

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, *et al.*,

*Plaintiffs,*

v.

JOSEPH R. BIDEN, JR., in his official capacity as  
President of the United States, *et al.*,

*Defendants.*

Case No: CIV-21-1069-G

**PLAINTIFFS' REPLY IN SUPPORT OF  
MOTION FOR A PRELIMINARY INJUNCTION**

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Plaintiffs possess the requisite standing to bring this action and their constitutional and statutory claims are likely to succeed on the merits. Defendants’ arguments to the contrary fail.

# **I. PLAINTIFFS HAVE STANDING.**

Defendants argue that Plaintiffs lack *parens patriae* standing to protect the rights of Oklahomans and that the State has not shown that its contracts are sufficiently jeopardized to demonstrate a concrete, particularized injury. *See* Resp. 7–12 [Doc. No. 25]. These arguments fail.

First, the State is “entitled to special solicitude in [the] standing analysis” and “to litigate” cases against the federal government “as *parens patriae* to protect quasi-sovereign interests—*i.e.*, public or governmental interests that concern the state as a whole.” *Massachusetts v. EPA*, 549 U.S. 497, 520 & n.17 (2007) (cleaned up); *see also* David M. Howard, *State Parens Patriae Standing to Challenge the Federal Government: Overruling the Mellon Bar*, 11 N.Y.U. J.L. & LIBERTY 1089, 1130 (2018) (“Federalism principles and our system of checks and balances require states to have the power to check the authority of the growing federal administrative state. This can—and should—be done through *parens patriae* actions in the context of federal action or inaction ...”). Two other federal courts have already recognized the States’ *parens patriae* standing to challenge federal COVID-19 vaccine mandates, including in one case challenging the same contractor mandate at issue here. *See Kentucky v. Biden*, No. 3:21-cv-00055-GFVT, 2021 WL 5587446, at \*3 (E.D. Ky. Nov. 30, 2021), *appeal docketed*, No. 21-6147 (6th Cir. Dec. 6, 2021); *Louisiana v. Becerra*, No. 3:21-CV-03970, 2021 WL 5609846, at \*4–5 (W.D. La.

Nov. 30, 2021), *appeal docketed*, No. 21-30734 (5th Cir. Dec. 1, 2021).

The harm visited upon Oklahoma residents is the State’s concrete and particularized concern. Under *Massachusetts*, the contractor mandate’s infliction of harm on individuals in Oklahoma through the violation of their individual rights under the Constitution and federal laws injures Oklahoma’s “well-founded desire to preserve its sovereign territory.” 549 U.S. at 519. As Oklahoma has shown, the hemorrhaging of employees from the federal contractor workforce, including defense contractors, will hurt the State’s security interests, public policy, and other sovereign and territorial prerogatives. Prel. Inj./TRO Motion 7 [Doc. No. 9].

In that regard, Defendants’ implicit distinction (at 9–12) between individual rights directly addressed in the Constitution’s text and the individual liberties protected by the Constitution’s *structure* is specious, artificial, and illusory. *See Bond v. United States*, 564 U.S. 211, 222 (2011). Much of the point of the Constitution’s structure is that it is designed to protect our individual liberties. *See id.* Because States may sue the federal government to stop it from violating the Constitution’s structure and thus to protect individual liberty, States may also sue to vindicate their residents’ individual liberties expressly protected in the Constitution. *See, e.g., New York v. United States*, 505 U.S. 144 (1992); *South Dakota v. Dole*, 483 U.S. 203 (1987).

Second, Plaintiffs themselves have suffered a concrete, particularized injury from this contractor mandate because of the harm it has inflicted on Oklahoma’s federal contracts, its sovereignty—including its right to legislate in the vaccination space—and its public policy, and security interests. The contractor mandate is effectively blocking

Oklahoma from deciding its own public policy in this arena—including the choice not to have a vaccine mandate. As the *Louisiana* court concluded with respect to another recent federal vaccine mandate, “the Plaintiff States have standing to regulate matters they believe they control, to attack preemption of state law by a federal agency, and to protect the enforcement of state law.” 2021 WL 5609846, at \*5. That is true here as well.

As for Defendants’ contention (at 9–12) that Plaintiffs have not completely demonstrated the injuries this mandate inflicts on them: the affidavits,<sup>1</sup> statutory evidence, and common sense adduced by Plaintiffs all foreclose that argument. In any event, “[a]t the preliminary injunction stage, a district court may rely on affidavits and hearsay materials which would not be admissible evidence for a permanent injunction, if the evidence is ‘appropriate given the character and objectives of the injunctive proceeding.’” *Levi Strauss & Co. v. Sunrise Int’l Trading Inc.*, 51 F.3d 982, 985 (11th Cir. 1995) (quoting *Asseo v. Pan Am. Grain Co.*, 805 F.2d 23, 26 (1st Cir. 1986)). Plaintiffs’ agencies are federal contractors that are challenging a federal contractor mandate—standing is “self-evident.” *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 733 (D.C. Cir. 2003). Moreover, they have provided evidence in the form of affidavits showing that those agencies will be harmed by exacerbated labor shortages should the contractor mandate be inflicted on them. *Cf. BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021) (Plaintiffs “will also be irreparably harmed in the absence of a stay, whether by the business and financial effects

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<sup>1</sup> Plaintiffs are submitting a signed copy of the declaration of Mr. Trey Lam, the Executive Director of the Oklahoma Conservation Commission (“OCC”), as Exhibit 1. *See* Resp. 9 n.5; Ex. 2 to Prel. Inj./TRO Motion [Doc. No. 9-2].

of a lost or suspended employee.”). That is enough to establish standing.

## II. DEFENDANTS’ ARGUMENTS ON THE MERITS FAIL.

### A. The Mandate Violates the Procurement Act

Defendants contend that Congress “*implicit[ly]*” has “endorse[d] ... an expansive view of the President’s power under [the Procurement Act].” Resp. 13–14 (emphasis added). That argument is both wrong factually and based on an incorrect premise. First, the Procurement Act never—implicitly or explicitly—granted the President *direct* authority to do anything. To be sure, in an era when statutes were often construed without much regard to their particular texts—an era the Supreme Court has long left behind—the D.C. Circuit suggested that the Procurement Act confers on the President “direct presidential authority.” *Am. Fed’n of Labor and Congress of Indus. Orgs. v. Kahn*, 618 F.2d 784, 789 (D.C. Cir. 1979). But the Court could point to no textual evidence of such direct authority.

Instead, as *Kahn* acknowledged, *see id.* at 789, and as the U.S. District Court for the Southern District of Georgia noted this week, the statute merely allows the President to prescribe regulations “ensuring contracts are awarded on terms that are ‘most advantageous to the Government, price and other factors considered.’” *Georgia v. Biden*, No. 1:21-cv-00163-RSB-BKE, 2021 WL 5779939, at \*8 (S.D. Ga. Dec. 7, 2021). The D.C. Circuit in *Kahn* interpreted the Procurement Act to encompass “those *larger administrative and management issues* that involve the Government as a whole” for the purpose of “achiev[ing] a flexible *management* system capable of making sophisticated judgments in pursuit of *economy and efficiency*.” *Id.* at \*8–9 (emphases added) (citing *Kahn*, 618 F.2d



at 789). The plain text or legislative history of this statute does not bear the interpretation that the contractor mandate falls within this largely procurement-related scope of the statute. If a vaccine mandate does, then everything does—and the Procurement Act would become just an empty vessel susceptible of being filled with the federal Executive’s preferred content—congressional priorities aside. To say otherwise would be to embrace a strained and implausible interpretation of the statute, not just an “expansive” one. Resp. 13–14.

But even if the Defendants’ reading were permissible as a textual matter, that would not be enough here. That is due to the well-established rule that on matters of “vast economic and political significance,” Congress is required to “speak clearly” before courts may infer a delegation. *Ala. Ass’n of Realtors v. Dep’t of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021); *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014); *see also Georgia*, 2021 WL 5779939, at \*9. And Defendants expressly have admitted that Congress has not done so. *See* Resp. 13–14. As Plaintiffs, joined by the U.S. District Courts for the Southern District of Georgia and the Eastern District of Kentucky, have explained this mandate is a matter of vast economic and political significance. *See* Compl. ¶¶ 78–88 [Doc. No. 1]; Prel. Inj./TRO Motion 8–13; *Kentucky*, 2021 WL 5587446, at \*7; *Georgia*, 2021 WL 5779939, at \*9. Every court to rule on the contractor mandate has concluded that EO 14042 “bring[s] about an enormous and transformative expansion in ... regulatory authority without clear congressional authorization.” *Utility Air Regul. Grp.*, 573 U.S. at 324.

As the Southern District of Georgia recently deduced from the Procurement Act,

there is at least a likelihood that “Congress, through the language it used, did *not* clearly authorize the President to issue the kind of mandate contained in EO 14042, as EO 14042 goes far beyond addressing administrative and management issues in order to promote efficiency and economy in procurement and contracting, and instead, in application, works as a regulation of public health, which is not clearly authorized under the Procurement Act.” *Georgia*, 2021 WL 5779939, at \*9 (cleaned up, emphasis added). That is all Plaintiffs need show under the likelihood-of-success prong. Nor does EO 14042 have the required “sufficient nexus to the purposes of the Procurement Act and thus does not fall within the authority actually granted to the President in that Act.” *Id.* at \*10; *see also Kahn*, 618 F.2d. at 797 (Bazelon, J., concurring). Accordingly, Plaintiffs have shown a likelihood of success on their Procurement Act claim.

#### **B. The Mandate Violates the Administrative Procedure Act (“APA”)**

Defendants further claim that the contractor mandate, as revised by the November 2021 determination of the Office of Management and Budget (“OMB”), is not “in excess of statutory ... authority, or limitations, or short of statutory right.” 5 U.S.C. § 706(2)(A), (C). But as the preceding section demonstrates, that is simply wrong because the mandate violates the Procurement Act.

Next, Defendants claim that the mandate is not arbitrary or capricious in violation of 5 U.S.C. § 706(2)(A) because the Executive considered some generalized correlations between vaccination rates and worker productivity and the rise of the Delta variant. Resp. 21–22; *see also* 86 FR 63418, 63422–23. But none of this explains why a blanket and over-inclusive mandate, rather than a less drastic alternative, was appropriate. *See* Prel. Inj./TRO

Motion 16–17. Nor does the November OMB determination even suggest that the Executive considered the costs to Oklahoma’s sovereignty and laws—which it displaced. Resp. 22; *cf. Alden v. Maine*, 527 U. S. 706, 715 (1999) (the States “are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty”). Plaintiffs have adequately pleaded an APA violation.

**C. The Mandate Violates the Tenth Amendment and Federalism.**

Defendants focus entirely on Plaintiff’s Tenth Amendment claim and ignore Plaintiffs’ many other federalism concerns. Resp. 25–29. To be sure, Plaintiffs’ resources *are* effectively being commandeered by the federal government in order to make state agencies and institutions eligible for federal contracts. Compl. ¶¶ 135–36. And those state apparatuses have the proverbial gun to their heads because they cannot survive without those federal contractor dollars. *See id.* at ¶ 136. But in addition to that commandeering, this mandate prevents Oklahoma from functioning as a proper sovereign by taking over its police power to govern the public health of Oklahoma residents who happen to be federal contractors. *See Zucht v. King*, 260 U.S. 174, 176 (1922); *Jacobson v. Massachusetts*, 197 U.S. 11, 24–25 (1905). That is a quintessential federalism violation under the Constitution.

**D. The Mandate Violates the Non-Delegation Principle and the Separation of Powers.**

Responding to Plaintiffs’ non-delegation and separation of powers claim, Defendants claim that broad and generalized delegations are permissible under our Constitution’s separation of powers and that Congress may “leav[e] a certain degree of discretion to executive ... actors.” Resp. 31 (quoting *Touby v. United States*, 500 U.S. 160,

165 (1991)). However, not only are broad and generalized delegations inconsistent with the Constitution’s original meaning, but the Government can find no support for this contractor mandate under existing precedents. The permissible “discretion” of which Defendants speak pertains to the *manner* in which the Executive achieves a congressionally-authorized objective—not the refashioning or creating of the *objective* itself. *See, e.g., Field v. Clark*, 143 U.S. 649, 693–94 (1892). The latter would be sheer lawmaking, which is a power the Constitution commits to Congress. *See id.*; THE FEDERALIST No. 47, pp. 325-326 (J. Cooke ed. 1961); 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, p. 77 (M. Farrand rev. 1966). As a consequence, this mandate violates the non-delegation principle.

#### **E. The Mandate Violates the Fourth Amendment.**

As to Plaintiffs’ Fourth Amendment claim, the Government first attacks (at 31–32) the State’s standing to raise this claim before challenging its merits. With respect to standing, Plaintiffs already have explained why States have *parens patriae* standing to protect its residents’ constitutional rights. *See* Compl. ¶¶ 154, 166, 179, 186, 195; Prel. Inj./TRO Motion 4–7. On the merits, something that is an unreasonable search *or* an “unreasonable seizure” violates the Fourth Amendment. And, as the Supreme Court recently held in *Torres v. Madrid*, a mere “a ‘show of authority’ that ‘in some way restrain[s] the liberty’ of the person” counts as a seizure. 141 S. Ct. 989, 995 (2021) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968)).

Nor is there any merit to Defendants’ claim that individuals forced to take the vaccine in order to keep their jobs are cooperating “voluntarily.” Resp. 32, 33–34 (cleaned

up). If this is voluntary, then everything is voluntary. For example, the schoolchild who won her Establishment Clause suit at the Supreme Court by challenging a religious prayer at her graduation also had the nominal “choice” to forego attending her graduation. *See Lee v. Weisman*, 505 U.S. 577 (1992). The public sector employee who did not want to pay compelled union dues could have quit his state government job. *See Janus v. AFSCME*, 138 S. Ct. 2448 (2018). But, as those decisions and other “unconstitutional conditions” cases show, the Supreme Court has rejected the wooden concept of choice advanced by Defendants here. *See, e.g., Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606 (2013); *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 59 (2006).

Nor is there any merit to Defendants’ contention that a forcible vaccination is no search at all because the federal government is not trying “to obtain information” through this vaccine. Resp. 32 (cleaned up). That view overlooks the fact that the Executive does gain information about *how many* conscientious objectors there are in the federal contractors’ workforce and transfers its putative authority to the contractors themselves to find out *who* they are. *See Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). Even if an employee who quits does not give a reason, the timing and other circumstances related to their departure would permit the authorities to “obtain” at least some “information” about them. *United States v. Jones*, 565 U.S. 400, 408 n.5 (2012).

#### **F. The Mandate Violates the Take Care Clause and the Separation of Powers.**

As to Plaintiffs’ Take Care Clause claim, Defendants’ invocation of *Dalton v. Specter*, 511 U.S. 462 (1994), is misplaced because *Dalton* is not a Take Care Clause or

separation of powers case—or even a constitutional case. The question in *Dalton* was whether judicial review was available under the APA. *See id.* at 476–77. Furthermore, as Plaintiffs have pointed out, the President’s utter failure to obey the constraints that Congress and the Constitution have imposed on him is a classic deployment of the now-disfavored “dispensing power,” which spurred the enshrinement of our Take Care Clause and separation of powers in the Constitution. *See* Compl. ¶¶ 190-97. Defendants do not even endeavor to challenge Plaintiffs’ constitutional analysis on this score.

### CONCLUSION

Even a single day of Oklahoma’s suffering the injury that the contractor mandate inflicts is irreparable and contrary to the public interest. The constant threat of having the State’s federal contractor funds cut off, forced medical interventions on its workers, and the lived reality of having its sovereignty violated are irreparable. Accordingly, Plaintiffs’ motion for a preliminary injunction should be granted.

Respectfully submitted,

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Dated: December 13, 2021

# Exhibit 1



**IN THE UNITED STATES DISTRICT COURT  
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STATE OF OKLAHOMA, *et al.*,

*Plaintiffs,*

v.

Case No: CIV-21-1069-G

JOSEPH R. BIDEN, JR., in his official capacity as  
President of the United States, *et al.*,

*Defendants.*

I, JESS W. LAM but best known as Trey Lam, hereby declare:

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

2. I serve as the Executive Director at the Oklahoma Conservation Commission (“OCC”). OCC is an agency of the State of Oklahoma. Oklahoma’s Conservation District Act, 27A O.S. § 3-3-101 *et seq.*, authorizes the creation of both the Oklahoma Conservation Commission and the conservation districts to administer programs to conserve and protect the natural resources of the State of Oklahoma.

3. OCC is subject to the vaccine mandate issued by President Biden on September 9, 2021, *see* Exec. Order No. 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, 86 Fed. Reg. 50985 (Sept. 9, 2021), and the guidance provided by the Safer Federal Workforce Task Force (the “SFWTF”) on September 24, 2021, *see COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors*, SFWTF (Sept. 24, 2021).

4. I have been the Executive Director of the OCC since November 2014. As Executive Director, it is my responsibility to administer the laws, rules, regulations, policies, programs, and procedures of the OCC while directing and managing the human and financial resources available to successfully achieve our program goals and to accomplish our mission to conserve, protect and restore Oklahoma’s natural resources, working in collaboration with the conservation districts and other partners, on behalf of the citizens of Oklahoma.

5. As a lifelong conservationist, I also served on the Garvin County Conservation District Board of Directors from April 2003 until October 2014. I also have served on the board of the Oklahoma Association of Conservation Districts, which is a private, nonprofit organization that provides leadership, resources and partnership opportunities for conservation districts and those who manage the land to enhance their natural resources for a better Oklahoma.

6. Pursuant to Oklahoma's Conservation District Act, in general, OCC assists Oklahoma's 84 conservation districts, which serve as local political subdivisions of the state and the public to foster a sense of stewardship and conservation management of Oklahoma's renewable natural resources. This is accomplished through soil and water conservation, land use planning, small watershed upstream flood control, Abandoned Mine Land reclamation, water quality monitoring, environmental education, and wetlands conservation.

7. COVID-19 has engendered numerous challenges in OCC's and the conservation districts' abilities to administer our mission. A majority of the conservation districts were severely restricted in their ability to conduct work in their offices and to hold required board meetings at their offices since they shared office space and or building space with the U.S. Department of Agriculture's ("USDA") Field Offices. On November 8, 2021, the USDA released a new model that allowed the majority of conservation districts to increase to 75% staffing at the office from 25%.

8. On September 14, 2021, the USDA, Natural Resources Conservation Service ("NRCS") received talking points from the USDA Pandemic Incident Commander about the vaccine mandate for USDA employees and contractors which was shared with OCC and the conservation districts. Below are some key points from the USDA's talking points regarding employees of contractors that do business with the federal government:

- Continual checking of vaccine certification for contractors and visitors is required;
- On-site 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 before they get to enter a federal building;
- New contracts and new contract-like instruments for services, construction, leasehold interest in real property, or concessions; new solicitations for such contracts or contract-like instruments; extensions or renewals of existing such contracts or contract-like instruments; and exercises of options on existing such contracts or contract-like instruments that become relevant on or after October 15; and

- Exclusion of grants; contracts or subcontracts with a value equal to or less than the simplified acquisition threshold of \$250,000.

9. Below is a non-exhaustive, but representative, list of the contracts that OCC currently has with the federal government. Many of these contracts reoccur annually and make up a large portion of OCC's budget. OCC has 54 employees and over 75% of these employees work in federally funded projects and programs and are paid between 50%-100% by those federal funds. Conservation districts employ around 125 employees and have over 435 elected and appointed board members across the state. Over 90% of our 84 conservation districts are in shared offices with USDA Field Services Offices and would be considered contractors or subcontractors under EO 14042 and the SFWTF guidance. Complying with the mandate on federal contractors that EO 14042 and the SFWTF guidance have imposed is almost impossible for many of the conservation districts' staff and board members to meet due to the limited availability of COVID-19 testing in these rural areas.

Project/Program	Commission Division	Federal Agency Funding	Fund Amount	Annual / One time	Contractor / Subcontractor/ Grantee
Shared 50/50 PIO Position	Admin.	USDA - NRCS	\$60,000	Annually	Contractor
4 Pilot Feral Swine Eradication Projects	Field Services	USDA - NRCS	\$2,110,000	3 yr. one time	Contractor
Contributions Agreements (helps pay benefits for district employees and operating expenses to districts)	Field Services	USDA - NRCS	\$300,000	Annually	Contractor
Advanced Farm Bill Delivery Agreement with 17 Conservation Districts (where district employees assist with accelerated delivery of farm bill programs)	Field Services	USDA - NRCS	\$116,000	Annually	Contractor
Shared Position Agreements between NRCS and conservation districts	Field Services	USDA - NRCS	\$670,000	Annually	Contractor
Prescribed burning	Field Services	USFWS	\$100,000	One time	Contractor
CWA Section 319 Nonpoint Source Program	Water Quality	EPA	\$2,420,874	Annually	Subcontractor to OSEE
Neighbors Helping Neighbors RCPP	Water Quality	USDA - NRCS	\$710,000	Annually	Contractor
Comprehensive Nutrient Management Planner	Water Quality	USDA - NRCS	\$34,127.70	Annually	Contractor
Soil Health Education Program	Water Quality	USDA - NRCS	\$55,815.96	Annually	Contractor
Water Quality Liaison	Water Quality	USDA - NRCS	\$43,672.35	Annually	Contractor



Rehabilitation of Upper Elk Creek Site 23D – Dam Safety	Conservation Programs	USDA – NRCS	\$1, 500.000 To complete construction	One time	Contractor
Rehabilitation of Upper Black Bear Site 62 – Flood control & dam safety	Conservation Programs	USDA – NRCS	\$710,000	One time	Contractor
Rehabilitation of Fourche Maline 7M – Flood control & dam safety	Conservation Programs	USDA – NRCS	\$340,127.70	One time	Contractor
New dam Lower Bayou 12 – Flood control	Conservation Programs	USDA – NRCS	\$15-20 million	One time	Contractor
Other rehabilitation projects in the planning and design stages - Flood control & dam safety	Conservation Programs	USDA – NRCS	\$15 million	One time	Contractor

10. OCC is already struggling to survive under difficult conditions. It has been badly damaged by the COVID-19 pandemic. Based on my knowledge and experience, the vaccine mandate will make retention and hiring of qualified Commission and conservation district employees, as well as the retention and recruitment of conservation district Board members, profoundly difficult and likely impossible. It will also undermine the Oklahoma Conservation Commission mission as well as its compliance with state law, which precludes the Oklahoma Conservation Commission from requiring “a vaccination against COVID-19 as a condition of admittance to any public building.” Okla. Admin. Code 1:2021-16 (citing art. VI, §§ 1 and 2 of Okla. Const.).

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

\_\_\_\_\_  
Date

**Trey Lam**

Digitally signed by Trey  
Lam  
Date: 2021.11.11  
10:38:56 -06'00'

Jess W. Lam  
Executive Director  
Oklahoma Conservation Commission