnick@ebsco.com>, luke.fitzwater@ezag.com <luke.fitzwater@ezag.com>, smarrow@econometricainc.com <smarrow@econometricainc.com>, ido.bernstein@econtrolsystems.com <ido.bernstein@econtrolsystems.com>, avi.bernstein@econtrolsystems.com <avi.bernstein@econtrolsystems.com>, awilliams@jhctechology.com <awilliams@jhctechology.com>, bids@erc-corp.com <bids@erc-corp.com>, l.wichman@elsevier.com <l.wichman@elsevier.com>, k.partridge@elsevier.com <k.partridge@elsevier.com>, hira.shafeeq@embarcadero.com <hira.shafeeq@embarcadero.com>, allisonwilkins@emconservices.com <allisonwilkins@emconservices.com>, louai.hauranieh@milliporesigma.com <louai.hauranieh@milliporesigma.com>, karolina.cermenio@emdmillipore.com <karolina.cermenio@emdmillipore.com>, nacustomerservice@emdmillipore.com <nacustomerservice@emdmillipore.com>, mmcGinness@emergent360.com <mmcGinness@emergent360.com>, jhulett@emergent360.com <jhulett@emergent360.com>, registration@emergent360.com <registration@emergent360.com>, eric.esswein@outlook.com <eric.esswein@outlook.com>, admin@emiadvisors.net <admin@emiadvisors.net>, hsomme2@emory.edu <hsomme2@emory.edu>, jhannam@emory.edu <jhannam@emory.edu>, kanika.moss@emory.edu <kanika.moss@emory.edu>, cawilliams@atcc.org <cawilliams@atcc.org>, larry.anderson@emory.edu <larry.anderson@emory.edu>, jane.lim@emory.edu <jane.lim@emory.edu>, bo.liang@emory.edu <bo.liang@emory.edu>, blambrt@emory.edu <blambrt@emory.edu>, jgarzillo@encompass.tv <jgarzillo@encompass.tv>, joe@enerfusioninc.com <joe@enerfusioninc.com>, jleichter@engagedin.com <jleichter@engagedin.com>, greg@engagingtrainingsolutions.com <greg@engagingtrainingsolutions.com>, Orders@ENTECHINST.COM <Orders@entechinst.com>, norman@enterprisesol.com <norman@enterprisesol.com>, ali@enterprisesol.com <ali@enterprisesol.com>, nancy.bergey@envservices.com <nancy.bergey@envservices.com>, tdarden@emgsi.com <tdarden@emgsi.com>, bboyer@eeienv.com <bboyer@eeienv.com>, pwilliams@erisksciences.com <pwilliams@erisksciences.com>, plaborce@esri.com <plaborce@esri.com>, jdeo@esri.com <jdeo@esri.com>, j.rivera@envirotabpr.com <j.rivera@envirotabpr.com>, jwalsh@epochconcepts.com <jwalsh@epochconcepts.com>, fuhrmann@ergoneers.com <fuhrmann@ergoneers.com>, ryan.todd@evidencepartners.com <ryan.todd@evidencepartners.com>, debbie@evolutionmgt.com <debbie@evolutionmgt.com>, kathryn.heavey@exlibrisgroup.com <kathryn.heavey@exlibrisgroup.com>, louise.wishart@delaware.gov <louise.wishart@delaware.gov>, melvin.evans@expeditionary.com <melvin.evans@expeditionary.com>, msdonnelly@express-scripts.com <msdonnelly@express-scripts.com>, christianr@fhcsd.org <christianr@fhcsd.org>, asahni@fhi360.org <asahni@fhi360.org>, kward@fhi360.org <kward@fhi360.org>, tkhan@fhi360.org <tkhan@fhi360.org>, tphillips@fhi360.org <tphillips@fhi360.org>, mhodgson@fhi360.org <mhodgson@fhi360.org>, mike@metalocator.com <mike@metalocator.com>, shaun.greer@fcnit.com <shaun.greer@fcnit.com>, brad.graham@fcnit.com <brad.graham@fcnit.com>, mike.nette@fcnit.com <mike.nette@fcnit.com>, feal13@aol.com <feal13@aol.com>, yibitoye@fearless.tech <yibitoye@fearless.tech>, matthew_dodge@fd.org <matthew_dodge@fd.org>, mpaulson@fedstore.com <mpaulson@fedstore.com>

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[<rtarkington@fseinc.net>](mailto:rtarkington@fseinc.net), [<rmurakami@fourinc.com>](mailto:rmurakami@fourinc.com),
[<david.cook@franklinyoung.com>](mailto:david.cook@franklinyoung.com), [<jsram@fulgentgenetics.com>](mailto:jsram@fulgentgenetics.com),
[<jsram@fulgentgenetics.com>](mailto:jsram@fulgentgenetics.com), [<gov@fullcirclecomputing.com>](mailto:gov@fullcirclecomputing.com),
[<contracts@fsaservice.com>](mailto:contracts@fsaservice.com), [<yzhou@futrend.com>](mailto:yzhou@futrend.com),
[<keith.lytton@cerulean.com>](mailto:keith.lytton@cerulean.com), [<strevino@g2scorp.com>](mailto:strevino@g2scorp.com),
[<pss@g2scorp.com>](mailto:pss@g2scorp.com), [<michele.carpenter@hms.com>](mailto:michele.carpenter@hms.com),
[<e.gale@comcast.net>](mailto:e.gale@comcast.net), [<tpao@gapsi.com>](mailto:tpao@gapsi.com), [<econtreras@gapsi.com>](mailto:econtreras@gapsi.com),
[<econtreras@gapsi.com>](mailto:econtreras@gapsi.com), [<mrathmann@gapsi.com>](mailto:mrathmann@gapsi.com), [<cdc_cpr-bpa@gapsi.com>](mailto:cdc_cpr-bpa@gapsi.com),
[<cdc_cpr-bpa@gapsi.com>](mailto:cdc_cpr-bpa@gapsi.com), [<kristian.larson@gartner.com>](mailto:kristian.larson@gartner.com),
[<diane.julian@gartner.com>](mailto:diane.julian@gartner.com), [<ashley.free@criticalcontrol.com>](mailto:ashley.free@criticalcontrol.com),
[<ashley.free@criticalcontrol.com>](mailto:ashley.free@criticalcontrol.com), [<lcosta@gatan.com>](mailto:lcosta@gatan.com), [<jkargon@geisinger.edu>](mailto:jkargon@geisinger.edu),
[<jkargon@geisinger.edu>](mailto:jkargon@geisinger.edu), [<dana.lotspeich@gdit.com>](mailto:dana.lotspeich@gdit.com), [<Victoria.Lemieux@gdit.com>](mailto:Victoria.Lemieux@gdit.com),
[<Victoria.Lemieux@gdit.com>](mailto:Victoria.Lemieux@gdit.com), [<victoria.lemieux@gdit.com>](mailto:victoria.lemieux@gdit.com),
[<pmanheimer@anteon.com>](mailto:pmanheimer@anteon.com), [<gditgsa@gdit.com>](mailto:gditgsa@gdit.com),
[<debra.lilley@gd-ms.com>](mailto:debra.lilley@gd-ms.com), [<tony.garces@gi-sdvob.com>](mailto:tony.garces@gi-sdvob.com),
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[<anna.zhou@genscript.com>](mailto:anna.zhou@genscript.com), [<zac.odom@gisinc.com>](mailto:zac.odom@gisinc.com),
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Dana (CDC [<osp.gatech.edu>](mailto:osp.gatech.edu)) [<dana.simpson@osp.gatech.edu>](mailto:dana.simpson@osp.gatech.edu), [<lbrooks@gatech.edu>](mailto:lbrooks@gatech.edu),
[<lsclark@gerstelus.com>](mailto:lsclark@gerstelus.com), [<tmpence@gerstelus.com>](mailto:tmpence@gerstelus.com),
[<pam.woehrle@gettyimages.com>](mailto:pam.woehrle@gettyimages.com), [<beth.partain@gettyimages.com>](mailto:beth.partain@gettyimages.com),
[<beth.partain@gettyimages.com>](mailto:beth.partain@gettyimages.com), [<lparker@gi.org>](mailto:lparker@gi.org), [<bsteed@gilbaneco.com>](mailto:bsteed@gilbaneco.com),
[<bsteed@gilbaneco.com>](mailto:bsteed@gilbaneco.com), [<david@biomic.com>](mailto:david@biomic.com), [<sales@gilson.com>](mailto:sales@gilson.com),
[<ssteinbrink@gilson.com>](mailto:ssteinbrink@gilson.com), [<rhonda.e.berube@gsk.com>](mailto:rhonda.e.berube@gsk.com),
[<steve.d.moore@gsk.com>](mailto:steve.d.moore@gsk.com), [<babatunde.a.adedeji@gsk.com>](mailto:babatunde.a.adedeji@gsk.com),
[<babatunde.a.adedeji@gsk.com>](mailto:babatunde.a.adedeji@gsk.com), [<stacey.a.crock@gsk.com>](mailto:stacey.a.crock@gsk.com),
[<mbosley@goldbeltc6.com>](mailto:mbosley@goldbeltc6.com), [<kathryn.ravelo@goldbelt.com>](mailto:kathryn.ravelo@goldbelt.com),
[<kathryn.ravelo@goldbelt.com>](mailto:kathryn.ravelo@goldbelt.com), [<randy.cook@aspenmi.com>](mailto:randy.cook@aspenmi.com),
[<jasmine.stewart@goldbeltfrontier.com>](mailto:jasmine.stewart@goldbeltfrontier.com), [<tammy.demarco@goldbelt.com>](mailto:tammy.demarco@goldbelt.com),
[<svarroney@golinharris.com>](mailto:svarroney@golinharris.com), [<micheleh@giin.org>](mailto:micheleh@giin.org),
[<sparry@ging.org>](mailto:sparry@ging.org), Garrido, Carolyn <GU> (CDC [<dphss.guam.gov>](mailto:dphss.guam.gov))
[<carolyn.garrido@dphss.guam.gov>](mailto:carolyn.garrido@dphss.guam.gov), [<armilynn.lujan@doa.guam.gov>](mailto:armilynn.lujan@doa.guam.gov),

tsellent@govsci.com <tsellent@govsci.com>, sjang@govsci.com <sjang@govsci.com>, bhurlburt@govsci.com <bhurlburt@govsci.com>, brent@govsmart.com <brent@govsmart.com>, tom@govsmart.com <tom@govsmart.com>, jackie@govsmart.com <jackie@govsmart.com>, karen_lee@insigniafederal.com <karen_lee@insigniafederal.com>, dnoble@gmh.edu <dnoble@gmh.edu>, william.graham@graham-tech.net <william.graham@graham-tech.net>, tamara.reynolds@us.gt.com <tamara.reynolds@us.gt.com>, sheri@greenlanternllc.com <sheri@greenlanternllc.com>, greenworldcorp@live.com <greenworldcorp@live.com>, lesa@allianceatl.com <lesa@allianceatl.com>, mike@fedpubseminars.com <mike@fedpubseminars.com>, greerchuck@gmail.com <greerchuck@gmail.com>, gregory.salerno@grifols.com <gregory.salerno@grifols.com>, wendy.menendez@grifols.com <wendy.menendez@grifols.com>, dan@labtracker.com <dan@labtracker.com>, rterrell@isupport.com <rterrell@isupport.com>, kimberly@gryphonscientific.com <kimberly@gryphonscientific.com>, rocco@gryphonscientific.com <rocco@gryphonscientific.com>, lsohn@gSIG.com <lsohn@gSIG.com>, jdoss@guidehouse.com <jdoss@guidehouse.com>, tgray@guidehouse.com <tgray@guidehouse.com>, thutchison@guidehouse.com <thutchison@guidehouse.com>, ronnie.favors@us.pwc.com <ronnie.favors@us.pwc.com>, eeich@guidehouse.com <eeich@guidehouse.com>, pzaprudsky@guidehouse.com <pzaprudsky@guidehouse.com>, erik@theprecisioncs.com <erik@theprecisioncs.com>, steve@handmanalytical.com <steve@handmanalytical.com>, sharper@heneumann.com <sharper@heneumann.com>, mike.herres@h3s-inc.com <mike.herres@h3s-inc.com>, wwatts@hagerssharp.com <wwatts@hagerssharp.com>, jknights@hagerssharp.com <jknights@hagerssharp.com>, ttaylor@hagerssharp.com <ttaylor@hagerssharp.com>, lsalay@hagerssharp.com <lsalay@hagerssharp.com>, samantha.slavik@hamiltoncompany.com <samantha.slavik@hamiltoncompany.com>, rschultz@hamiltoncompany.com <rschultz@hamiltoncompany.com>, clinton.riach@hamiltoncompany.com <clinton.riach@hamiltoncompany.com>, mhamilton@hamilton-storage.com <mhamilton@hamilton-storage.com>, jbooms@thehannongroup.com <jbooms@thehannongroup.com>, joseph.ranieri2@peraton.com <joseph.ranieri2@peraton.com>, gayle.lowe@peraton.com <gayle.lowe@peraton.com>, tmarnien@peraton.com <tmarnien@peraton.com>, joseph.ranieri@peraton.com <joseph.ranieri@peraton.com>, gayle.loew@peraton.com <gayle.loew@peraton.com>, charlotte_johnson@hphc.org <charlotte_johnson@hphc.org>, nicholas_mulherin@harvardpilgrim.org <nicholas_mulherin@harvardpilgrim.org>, mary.meyers@haworth.com <mary.meyers@haworth.com>, georgeknuckles@beckgroup.com <georgeknuckles@beckgroup.com>, Royce, Paul <KY> (CDC ky.gov) <paul.royce@ky.gov>, kelli.hill@ky.gov <kelli.hill@ky.gov>, Copeland, Glenn <MI> (CDC michigan.gov) <copelandg@michigan.gov>, weavert@michigan.gov <weavert@michigan.gov>, clarlynda.williams-devane@dhhs.nc.gov <clarlynda.williams-devane@dhhs.nc.gov>, khaug@kdheks.gov <khaug@kdheks.gov>, kelly.chilson@ks.gov <kelly.chilson@ks.gov>, Sutton, Shae (CDC dhec.sc.gov) <suttonsr@dhec.sc.gov>, saleebap@dhec.sc.gov <saleebap@dhec.sc.gov>, dgeorge@dhh.la.gov <dgeorge@dhh.la.gov>, Thompson, Gary <WV> (CDC wv.gov) <gary.l.thompson@wv.gov>, Markiewicz, James (CDC maine.gov) <james.markiewicz@maine.gov>, Garikapaty, Venkata (CDC health.mo.gov) <Venkata.Garikapaty@health.mo.gov>, heidi.lengdorfer@alaska.gov <heidi.lengdorfer@alaska.gov>, rosa.avila@alaska.gov <rosa.avila@alaska.gov>, michelle_grose@health.state.ak.us <michelle_grose@health.state.ak.us>, brenda.h.conner@state.de.us <brenda.h.conner@state.de.us>, Peterson, Jeremy <ID> (CDC dhw.idaho.gov) <petersj2@dhw.idaho.gov>, rachelle.vance@dhw.idaho.gov <rachelle.vance@dhw.idaho.gov>, Pate, Derek <OK> (CDC health.ok.gov) <DerekP@health.ok.gov>, markmcd@hl7.org <markmcd@hl7.org>, sdebakey@health-ra.com <sdebakey@health-ra.com>, krystal.colburn@azdhs.gov <krystal.colburn@azdhs.gov>

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 B

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.
X	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,II, 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	15C. DATE SIGNED	16B. UNITED STATES OF AMERICA	16C. DATE SIGNED
_____ (Signature of person authorized to sign)		BY _____ (Signature of Contracting Officer)	

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 8

MARK BRNOVICH
ATTORNEY GENERAL
(Firm State Bar No. 14000)

WILENCHIK & BARTNESS PC

Joseph A. Kanefield (No. 15838)
Brunn (Beau) W. Roysden III (No. 28698)
Drew C. Ensign (No. 25463)
James K. Rogers (No. 27287)
2005 N. Central Ave
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Joseph.Kanefield@azag.gov
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The Wilenchik & Bartness Building
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Phoenix, AZ 85004
Phone (602) 606-2816
JackW@wb-law.com

Attorney for Plaintiff John Doe

*Attorneys for Plaintiffs Mark Brnovich and
the State of Arizona*

**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Mark Brnovich, in his official capacity as
Attorney General of Arizona; and the State
of Arizona,

Plaintiffs,

v.

Joseph R. Biden in his official capacity
as President of the United States;
Alejandro Mayorkas in his official
capacity as Secretary of Homeland
Security; United States Department of
Homeland Security; Troy Miller in his
official capacity as Senior Official
Performing the Duties of the
Commissioner of U.S. Customs and
Border Protection; Tae Johnson in his
official capacity as Senior Official
Performing the Duties of Director of
U.S. Immigration and Customs
Enforcement; Ur M. Jaddou in her
official capacity as Director of U.S.
Citizenship and Immigration Services;
United States Office of Personnel
Management; Safer Federal Workforce
Task Force ("SFWTF"); Kiran Ahuja in

No. 2:21-cv-01568-MTL

**DECLARATION OF DANIEL
BERGIN**

1 her official capacity as director of the
2 Office of Personnel Management and as
3 co-chair of the SFWTF; General
4 Services Administration; Robin
5 Carnahan in her official capacity as
6 administrator of the General Services
7 Administration and as co-chair of the
8 SFWTF; Office of Management and
9 Budget; Shalanda Young in her official
10 capacity as Acting Director of the Office
11 of Management and Budget and as a
12 member of the SFWTF; and Jeffrey
13 Zients in his official capacity as co-chair
14 of the SFWTF and COVID-19 Response
15 Coordinator; L. Eric Patterson in his
16 official capacity as Director of the
17 Federal Protective Service and member
18 of the SFWTF; James M. Murray in his
19 official capacity as Director of the
20 United States Secret Service and
21 member of the SFWTF; Deanne
22 Criswell in her official capacity as
23 Director of the Federal Emergency
24 Management Agency and member of the
25 SFWTF; Rochelle Walensky in her
26 official capacity as Director of the
27 Centers for Disease Control and
28 Prevention and member of the SFWTF;
Defendant Centers for Disease Control
and Prevention; the Federal Acquisition
Regulatory Council; Mathew C. Blum,
in his official capacity as Chair of the
Federal Acquisition Regulatory Council
and Acting Administrator of the Office
of Federal Procurement Policy, Office of
Management and Budget; Lesley A.
Field, in her official capacity as a
member of the Federal Acquisition
Regulatory Council and Acting
Administrator for Federal Procurement
at the Office of Federal Procurement
Policy, Office of Management and
Budget; Karla S. Jackson, in her official
capacity as a member of the Federal

1 Acquisition Regulatory Council and
2 Assistant Administrator for Procurement
3 at the National Aeronautics and Space
4 Administration; Jeffrey A. Koses, in his
5 official capacity as a member of the
6 Federal Acquisition Regulatory Council
7 and Senior Procurement Executive at the
8 General Services Administration; John
9 M. Tenaglia in his official capacity as a
10 member of the Federal Acquisition
11 Regulatory Council and Principal
12 Director of Defense Pricing and
13 Contracting at the Department of
14 Defense; the United States of America

15 Defendants.

16 I, Daniel Bergin, declare as follows:

17 1. I am an attorney licensed to practice law in Arizona. I am Transportation
18 Section Chief Counsel in the State Government Division of the Office of the Attorney
19 General of Arizona. I have been authorized by the Arizona Department of Public Safety
20 to sign this Declaration.

21 2. The Arizona Department of Public Safety (“DPS”) is a statewide law
22 enforcement agency with a primary focus of patrolling and enforcing laws on Arizona
23 state highways. Additionally, it enforces laws in the areas of traffic, narcotics, organized
24 crime/racketeering, liquor, and specific regulatory functions. It also provides operational
25 and technical assistance to local and state governmental agencies and other components
26 of the criminal justice community, including through cooperative enforcement, training,
27 scientific analysis, aircraft support, emergency first care, criminal information systems,
28 and statewide communications.

3. DPS has a contract with the National Park Service (“NPS”) to provide
laboratory testing. The relevant contract number is 140P1521P0006. On November 2,

1 2021, NPS sent an email to DPS demanding that DPS sign a contract modification to
2 incorporate the Contractor Mandate.

3 4. Statewide, DPS employs approximately 2,100 individuals.

4 5. Attached hereto as **Exhibit A** is a true and correct copy of the November 2,
5 2021 email from NPS.

6 6. Attached hereto as **Exhibit B** is a true and correct copy of the attachment to
7 the November 2, 2021 email from NPS.

8 I declare under penalty of perjury that the foregoing is true and correct to the best
9 of my knowledge, and that this declaration was issued on November 19, 2021, in
10 Phoenix, Arizona.

11
12 s/ Dan Bergin

13 Daniel Bergin

Exhibit A

From: Robertson, Catherine E <Catie_Robertson@nps.gov>
Sent: Tuesday, November 2, 2021 6:56 AM
To: Stephen Butler
Cc: Hughes, Kenneth
Subject: Bilateral Modification- National Park Service- To Incorporate FAR Clause 52.223-99
(140P1521P0006 Grand Canyon Crime Lab Testing Services)
Attachments: M01 F01 P1521P0006 SF-30.pdf

Good morning,

Please find attached a bilateral modification to incorporate FAR Clause 52.223-99 as required under Executive order 14042. Please sign and return the modification at your earliest convenience.

Thanks in advance,

Catie Robertson
Contract Specialist
National Park Service
Arizona Major Acquisition Buying Office (MABO)
1824 S. Thompson St., Suite 200, Flagstaff, AZ 86001
NPS Regional Office Serving Interior Regions 6, 7, & 8
928.638.7436 Office
928.679.0946 Cell
catie_robertson@nps.gov
Work Hours: OFF EVERY FRIDAY
Mon - Thurs: 0500 - 1530

Exhibit B

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT

1. CONTRACT ID CODE

PAGE OF PAGES

1

2

2. AMENDMENT/MODIFICATION NO.

P00001

3. EFFECTIVE DATE

See Block 16C

4. REQUISITION/PURCHASE REQ. NO.

5. PROJECT NO. (If applicable)

6. ISSUED BY

CODE

PIA

7. ADMINISTERED BY (If other than Item 6)

CODE

NPS, IMR - Arizona MABO
1824 S Thompson St, Ste 200
Flagstaff AZ 86001-2694

8. NAME AND ADDRESS OF CONTRACTOR (No., street, county, State and ZIP Code)

PUBLIC SAFETY, ARIZONA
Attn: ATTN GOVERNMENT POC
2102 WEST ENCANTO
PHOENIX AZ 85009-2847

(x)

9A. AMENDMENT OF SOLICITATION NO.

9B. DATED (SEE ITEM 11)

x

10A. MODIFICATION OF CONTRACT/ORDER NO.
140P1521P0006

10B. DATED (SEE ITEM 13)

02/01/2021

CODE 0070042809

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 electronic communication which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGEMENT 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 letter or electronic communication, provided each letter or electronic communication 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)

See Schedule

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

CHECK ONE	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 data, 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 52.212-4 (c)--Contract Terms and Conditions-Commercial Items (Changes) Oct 2018
	D. OTHER (Specify type of modification and authority)

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.)

Executive Order 14042

Modification 1 incorporates FAR clause 52.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors (OCT 2021) (DEVIATION) into this contract effective upon signature. See attachment for clause printed in full.

Contractor's Statement of Release: The foregoing Modification No. 1 is satisfactory and is hereby accepted. In accepting this Modification No. 1, the Contractor acknowledges that s/he has no unsatisfied claim against the Government arising out of or resulting from this modification, and the Contractor hereby releases and discharges the Government from any and all claims or demands whatsoever arising out of or resulting from this modification.

Legacy Doc #: NPS

Continued ...

Except as provided herein, all terms and conditions of the document referenced in Item 9 A or 10A, as heretofore changed, remains unchanged and in full force and effect.

15A. NAME AND TITLE OF SIGNER (Type or print)

16A. NAME AND TITLE OF CONTRACTING OFFICER (Type or print)

Catherine Robertson

15B. CONTRACTOR/OFFEROR

15C. DATE SIGNED

16B. UNITED STATES OF AMERICA

16C. DATE SIGNED

(Signature of person authorized to sign)

(Signature of Contracting Officer)

Previous edition unusable

STANDARD FORM 30 (REV. 11/2016)
Prescribed by GSA FAR (48 CFR) 53.243

CONTINUATION SHEET

REFERENCE NO. OF DOCUMENT BEING CONTINUED

140P1521P0006/P00001

PAGE

OF

2

2

NAME OF OFFEROR OR CONTRACTOR
PUBLIC SAFETY, ARIZONA

ITEM NO. (A)	SUPPLIES/SERVICES (B)	QUANTITY (C)	UNIT (D)	UNIT PRICE (E)	AMOUNT (F)
	Period of Performance: 02/15/2021 to 02/14/2022				

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.

(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 9

MARK BRNOVICH
ATTORNEY GENERAL
(Firm State Bar No. 14000)

WILENCHIK & BARTNESS PC

Joseph A. Kanefield (No. 15838)
Brunn (Beau) W. Roysden III (No. 28698)
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Jack Wilenchik (No. 029353)
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Phone (602) 606-2816
JackW@wb-law.com

Attorney for Plaintiff John Doe

*Attorneys for Plaintiffs Mark Brnovich and
the State of Arizona*

**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Mark Brnovich, in his official capacity as
Attorney General of Arizona; and the State
of Arizona,

Plaintiffs,

v.

Joseph R. Biden in his official capacity
as President of the United States;
Alejandro Mayorkas in his official
capacity as Secretary of Homeland
Security; United States Department of
Homeland Security; Troy Miller in his
official capacity as Senior Official
Performing the Duties of the
Commissioner of U.S. Customs and
Border Protection; Tae Johnson in his
official capacity as Senior Official
Performing the Duties of Director of
U.S. Immigration and Customs
Enforcement; Ur M. Jaddou in her
official capacity as Director of U.S.
Citizenship and Immigration Services;
United States Office of Personnel
Management; Safer Federal Workforce
Task Force ("SFWTF"); Kiran Ahuja in

No. 2:21-cv-01568-MTL

**DECLARATION OF DENEL
PICKERING**

1 her official capacity as director of the
2 Office of Personnel Management and as
3 co-chair of the SFWTF; General
4 Services Administration; Robin
5 Carnahan in her official capacity as
6 administrator of the General Services
7 Administration and as co-chair of the
8 SFWTF; Office of Management and
9 Budget; Shalanda Young in her official
10 capacity as Acting Director of the Office
11 of Management and Budget and as a
12 member of the SFWTF; and Jeffrey
13 Zients in his official capacity as co-chair
14 of the SFWTF and COVID-19 Response
15 Coordinator; L. Eric Patterson in his
16 official capacity as Director of the
17 Federal Protective Service and member
18 of the SFWTF; James M. Murray in his
19 official capacity as Director of the
20 United States Secret Service and
21 member of the SFWTF; Deanne
22 Criswell in her official capacity as
23 Director of the Federal Emergency
24 Management Agency and member of the
25 SFWTF; Rochelle Walensky in her
26 official capacity as Director of the
27 Centers for Disease Control and
28 Prevention and member of the SFWTF;
Defendant Centers for Disease Control
and Prevention; the Federal Acquisition
Regulatory Council; Mathew C. Blum,
in his official capacity as Chair of the
Federal Acquisition Regulatory Council
and Acting Administrator of the Office
of Federal Procurement Policy, Office of
Management and Budget; Lesley A.
Field, in her official capacity as a
member of the Federal Acquisition
Regulatory Council and Acting
Administrator for Federal Procurement
at the Office of Federal Procurement
Policy, Office of Management and
Budget; Karla S. Jackson, in her official
capacity as a member of the Federal

1 Acquisition Regulatory Council and
2 Assistant Administrator for Procurement
3 at the National Aeronautics and Space
4 Administration; Jeffrey A. Koses, in his
5 official capacity as a member of the
6 Federal Acquisition Regulatory Council
7 and Senior Procurement Executive at the
8 General Services Administration; John
9 M. Tenaglia in his official capacity as a
10 member of the Federal Acquisition
11 Regulatory Council and Principal
12 Director of Defense Pricing and
13 Contracting at the Department of
14 Defense; the United States of America

15 Defendants.

16 I, Denel Pickering, declare as follows:

17 1. I am the Chief Procurement Officer of the Arizona Department of
18 Corrections, Rehabilitation, and Reentry (ADCRR).

19 2. ADCRR is a statewide law enforcement agency that operates ten large
20 prison complexes and a regional corrections center and oversees six private prisons.
21 ADCRR is responsible for the incarceration of over 35,000 inmates in prisons located all
22 over the State of Arizona and also for the supervision of more than 4,000 inmates who
23 have been paroled or statutorily released from prison before their entire sentence has been
24 served.

25 3. ADCRR has a contract with the U.S. Forest Service through which inmates
26 perform work on Forest Service land. On September 28, 2021, Jeremy Plain, District
27 Ranger for the Tonto National Forest, sent an email to personnel at ADCRR stating that
28 persons performing under the contract would be required to comply with new COVID-19
"safeguards," including mandatory "vaccine certification." The email concluded by
stating that "[w]e are very thankful for the work that the AZDOC crews provide for us
and we would like to continue utilizing them, but we have to follow the above policy."

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, and that this declaration was issued on November 18, 2021, in Phoenix, Arizona.

2

Exhibit A

RE: [External Email]Re: FW: [External Email]Amendment to add Covid Language in Contract 17-005-22

1 message

Tue, Sep 28, 2021 at 3:01 PM

Plain, Jeremy - FS <jeremy.plain@usda.gov>

To: David Brackney <dbrackney@azadc.gov>, "Abel, Angela -FS" <angela.abel@usda.gov>

Cc: Kristine Yaw <kyaw@azadc.gov>, Rocky Advani <radvani@azadc.gov>, "Spence, Jason -FS" <jason.spence@usda.gov>

Greetings all,

As Angie mentioned below, we have been given vaccine policy to follow and within that policy, direction is given for outside contractors performing work on federal lands. See below:

Key points on the new Executive Order for employees of most contractors that do business with the Federal Government.

- The order ensures 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, through inclusion in the contract or contract-like instrument of a clause that the contractor and any subcontractors (at any tier) will incorporate into lower-tier subcontracts.
- Until further notice, we are to continue the checking of vaccine certification for contractors and visitors.
- Prior to being contractually required to be vaccinated, onsite contractor employees who are not fully vaccinated and are not part of an agency testing program, must provide proof of a negative COVID-19 test from no later than the previous 3 days prior to entry to a Federal building.

We have given the crew our mandatory form to self-disclose vaccine status which is attached. The crew is required to keep that form on hand while performing work on federal lands. For the individuals that are not fully vaccinated, they must provide a negative test as stated above. We are very thankful for the work that the AZDOC crews provide for us and we would like to continue utilizing them, but we have to follow the above policy. Please advise if this is something that the State can follow. Thank you.

V/r



Jeremy Plain
District Ranger

Forest Service

Tonto National Forest, Tonto Basin
Ranger District

p: 602-225-5395

c: 928-595-0865

jeremy.plain@usda.gov

28079 N AZ HWY 188

Roosevelt, AZ 85545

www.fs.fed.us



Caring for the land and serving people

Exhibit B



DOUGLAS A. DUCEY
GOVERNOR

Arizona Department of Corrections Rehabilitation & Reentry

1601 WEST JEFFERSON
PHOENIX, ARIZONA 85007
(602) 542-5497
www.azcorrections.gov



DAVID SHINN
DIRECTOR

November 15, 2021

U.S.D.A. Forest Service
Tonto National Forest, Tonto Basin
28079 N. AZ HWY 188
Roosevelt, AZ 85545
Attn: Jeremy Plain, District Ranger

Re: Contract 17-005-22, Inmate Work Contract/Inmate Job Development Program
USDA Forest Service, Tonto National Forest

Dear Mr. Plain:

We are in receipt of your email dated September 28, 2021, regarding USDA's policy regarding checking vaccine certifications for contractors and visitors, for the above referenced contract.

This information was sent to ADCRR Prison Operations for review. The determination by Prison Operations indicates that the Department cannot facilitate the requirements at this time.

If you have any questions or concerns, please feel free to contact David Brackney, Sr. Procurement Specialist, at dbrackney@azadc.gov or 602-364-3796, responsible for this contract or myself, at (602) 364-3785.

Sincerely,

A handwritten signature in blue ink, appearing to read "Kristine Yaw".

Kristine Yaw
Deputy Chief Procurement Officer
Arizona Department of Corrections, Rehabilitation & Reentry

KY/db

Exhibit 10

DECLARATION OF MICHAEL NAPIER

I, Michael Napier, declare under penalty of perjury:

1. I am an attorney at Napier, Baillie, Wilson, Bacon & Tallone, P.C., representing the Phoenix Law Enforcement Association (“PLEA”).
2. PLEA is the certified bargaining representative for the police officers for the City of Phoenix.
3. The City of Phoenix issued an Employee Notification on November 18, 2021, which is attached hereto as Exhibit A.
4. As a result, the police officers for the City of Phoenix will be required to submit to the vaccination mandate and thus become vaccinated by January 18, 2022.
5. PLEA has joined this lawsuit seeking an injunction against the enforcement of the vaccine mandate as described in the Employee Notification to protect the interests of its membership in not being forced to submit to the vaccination.

November 19, 2021
Date



Michael Napier, Esq.
Attorney for PLEA

Exhibit A

From: Employee Notification employee.notification@phoenix.gov 
Subject: Employee Notification - COVID-19 Vaccine Federally Mandated for City of Phoenix Employees
Date: November 18, 2021 at 3:25 PM
To: All Enterprise Email Users AllEnterpriseEmail.Users@phoenix.gov

Important Employee Information. THIS MESSAGE HAS BEEN SENT TO ALL CITY OF PHOENIX E-MAIL USERS. DO NOT REPLY TO THIS MESSAGE.



IMPORTANT EMPLOYEE INFORMATION

COVID-19 Vaccine Federally Mandated for City of Phoenix Employees

November 18, 2021

To: All Employees

Throughout the COVID-19 pandemic, the city of Phoenix has been fully committed to creating a safe environment for employees and our customers.

The responsibility of balancing the rights to a safe workplace with the rights to make individual health choices is not one we've taken lightly. Although the city has and continues to provide free COVID-19 testing and vaccines, the choice to get vaccinated has remained entirely at the discretion of each individual employee.

However, on September 9, 2021, President Biden issued [Executive Order 14042](#), which established **COVID-19 vaccine requirements for federal employees and contractors**. Additional guidance regarding who is considered a Federal contractor was provided this month. Per the Executive Order, the Safer Federal Workforce Task Force (Task Force Guidance or Guidance), established the [guidance for federal contractors](#), which includes:

- 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.

- 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.

Due to the number of federal contracts held by the city of Phoenix, we are considered a federal contractor. As such, all city employees are subject to the provisions outlined in the Executive Order, which requires **all employees, regardless of telework status or if you previously tested positive for COVID-19, to be fully vaccinated against COVID-19 by January 18, 2022**, except in limited circumstances where an employee is legally entitled to an accommodation. In order to be considered compliant, employees will be required to submit a completed vaccination card with two completed doses for the Pfizer or Moderna vaccines or one completed dose for the Johnson & Johnson vaccine. Booster doses are not required at this time.

Submitting Proof of Vaccination

If you have already submitted proof of vaccination for the [Vaccine Safety Award of \\$75](#), **you are not required to resubmit your information**. Employees who still need to submit their proof of vaccination will do so in eCHRIS, [following the same process for the Vaccine Safety Award](#) program. All city employees are eligible to receive a **one-time** Vaccine Safety Award of \$75 through January 18, 2022, when they submit a completed vaccine card showing the dates of all required doses for the type of vaccine received. Booster doses are not required at this time.

Vaccine Resources

As a reminder, city of Phoenix employees have access to the following options for a COVID-19 vaccine:

- The **Moderna** and **Johnson & Johnson Vaccine** are available for city of Phoenix employees, 18 and older. Please call 480-968-1886 to schedule your appointment at the Healthwaves office near Sky Harbor Airport, 1615 W. University Drive, Tempe, Suite 137.
- Additional vaccine locations can be found by visiting the [ADHS Find COVID-19 Vaccines](#).

Accommodations

The city of Phoenix will continue to work with employees, as much as possible, during the implementation of this requirement, while balancing our operational needs and compliance.

- **An accommodation is not guaranteed.** An employee may request a religious or medical accommodation by submitting a completed [religious](#) or [medical](#) accommodation form and any required supporting documentation to vaccine.request@phoenix.gov.
- Staff from the Human Resources, Equal Opportunity, and Law departments will evaluate the requests.
- The city will engage in an interactive process with the employee to determine if the employee is eligible, and if so, which reasonable accommodations can be provided that will enable the employee to perform the essential functions of their position.
- **A request for accommodation will not be granted** if it is unreasonable, or if it poses a direct threat to the health and/or safety of others in the workplace.
- **In order to be considered for approval prior to the January 18, 2022 deadline, accommodation requests must be submitted by December 31, 2021.**

Employees not in compliance with the COVID-19 vaccine requirement by January 18, 2022 will be contacted and subject to progressive discipline up to and including termination.

Please visit the [Vaccine News & Resources](#) webpage on the Employee Health Updates website for more information. Any additional questions can be directed to your HR liaison. Thank you in advance for your cooperation and continued commitment to our safety culture here at the city of Phoenix.

As has been this case throughout the pandemic, this information is subject to change pursuant to additional guidance or other legally binding decisions. Please visit the [Vaccine News & Resources](#) webpage on the Employee Health Updates website for more information. Any additional questions can be directed to your HR liaison.

Thank you in advance for your cooperation and continued commitment to our safety culture here at the city of Phoenix.





THIS MESSAGE HAS BEEN SENT TO ALL CITY OF PHOENIX E-MAIL USERS.

DO NOT REPLY TO THIS MESSAGE.

Exhibit 11

 An official website of the United States government [Here's how you know](#) ▼

**The .gov means it's official.**

Federal government websites often end in .gov or .mil. Before sharing sensitive information, make sure you're on a federal government site.

**The site is secure.**

The **https://** ensures that you are connecting to the official website and that any information you provide is encrypted and transmitted securely.

**SAFER
FEDERALWORKFORCE**

MENU

Vaccinations

Vaccination Requirement for Federal Employees

**Q: By what date do Federal employees need to be fully vaccinated?**

A: Federal employees need to be fully vaccinated by November 22, 2021.

Employees will be considered [fully vaccinated](#) for COVID-19 2 weeks after they have received the requisite number of doses of a COVID-19 vaccine approved or authorized for emergency use by the U.S. Food and Drug Administration or that has been listed for emergency use by the World Health Organization. For Pfizer-BioNTech, Moderna, or AstraZeneca/Oxford, that is 2 weeks after an employee has received the second dose in a 2-dose series. For Johnson and Johnson (J&J)/Janssen, that is 2 weeks after an employee has received a single-dose.

More information is available at [Interim Clinical Considerations for Use of COVID-19 Vaccines | CDC](#).

Q: By what date do Federal employees need to have had their doses of a COVID-19 vaccination?

A: Federal employees must receive their last dose of their vaccine no later than November 8, 2021, to meet the November 22, 2021 deadline to be fully vaccinated.

The timing between the first and second shots [depends on which vaccine is received](#).

If someone receives the:

- Pfizer-BioNTech COVID-19 vaccine, then that person should get their second shot 3 weeks (or 21 days) after the first. This means for Federal employees to meet the vaccination deadline, they should receive their first vaccination no later than October 18. They would not be eligible for the second dose until November 8, which is the deadline by which they need to have received both shots.
- Moderna COVID-19 vaccine, then that person should get their second shot 4 weeks (or 28 days) after their first. This means for Federal employees to meet the vaccination deadline, they should receive their first vaccination no later than October 11. They would not be eligible for the second dose until November 8, which is the deadline by which they need to have received both shots.

Since the Johnson & Johnson vaccine only has one shot, Federal employees have until November 8 to receive that shot and still meet the November 22, 2021 deadline to be fully vaccinated.

Depending on employees' locations, they may not have all types of vaccines available to them. Agencies should encourage employees to plan ahead and allow enough time to receive all required vaccine doses before the November 8 deadline to have their second shot.

Q: By what date do individuals who start their government service after November 22, 2021 need to be fully vaccinated?

A: Agencies should require that individuals who start their government service after November 22, 2021, be [fully vaccinated](#) prior to their start date, except in limited circumstances where an accommodation is legally required. Agencies should require documentation to prove vaccination prior to the enter on-duty date. However, should an agency have an urgent, mission-critical hiring need to onboard new staff prior to those new staff becoming fully vaccinated, the agency head may delay the vaccination requirement—in the case of such limited delays, agencies should require new hires to be fully vaccinated within 60 days of their start date and to follow safety protocols for not fully vaccinated individuals until they are fully vaccinated.

OPM has issued [further guidance](#) to agencies, including suggested language for job opportunity announcements and tentative and final offer letters.

Q: How does the requirement for federal employees to be [fully vaccinated](#) apply

to individuals who start their employment after the issuance of EO 14043 but prior to November 22, 2021?

A: Agencies should require that individuals who start their government service prior to November 22, 2021 be fully vaccinated by November 22, 2021, except in limited circumstances where an accommodation is legally required. Should an agency have an urgent, mission-critical hiring need to onboard new staff who cannot be fully vaccinated by November 22, 2021, the agency head may delay the vaccination requirement—in the case of such limited delays, agencies should require new hires to be fully vaccinated within 60 days of their start date and to follow safety protocols for not fully vaccinated individuals until they are fully vaccinated.

As soon as possible, agencies should ensure that individuals who will or may start their government service prior to November 22, 2021, are aware of the requirement to be fully vaccinated by that date and how to seek an exception required by law to the vaccination requirement. OPM has issued [further guidance](#) to agencies, including suggested language for job opportunity announcements and tentative and final offer letters.

Q: To what types of Federal employees does the vaccination requirement apply?

A: The vaccination requirement in Executive Order 14043 (Requiring Coronavirus Disease 2019 Vaccination for Federal Employees) covers employees as defined in 5 U.S.C. 2105 (including an employee paid from nonappropriated funds as referenced in 5 U.S.C. 2105(c)). Agencies are strongly encouraged to require vaccinations for any employees or other personnel working under an agreement with an agency not covered by the Executive Order, consistent with applicable law and in consultation with the Safer Federal Workforce Task Force. Implementation of such additional requirements should generally follow the Safer Federal Workforce Task Force's guidance for implementing the vaccination requirement in Executive Order 14043.

Q: Does the requirement to be vaccinated apply to Federal employees who are not reporting to the worksite (e.g., are on maximum telework or working remotely)?

A: Yes. To protect the health and safety of the Federal workforce and to promote the efficiency of the civil service, all Federal employees covered by Executive Order 14043 and without a legally required exception need to be [fully vaccinated](#) by November 22, 2021, regardless of where they are working. Employees who are on maximum telework or working remotely are not excused from this requirement, including because

employees working offsite may interact with the public as part of their duties and agencies may need to recall employees who are on maximum telework or working remotely.

Q: Do agencies need to provide onsite vaccinations to their employees?

A: No. Agencies should take steps to make their employees aware of convenient opportunities to be vaccinated. Given the [widespread availability of vaccinations](#), it is not required that agencies provide vaccinations at their facilities or worksites, although agencies may choose to do so.

Vaccination Documentation and Information



Q: Must agencies require documentation from employees to prove vaccination status?

A: Yes, agencies must require documentation from employees to prove vaccination, even if an employee has previously attested to their vaccination status. Employees may provide a copy of the record of immunization from a health care provider or pharmacy, a copy of the COVID-19 Vaccination Record Card, 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 containing required data points (the required data points for such other official documentation are the type of vaccine administered, date(s) of administration, and the name of the health care professional(s) or clinic site(s) administering the vaccine(s)). Employees must certify under penalty of perjury that the documentation they are submitting is true and correct.

Employees may provide a digital copy of such records, including, for example, a digital photograph, scanned image, or PDF of such a record that clearly and legibly displays the information outlined above. In requesting this information, agencies should comply with any applicable Federal laws, including requirements under the Privacy Act and Rehabilitation Act of 1973.

Q: What steps should an agency take when an employee has lost or does not have a copy of required vaccination documentation?

A: If an employee states that they have lost their vaccination documentation or do not have a copy of it, the agency should direct the employee to contact the vaccination

provider site where they received their vaccine. If the location where the employee received their COVID-19 vaccine is no longer operating, the employee should contact their health care provider, who, in most cases, can access a State or local health department's immunization information system (IIS) for the employee's record. In many States or localities, the employees may themselves be able to get their record by directly contacting the State or local health department's IIS. Employees should contact their State or local health department if they have additional questions about vaccination cards or vaccination records.

If an employee was vaccinated in another country, the agency should direct the employee to contact the vaccination provider site where they received their vaccine for information on how to obtain records. Alternatively, the employee should contact the appropriate health department in that country.

If an employee who claims they are fully vaccinated is able to demonstrate to the agency a good faith effort to locate required documentation, the agency can hold any disciplinary action associated with failure to comply with the vaccination requirement in abeyance for a short period of time, pending the employee's submission of documentation providing proof of vaccination.

Q: Can an employee provide a recent antibody test in order to prove vaccination status?

A: No. An employee must provide the required documentation for proof of vaccination. A recent antibody test cannot be used to prove vaccination status.

Q: How should agencies maintain documentation provided by employees regarding vaccination?

A: Agencies must collect certain information necessary to verify that an employee is fully vaccinated. This includes the type of vaccine administered, the number of doses received, date of administration of each dose, and the submission of an approved form of required documentation, as set forth in this guidance. When providing this information, employees must also be required to certify under penalty of perjury that the information they are submitting is true and correct.

Agencies have unique operational environments and may develop their own processes to both collect and maintain the required information, in compliance with all applicable laws and in accordance with their agency record management policies. Accordingly, agencies may develop and use new processes, systems, tools, and applications to

collect and maintain the required information or choose to leverage existing processes, systems, tools, or applications previously established to collect Certification of Vaccination forms. Agency systems, processes, tools, and applications for the collection of this information must allow an employee to update their vaccination status and related information.

The collection and use of this information for many agencies is subject to the OPM/GOVT-10 Employee Medical File system of records notice (SORN) and OPM regulations (5 C.F.R. part 293, subpart E). Under those rules, each agency must have written instructions for its EMF system with appropriate safeguards. Employees must be provided with a [Privacy Act statement](#) at the point of collection of this information. Agencies that are not subject to OPM's regulations (or who employ categories of employees not covered by OPM/GOVT-10) must give their employees an alternative Privacy Act statement. As a general rule, this information should not be maintained in the Official Personnel Folder.

Agencies are encouraged to take steps to promote privacy and IT security, while also providing the relevant information to those who need to know in order to implement the safety protocols. Agencies should consult with their Agency Records Officer, Chief Information Officer, Senior Agency Official for Privacy, and agency's legal counsel to determine the best means to maintain this information to meet the agency's needs.

Q: Which individuals within an agency should have access to information on employees' vaccination status?

A: The Privacy Act permits disclosure within the agency to employees "who have a need for the record in the performance of their duties." 5 U.S.C. 552a(b)(1). Agencies should only disseminate information to the appropriate agency officials who have a need to know to ensure effective implementation of the safety protocols, which, in many cases, will include the supervisor level. Agencies must comply with the requirements of the Privacy Act at all times. Agencies should consult with their Senior Agency Official for Privacy on any questions related to Privacy Act requirements.

Q: Should agencies require documentation from visitors to verify their attestation of vaccination status?

A: Visitors (except those seeking a public benefit or service, who do not need to attest to or otherwise document vaccination status) must attest to their vaccination status using the [Certification of Vaccination form](#), but agencies should not ask them for documentation to verify their attestation.

Q: Should agencies require documentation from onsite contractor employees to verify their attestation of vaccination status?

A: Prior to contractor employees being subject to a contractual requirement to be vaccinated, onsite contractor employees need only attest to their vaccination status using the [Certification of Vaccination form](#).

For onsite contractor employees who are not yet subject to a contractual requirement to be vaccinated, agencies should not ask them for documentation to verify their attestation. When a contractor employee discloses that they are unvaccinated or declines to complete the attestation, agencies should treat that individual as not fully vaccinated for purposes of implementing safety measures.

If the agency has reasonable grounds to believe that an onsite contractor employee made a false statement on the Certification of Vaccination form, the agency may require that the contractor verify the contractor employee's vaccination documentation and confirm to the agency that the employee has been vaccinated, as part of the agency's review of the matter. If an onsite contractor employee who has attested to being vaccinated exhibits symptoms of COVID-19 illness, the agency should apply its safety protocols, but this is not an appropriate reason to request documentation to verify vaccination status.

Limited Exceptions to Vaccination Requirement



Q: Are there exceptions to the requirement for all employees to be fully vaccinated?

A: Federal employees must be fully vaccinated other than in limited circumstances where the law requires an exception. In particular, an agency may be required to provide a reasonable accommodation to employees who communicate to the agency that they are not vaccinated against COVID-19 because of a disability or because of a sincerely held religious belief, practice, or observance. Determining whether an exception is legally required will include consideration of factors such as the basis for the claim; the nature of the employee's job responsibilities; and the reasonably foreseeable effects on the agency's operations, including protecting other agency employees and the public from COVID-19. Because such assessments will be fact- and context-dependent, agencies are encouraged to consult their offices of general counsel with questions related to assessing and implementing any such requested

accommodations.

Q: Should agencies establish a date by which employees should notify agencies that they are seeking a legally required exception to the requirement to not be fully vaccinated?

A: Yes. In order to ensure that agencies can fully understand the effect of accommodation requests on their operations and to seek to ensure timely review of requests for an accommodation, agencies should establish a date by which employees should as a general matter notify agencies that they are seeking a legally required exception to the requirement to be fully vaccinated. Employees can submit requests for an exception after the date established by the agency.

Q: Should agencies provide employees who are seeking a legally required exception to the vaccination requirement with a form?

A: Yes. Agencies can refer to the following templates to develop a form for employees who are seeking an exception based on a [medical condition](#) (*template issued October 4, 2021*) or based on [religion](#) (*template updated October 29, 2021*). The information on the forms may be used by the agency to help determine whether the employee is entitled to an accommodation. The agency may also ask for other information as needed to determine if the individual is legally entitled to an accommodation. Agencies should consult with their senior agency official for privacy and their office of general counsel to address all legal considerations and privacy requirements in developing their forms, including but not limited to an appropriate Privacy Act Statement. Agencies should comply with any applicable recordkeeping and other requirements.

Q: If an employee requests an accommodation, and that accommodation is denied, how long should the employee be afforded to be fully vaccinated?

A: Agencies should require that an employee whose request for an accommodation is denied receive their first (or, if a one-dose series, only) dose within two weeks of the final determination to deny the accommodation. If receiving a two-dose series, the employee must receive the second dose within 6 weeks of receiving the first dose.

If the employee received a first dose of a two-dose series prior to seeking an accommodation, agencies should require that the employee receive their second dose within two weeks of the final determination to deny the accommodation or within a week of the earliest day by which they can receive their second dose, whichever is later.

Q: If an employee is not fully vaccinated due to a legally required exception, what

protocols should that individual follow?

A: Generally, employees would need to follow applicable masking, physical distancing, and testing protocols for individuals who are not fully vaccinated, as well as applicable travel guidance. Additional guidance will be forthcoming regarding testing protocols for individuals who are excepted from the vaccination requirement. There may be circumstances in which an agency determines that the nature of an employee's job responsibilities requires heightened safety protocols if they are provided with a legally required exception. In some cases, the nature of the employee's job may be such that an agency determines that no safety protocol other than vaccination is adequate. In such circumstances, the agency may deny the requested accommodation.

Q: Can an agency grant an extension to the deadline for vaccination due to a documented medical necessity even if the employee does not meet the legal definition of "disability" to be entitled to an accommodation?

A: Even in cases where the employee does not meet the legal definition of "disability" to be entitled to an accommodation under the Rehabilitation Act, in some limited circumstances an agency may grant an extension to a vaccination deadline based upon other medical considerations. For example, as explained in a separate FAQ, the CDC [recommends](#) delaying COVID-19 vaccination for at least 90 days after receiving monoclonal antibodies or convalescent plasma for COVID-19 treatment. Agencies that receive documented medical reasons that may not qualify as a disability but that necessitate a delay in vaccination should grant extensions but specify, consistent with the nature of the medical necessity, by what date the employee must be fully vaccinated.

Agencies should take note that an individual's medical need should be considered on a case-by-case basis, including any medical evaluation that addresses the individual's particular circumstance.

Q: What medical conditions does the CDC consider a contraindication to vaccination with COVID-19 vaccines?

A: The CDC considers a history of the following medical conditions to be [contraindications](#) to vaccination with COVID-19 vaccines:

- Severe allergic reaction (e.g., anaphylaxis) after a previous dose or to a component of the COVID-19 vaccine; and
- Immediate allergic reaction of any severity to a previous dose or known (diagnosed)

allergy to a component of the COVID-19 vaccine.

If an individual is allergic to a component of one or more COVID-19 vaccines, that individual may not be allergic to components in all COVID-19 vaccines.

Q: Are there circumstances that the CDC recommends delaying vaccination for COVID-19?

A: Yes. In the following circumstances, the CDC [recommends](#) delaying vaccination for COVID-19 for adults:

- Vaccination of people with known current SARS-CoV-2 infection should be delayed until the person has recovered from the acute illness (if the person had symptoms), and they have met [criteria](#) to discontinue isolation.
- People with a history of multisystem inflammatory syndrome in adults (MIS-A) should consider delaying vaccination until they have recovered from their illness and for 90 days after the date of diagnosis of MIS-A.
- Vaccination should be delayed for 90 days after receiving monoclonal antibodies or convalescent plasma for COVID-19 treatment.
- Whenever possible, mRNA COVID-19 vaccination doses (including the primary series and an additional dose) or the single dose Johnson and Johnson (J&J)/Janssen vaccine should be completed at least two weeks before initiation or resumption of immunosuppressive therapies, but timing of COVID-19 vaccination should take into consideration current or planned immunosuppressive therapies and optimization of both the patient's medical condition and response to vaccine. A patient's clinical team is best positioned to determine the degree of immune compromise and appropriate timing of vaccination.
- People who develop myocarditis or pericarditis after a dose of an mRNA COVID-19 vaccine should delay receiving a subsequent dose. People who choose to receive a subsequent dose should wait until myocarditis has completely resolved.
- People who have a history of myocarditis or pericarditis unrelated to mRNA COVID-19 vaccination may receive any currently FDA-approved or FDA-authorized COVID-19 vaccine after the episode of myocarditis or pericarditis has completely resolved. This includes resolution of symptoms attributed to myocarditis or pericarditis, as well as no evidence of ongoing heart inflammation or sequelae as determined by the person's clinical team, which may include a cardiologist, and special testing to assess cardiac recovery.

This is not an exhaustive list of the circumstances in which clinical considerations may

recommend in favor of delaying vaccination.

In circumstances in which delay pursuant to these clinical considerations means that an employee is not fully vaccinated by November 22, 2021, the agency should require that individual to receive their first (or if a one-dose series, only) dose no later than two weeks after clinical considerations no longer recommend delay. If receiving a two-dose series, the employee should be required to receive the second dose within 6 weeks of receiving the first dose. If the employee already received a first dose of a two-dose series, they should be required to receive their second dose no later than two weeks after clinical considerations no longer recommend delay.

During the period in which vaccination is delayed, an employee must follow applicable masking, physical distancing, and testing protocols for not fully vaccinated individuals, as well as applicable travel guidance. There may be circumstances in which an agency determines that the nature of an employee's job responsibilities requires heightened safety protocols during the intervening time.

Q: Is vaccination for COVID-19 recommended for people who are trying to get pregnant or might become pregnant in the future?

A: Yes. The CDC has [stated](#) that COVID-19 vaccination is recommended for people who are trying to get pregnant now or might become pregnant in the future, as well as their partners.

Q: Does the CDC recommend that an employee delay vaccination due to pregnancy?

A: The CDC recommends COVID-19 vaccination for [people who are pregnant, breastfeeding, trying to become pregnant now, or trying to become pregnant in the future](#). The American College of Obstetricians and Gynecologists and Society for Maternal-Fetal Medicine [recommend](#) that all pregnant individuals be vaccinated against COVID-19. However, an agency may allow such an employee to delay vaccination based on the employee's particular medical circumstances, consistent with the agency's process for reviewing delay requests.

Q: Is an employee who has had a prior COVID-19 infection required to be fully vaccinated?

A: Yes, an employee who has had a prior COVID-19 infection is required to be fully vaccinated. The CDC recommends that vaccination of people with known current SARS-CoV-2 infection should be delayed until the person has recovered from the acute

illness (if the person had symptoms) and has satisfied the [criteria](#) to discontinue isolation.

Q: Can an employee delay a COVID-19 vaccine because they have recently received another vaccine, such as the seasonal influenza vaccine?

A: COVID-19 vaccines may be administered without regard to timing of other vaccines. This includes simultaneous administration of COVID-19 vaccine and other vaccines on the same day.

Enforcement of Vaccination Requirement for Employees



Q: What steps may an agency take if a Federal employee refuses to be vaccinated or provide proof of vaccination?

A: Employees covered by Executive Order 14043 who fail to comply with a requirement to be fully vaccinated or provide proof of vaccination and have neither received an exception nor have an exception request under consideration, are in violation of a lawful order. Employees who violate lawful orders are subject to discipline, up to and including termination or removal.

Consistent with the Administration's policy, agencies should initiate an enforcement process to work with employees to encourage their compliance. Accordingly, agencies should initiate the enforcement process with a brief period of education and counseling (5 days), including providing employees with information regarding the [the benefits of vaccination](#) and [ways to obtain the vaccine](#). If the employee does not demonstrate progress toward becoming fully vaccinated through completion of a required vaccination dose or provision of required documentation by the end of the counseling and education period, it should be followed by a short suspension (14 days or less). Continued noncompliance during the suspension can be followed by proposing removal. Unique operational needs of agencies and the circumstances affecting a particular employee may warrant departure from these guidelines if necessary, but consistency across government in enforcement of this government-wide vaccine policy is desired, and the Executive Order does not permit exceptions from the vaccination requirement except as required by law.

Agencies may initiate the enforcement process as soon as November 9, 2021, for employees who fail to submit documentation to show that they have completed receiving required vaccination dose(s) by November 8, as long as those employees

have not received an exception and the agency is not considering an exception request from the employee.

If an employee responds at any phase of the discipline by submitting proof of progress toward full vaccination (i.e., completion of a required vaccination dose), the agency should hold the discipline in abeyance to afford the employee a reasonable period of time to become fully vaccinated. In pursuing any adverse action, the agency must provide the required procedural rights to an employee and follow normal processes, including any agency policies or collective bargaining agreement requirements concerning disciplinary matters. Employees should not be placed on administrative leave while pursuing an adverse action for refusal to be vaccinated but will be required to follow safety protocols for employees who are not fully vaccinated when reporting to agency worksites.

If the employee claims a legally required exception as the reason for not being vaccinated, an agency should follow its ordinary process to review and consider what, if any, accommodation it must offer. All agency personnel designated to receive requests for accommodations should know how to handle requests consistent with the Federal employment nondiscrimination laws that may apply. If the employee's request for an exception is denied, and the employee does not comply with the vaccination requirement, the agency may pursue disciplinary action, up to and including removal from Federal service.

OPM has issued [additional guidance](#) to further assist agencies with enforcing the vaccination requirement for Federal employees.

Visitors and Onsite Federal Contractors



Q: Can agencies incorporate vaccination requirements into contracts that are not covered by Executive Order 14042 (Ensuring Adequate COVID Safety Protocols for Contractors)?

A: Yes. Agencies are strongly encouraged to incorporate vaccination requirements into contracts that are not covered by Executive Order 14042, consistent with applicable law. This might include, for example, incorporating vaccination requirements into contracts in advance of when they are otherwise required by the Executive Order or incorporating requirements into contracts that are not covered by the Executive Order, such as contracts under the Simplified Acquisition Threshold. Implementation of such additional requirements should generally follow the Safer Federal Workforce Task

Force's guidance for implementing the vaccination requirement in Executive Order 14042.

Q: Should agencies inquire regarding the vaccination status of onsite contractor employees?

A: Prior to contractor employees being subject to a contractual requirement to be vaccinated, agencies need to ask about the vaccination status of those onsite contractor employees. Onsite contractor employees must attest to the truthfulness of the response they provide. If an onsite contractor employee chooses not to provide a response, they will be treated as not fully vaccinated for the purpose of agency safety protocols. In requesting this information, agencies should comply with any applicable federal laws, including requirements under the Privacy Act and the Paperwork Reduction Act.

Q: Do onsite contractor employees need to provide proof of a negative COVID-19 test?

A: Prior to being subject to a contractual requirement to be vaccinated, onsite contractor employees who are not fully vaccinated or who decline to provide information about their vaccination status must provide proof of a negative COVID-19 test from no later than the previous 3 days prior to entry to a federal building. If a contractor employee is regularly tested pursuant to an agency testing program, then they do not need to provide proof of a negative COVID-19 test from no later than the previous 3 days prior to entry to a federal building unless required to by the agency testing program.

Q: How should an agency ask onsite contractor employees about their vaccination status?

A: Prior to being subject to a contractual requirement to be vaccinated, onsite contractor employees should be provided with the [Certification of Vaccination form](#) when they enter a federal building or federally controlled indoor worksite.

Unless an agency has an existing system of records notice that permits it to collect and maintain this information on its contractor employees, agencies will direct onsite contractor employees to complete the Certification of Vaccination form and keep it with them during their time on federal premises—they may be asked to show the form upon entry to a federal building or federally controlled indoor worksite and to a federal employee who oversees their work.

Prior to being subject to a contractual requirement to be vaccinated, onsite contractor

employees who are not fully vaccinated (or who decline to disclose vaccination status) are required to show proof of a negative COVID-19 test result from within the previous 3 days before entry to a federal building or federally controlled indoor worksite. If a contractor employee is regularly tested pursuant to an agency testing program, then they do not need to provide proof of a negative COVID-19 test from no later than the previous 3 days prior to entry to a federal building unless required to by the agency testing program.

Agencies may email Certification of Vaccination form to contractor employees in advance of their time on-site or utilize a unique tool or application to share the form with contractor employees and enable them to easily complete it, but the agency will not maintain Certification of Vaccination forms from contractor employees at this time unless an agency has a system of records notice that covers its collection of this information from onsite contractor employees. Any such collection, storage, or maintenance of the attestation disclosure forms may implicate the Privacy Act and Paperwork Reduction Act.

Prior to having a contractual requirement for its employees to be vaccinated and if authorized and consistent with the terms of the contract, an agency may work with a contractor to facilitate compliance by its onsite employees with the agency's safety protocols, such as by having the company attest that all onsite contractor employees are fully vaccinated.

Q: What workplace safety protocols should an agency apply to an onsite contractor employee who is not fully vaccinated because the contractor employee has been provided an exception to the vaccination requirement by their employer?

A: In most circumstances, an agency should require an onsite contractor employee who is not fully vaccinated to follow applicable masking, physical distancing, and testing protocols. However, there may be circumstances in which an agency determines that the nature of an onsite contractor employee's job responsibilities at a Federal workplace, or the location of their work at a Federal workplace, requires heightened safety protocols. In some cases, an agency may determine that the nature of an onsite contractor employee's responsibilities at a Federal workplace are such that no safety protocol other than vaccination is adequate—in that case, an onsite contractor employee who is not fully vaccinated would be unable to perform the requisite work at the Federal workplace. Such circumstances do not relieve the contractor from meeting all contractual requirements.

In order for agencies to assess appropriate safety measures for contractor employees in Federal workplaces, contractors subject to a contractual requirement for maintaining COVID-19 workplace safety protocols pursuant to Executive Order 14042 should generally notify their contracting officers when one of their employees who works onsite at a Federal workplace has received an exception to the requirement to be fully vaccinated.

Q: Should agencies inquire regarding the vaccination status of visitors to federal buildings?

A: Visitors to federal buildings should be asked to provide information about vaccination status. In requesting this information, agencies should comply with any applicable federal laws, including requirements under the Privacy Act and the Paperwork Reduction Act. Visitors who are not fully vaccinated or who decline to provide information about their vaccination status must provide proof of a negative COVID-19 test from no later than the previous 3 days prior to entry to a federal building.

These requirements related to the provision of information about vaccination and provision of proof of a recent negative COVID-19 test do not apply to members of the public entering a federal building or federal land to obtain a public service or benefit. If they are not fully vaccinated, these visitors must comply with all relevant CDC guidance, including wearing a mask and physically distancing from other people.

Q: How should an agency ask visitors about their vaccination status?

A: Agencies should provide visitors with the [Certification of Vaccination form](#) when they enter a federal building or federally controlled indoor worksite. Agencies will direct visitors to complete the Certification of Vaccination form and keep it with them during their time on federal premises—visitors may be asked to show the form upon entry to a federal building or federally controlled indoor worksite. If they are not fully vaccinated or decline to answer, they will be required to show a negative COVID-19 test result from within the previous three days.

Agencies may email the Certification of Vaccination form to visitors in advance of arrival or utilize a tool or application to share the form with visitors and enable visitors to easily complete it, but the agency will not maintain Certification of Vaccination forms from visitors.

Individuals entering a federal building, federally controlled indoor worksite, or federal land to obtain a public service or benefit do not need to complete the form or show

documentation of a negative COVID-19 test result. However, if they are not fully vaccinated, they must comply with all relevant CDC guidance and safety protocols, including mask-wearing and physical distancing requirements.

Q: What type of negative COVID-19 test result must a visitor or onsite contractor employee who is not fully vaccinated show documentation of in order to enter a federal building?

A: Agencies may determine what types of tests a visitor or onsite contractor employee who is not subject to a contractual requirement to be vaccinated can show documentation of in order to enter a federal building, provided that the tests are authorized by the U.S. Food and Drug Administration to detect current infection and produce a dated result.

Q: If an agency has a system of records notice that covers its collection of information on vaccination status from onsite contractor employees, can the agency collect that information?

A: Yes, if an agency has a system of records notice that covers its collection of the requisite information—as reflected in the [Certification of Vaccination form](#)—from onsite contractor employees consistent with the Privacy Act, it may do so. The agency should ensure such a collection is also consistent with the Paperwork Reduction Act. The agency should provide a means for individuals to update their vaccination status over time.

Labor Relations Related to Vaccination



Q: Should agencies discuss vaccination plans with their employee unions?

A: Yes. Because agencies need to act quickly due to the COVID-19 emergency and to protect the health and safety of federal employees, contractor employees, and visitors, agencies should engage with employee unions at their earliest opportunity regarding the requirement for agency employees to be vaccinated. The Government-wide policy covers specific implementation steps that agencies need to take, as well as a deadline for implementation. Additional guidance on the policy will be forthcoming that will address further implementation issues. Accordingly, bargaining over this Government-wide policy will be limited to impact and implementation issues not otherwise addressed in the guidance. Moreover, agencies must implement Government-wide policy by the deadline, so any bargaining that has not been completed by the time implementation

must begin will have to be finished post-implementation.

Safety Protocols Related to Vaccination



Q: Who is considered fully vaccinated?

A: People are considered [fully vaccinated](#) for COVID-19 ≥ 2 weeks after they have received the second dose in a 2-dose series (Pfizer-BioNTech or Moderna), or ≥ 2 weeks after they have received a single-dose vaccine (Johnson and Johnson (J&J)/Janssen). There is currently no post-vaccination time limit on fully vaccinated status.

This guidance applies to COVID-19 vaccines currently either 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). This guidance can also be applied to 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](#).

Q: Can an employee who participates in a clinical trial for a COVID-19 vaccine be considered fully vaccinated?

A: 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 2 weeks after they have completed the vaccine series. Currently, the U.S.-based AstraZeneca and Novavax COVID-19 vaccines meet these criteria. More information is available [here](#).

Q: Can an employee who has received a heterologous primary vaccine series be considered fully vaccinated?

A: Individuals can be considered fully vaccinated ≥ 2 weeks after receipt of the last dose if they have received any combination of two doses of an FDA approved or authorized or WHO emergency use listed COVID-19 two-dose series. For these purposes, the second dose in a two dose heterologous series must have been received no earlier than 17 days (21 days with a 4-day grace period) after the first dose.

Q: Are agencies required to establish different safety protocols for fully vaccinated and not fully vaccinated individuals?

A: Yes. [Fully vaccinated individuals](#) do not need to physically distance or have restrictions on their official travel (although they still must comply with any local requirements and relevant CDC guidance for fully vaccinated individuals while traveling). Fully vaccinated individuals in areas of substantial or high transmission (see the [CDC COVID-19 Data Tracker County View](#)) need to wear a mask in public indoor settings. Fully vaccinated individuals in areas of low or moderate transmission do not need to wear a mask, unless required by state or local regulations or laws.

Fully vaccinated individuals might choose to wear a mask regardless of the level of transmission for a variety of reasons.

Some employees will not be vaccinated because they are legally entitled to a reasonable accommodation. Some onsite contractor employees may not yet be subject to a contractual requirement to be vaccinated. Individuals who are not fully vaccinated or who decline to provide information about their vaccination status must wear masks regardless of community transmission level, physically distance, and comply with travel requirements for not fully vaccinated individuals

Prior to being subject to a contractual requirement to be vaccinated, onsite contractor employees who are not fully vaccinated or who decline to provide information about their vaccination status must provide proof of a negative COVID-19 test from no later than the previous 3 days prior to entry to a federal building. If a contractor employee is regularly tested pursuant to an agency testing program, then they do not need to provide proof of a negative COVID-19 test from no later than the previous 3 days prior to entry to a federal building unless required to by the agency testing program.

Visitors will be asked to provide information about their vaccination status. Individuals who decline to provide information on their vaccination status will be treated as not fully vaccinated for purposes of agency COVID-19 workplace safety plans and protocols. Visitors who are not fully vaccinated must provide proof of a negative COVID-19 test that occurred within the previous 3 days prior to entry to a federal building.

Individuals entering a federal building or federal land to obtain a public service or benefit do not need to provide information about their vaccination status or provide proof of a negative COVID-19 test. If they are not fully vaccinated, they must comply with all relevant CDC guidance, including wearing a mask.

Q: Prior to an employee being fully vaccinated, what protocols should that individual follow?

A: Federal employees who are not fully vaccinated must comply with all agency requirements for individuals who are not fully vaccinated, including those requirements related to masking, physical distancing, and travel, subject to any legally required reasonable accommodation. In determining safety protocols for employees ahead of the deadline for employee vaccination, agencies can use information from vaccination attestations submitted by employees, or other information that the agency has on the vaccination status of employees (for example, information available to the agency because the agency administered the vaccine to an employee or the agency conducted a survey of its employees regarding vaccination status) consistent with the requirements of the Privacy Act.

Where the agency already has the requisite information regarding vaccination status, it can utilize that information for purposes of determining the proper safety protocols to apply to that individual. When an employee discloses that they are not fully vaccinated, or if an agency does not know the vaccination status of an employee, agencies should follow the protocols for an individual who is not fully vaccinated for purposes of implementing safety measures.

Q: If a federal employee seeks to enter space under the control of another agency, must they complete a Certification of Vaccination form at that agency?

A: Yes, federal employees are treated as visitors during their visit to another agency, meaning they would need to complete a [Certification of Vaccination form](#) and, if they are not fully vaccinated, they would need to show proof of a negative COVID-19 test result within the past 3 days. As with other visitors, the employee should keep the form with them during their time onsite at the other agency.



For questions or comments, email the Safer Federal Workforce Task Force at SaferFederalWorkforce@gsa.gov

