No. 22-35474

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID G. DONOVAN, *et al.*

Plaintiffs-Appellants,

v.

JOSEPH R. BIDEN, *et al.*

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Washington
No. 4:21-cv-05148-TOR
Hon. Thomas O. Rice

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

Prior to September 2021, the Federal Government has never, under the Procurement Act or otherwise, mandated vaccination for a civilian population. Not for smallpox, deadly for one-third of those infected, and eradicated by that vaccine; not for the lifetime-crippling polio, nearly wiped out through vaccination; and not for influenza, which causes billions of dollars of lost productivity every single year. And through the summer of 2021, President Biden's Administration still recognized that vaccine mandates were "not the role of the federal government."[1]

The Procurement Act itself has never been used to mandate any health-based requirement, much less an irreversible emergency use authorization therapy. The President cannot utilize the Procurement Act to compel "federal contractor employees to refrain from consuming soda or eating fast food" by claiming obesity

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[1] Press Briefing by Press Secretary Jen Psaki, July 23. 2021. In response to the question of whether "the federal government should step in and issue mandates," Secretary Psaki responded "that's not the role of the federal government." Available at: https://www.whitehouse.gov/briefing-room/press-briefings/2021/07/23/press-briefing-by-press-secretary-jen-psaki-july-23-2021/. Last accessed: October 22, 2022.

reduces productivity.[2] The President cannot blacklist employees cited for a speeding or seat belt ticket, because a hypothetical car accident could decrease productivity. In the wake of *Dobbs v. Jackson Women's Health Org.*, the next administration cannot bar federal contractor employees from seeking abortions because recovery time might reduce productivity.[3] And this administration could not, and cannot today, in the name of productivity, while admitting its true purpose lies elsewhere, mandate an irreversible medical procedure.

Prior to this case being dismissed under Fed. R. Civ. P. 12, by the Federal District Court of Eastern Washington, the Federal District Court of Arizona, in a case based upon substantially the same factual setting, and the same legal theories, entered a fully opposite ruling.[4] That court granted an injunction under Fed. R. Civ. Pro. 65, since made permanent, correctly holding: "The Contractor Mandate exceeds the scope of the President's authority under the Procurement Act." *Brnovich v. Biden*, 562 F.Supp.3d 123, 167 (D. Ariz., 2022).

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[2] *Brnovich v. Biden*, 562 F.Supp.3d 123, 152 (D.Ariz., 2022)

[3] *Dobbs v. Jackson Women's Health Org.,* No. 19-1392 (2022).

[4] The Arizona court also citedfour parallel cases involving states' challenges to the Contractor Mandate, from district courts in Kentucky, Georgia, Missouri and Florida. *Brnovich v. Biden*, 562 F.Supp.3d 123, 137 (D.Ariz., 2022)

As of the date of this Brief, the Contractor Mandate is enjoined in the following states: Arizona, Arkansas, Florida, Iowa, Kentucky, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, South Dakota, Tennessee, and Wyoming

Where the Arizona District Court, upon the same legal theories, and other Circuit Courts, found substantially similar facts satisfied the stringent test for injunction, it was error for the Eastern District of Washington to dismiss this case, particularly without leave to amend, on the much lower standard of Fed. R. Civ. P. 12.

There are several, independent, fatal defects in the Lower Court's ruling:

The President lacks the authority to issue EOs that mandate any vaccination under the Procurement Act. As the Arizona court, other courts, have held, the Federal Property and Administrative Services Act of 1949 (Procurement Act), 40 U.S.C. § 101 et seq. does not go anywhere near that far.

The Government failed to follow the necessary procedural steps to promulgate its unauthorized mandate. As the District Court in Arizona (*Brnovich v. Biden,* 562 F. Supp. 3d 123 (D. Ariz. 2022)) held, the Office of Management Budget's ("OMB") Federal Register Notice adopting the contracting elements of the mandates failed in three respects:

A. It did not provide analysis or evidence supporting the determination that the mandates were necessary or proper *Id.* at 134, 151;

B. It was not subject to public comment *Id.* at 134; and

C. It failed to "claim that urgent and compelling circumstances [that] merited forgoing the notice-and-comment procedures set forth in the Office of Federal Procurement Policy Act (the 'Procurement Policy Act'), 41 U.S.C. § 1707(d)."*Id.* at 134.

In the end, the Arizona District Court held that the Contractor Mandate, EO 14042, violated the Procurement Act (*Id.*, at 157), but that the revised OMB determination did not violate the Procurement Policy Act as the accompanying Federal Register Notice (issued nearly one month after the original solicitation) solicited comments (86 Fed. Reg. at 63,424). *Id.* at 159.

In addition, the EOs, on their face, and in application, invade the Police Powers of the several states. The health and safety of her citizens, generally, and specially as it regards compulsory vaccination, has long been the province of the sovereign States. The Procurement Act's own text does not speak at all about the health and safety of those citizens of these States united who performed services fulfilling the contracts procured by the Federal Government. Indeed, that role, if it can intrude upon the States at all, is delegated to OSHA, whose mandate has already

been struck by our Supreme Court, despite being much more lenient than the mandate at bar.

Independently, the EO's violate the Religious Freedom Restoration Act ("RFRA"), by failing to achieve an alleged compelling purpose by the "least restrictive means" when burdening employees' Free Exercise rights, by forcing them to choose between their sincere religious beliefs and their livelihoods, their chosen jobs.[5] Most notably, despite the ever changing guidance from the CDC, the Contractor Mandate is even more stringent than the mandate recently struck down by the Supreme Court, which allowed for a masking and testing exception, and fully excluded anyone working outside - a less restrictive means of achieving the

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[5] As the Fifth Circuit recently held, "Plaintiffs are 'staring down even more than a choice between their job(s) and their jab(s).' By pitting their consciences against their livelihoods, the vaccine requirements would crush Plaintiffs' free exercise of religion." *U.S. Navy Seals 1-26 v. Biden*, 27 F.4th 336, 348 (5th Cir. 2022) (stay granted) *Austin, et al. v. U.S. Navy Seals 1-26 et al.*,142 S.Ct. 1301 (2022) (granting stay in part, denial in part; order of stay granted only insofar as it precludes the Navy from considering respondents' vaccination status in making deployment, assignment, and other operational decisions) quoting *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021).

expressed government purpose, which could, at least in theory, allow for accommodation of sincere religious belief. *NFIB v. Dep't of Labor*, 142 S. Ct. 661, 671 (2022). The unsustainable OSHA Mandate allowed for specific exemptions, not allowed by the Contractor Mandate, which is an admission that the "least restrictive means" were not employed in the mandates here.

II. JURISDICTIONAL STATEMENT

The District Court had jurisdiction under 28 U.S.C. §1331 and 1343 and entered an Order denying Plaintiff's Motion for Declaratory Relief, Temporary Restraining Order, and a Preliminary Injunction on December 17, 2021, and a Dismissal of Plaintiff's Complaint on May 12, 2022. Appellants filed this timely appeal on June 9, 2022. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

III. ISSUES PRESENTED

1. Did the District Court err in holding that the Executive Orders are authorized by the Federal Property and Administrative Services Act ("FPASA" or "Procurement Act"), 40 U.S.C. §§ 101 and 121? *Yes.*

2. Do the Executive Orders violate the Administrative Procedure Act by serving as a rule or regulation requiring a notice and comment period and failing to provide such an opportunity? *Yes.*

3. Do the Executive Orders violate the Federal Procurement Policy, 41 U.S.C. § 1707(a), which mandate the issuance of, and adherence to the Safer Federal

Workforce Task Force Guidance upon the Director of the Office of Management Budget's ("OMB") approval of the Guidance without notice and comment without sufficient justifications of "urgent and compelling" circumstances? *Yes.*

4. Do the EO's run afoul of Federalism? *Yes*.

5. Do the EO's fail the level of scrutiny demanded by the Religious Freedom Restoration Act ("RFRA")? *Yes*.

IV. STATUTORY AND REGULATORY AUTHORITIES

All relevant statutory, constitutional, and regulatory authorities appear in the Addendum to this brief.

V. STATEMENT OF THE CASE

This appeal is taken from two orders issued in the District Court in and for the Eastern District of Washington's ("District Court"), case No.: Case No.: 4:21-cv-05148-TOR. First, an Order Denying Plaintiffs' Motion for Declaratory Relief, Temporary Restraining Order, and a Permanent Injunction, issued on December 17, 2021. ER140 – ER159. Second, on May 12, 2022, the District Court granted Appellees' Motion to Dismiss Plaintiffs' claims with prejudice. ER002-ER016. Plaintiffs filed a Notice of Appeal on June 9, 2022.

ER002-ER016. The District Court erred by dismissing claims raised by 307 of the 314 Plaintiffs, concluding that the matter was not ripe as these Plaintiffs had

suffered no harm while conceding that the seven remaining Plaintiffs who had been placed on administrative leave without pay or terminated had stated a claim sufficient for relief. Judge Rice's decision on this issue aligns with current Fifth Circuit case law that concludes that leave without pay is an adverse employment action that injunctive relief can remedy. *Sambrano v United Airlines, Inc.* holding that "that the district court erred as to the plaintiffs who remain on unpaid leave and have brought Title VII actions. Plaintiffs are being subjected to ongoing coercion based on their religious beliefs. That coercion is harmful in and of itself and cannot be remedied after the fact." *Sambrano v. United Airlines, Inc.*, No. 21-11159, at *5-6 (5th Cir. Feb. 17, 2022). ER-008. Among other things, all Plaintiffs except the three who decided not to submit religious exemptions to the COVID-19 vaccine requirements were sufficiently compelled to compromise their religious beliefs based upon the threat of termination posed by the Contractor Mandate, to receive a vaccine they believed abhorrent, a form of damage in and of itself. Their constitutional right to religious freedom was abridged by those very real threats, and they were thus damaged. As the United States Supreme Court has held, and this Court's sister Court in the Fifth Circuit recently affirmed, "the loss of constitutional freedoms 'for even minimal periods of time... unquestionably constitutes irreparable injury.'" *BST Holdings, LLC. V. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021) *citing*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

As to the RFRA claims, Judge Rice erroneously concluded that "Plaintiffs have failed to state a cognizable claim for violations of the RFRA." *Id.* at 13.

These EOs have been widely litigated in multiple Circuits in actions based on the same legal theories. Recently, the Sixth Circuit correctly concluded that the President's (and the U.S. Government's) authority falls far short of the express authorization needed to justify such "a significant encroachment into the lives—and health—of a vast number of employees." *Kentucky v. Biden*, 23 F.4th 585, 609–10 (6th Cir. 2022). See also: *NFIB v. Dep't of Labor*, 142 S. Ct. 661, 665 (2022). The Sixth Circuit enjoined the EOs, and it has not been alone in grating injunctive relief from these and similar overreaching mandates.[6] Less than a month ago, the Eleventh

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[6] *See Nat'l Fed'n of Indep. Bus. v. OSHA*, 142 S. Ct. 661 (2022) ("*OSHA*") (staying so-called 'OSHA mandate,' which was subsequently withdrawn by agency); *Feds for Medical Freedom v. Biden*, 2022 WL 188329 (S.D. Tex. Jan. 21, 2022) (nation-wide stay of federal employee vaccination mandate), *vacated and remanded* 30 F.4th 503 (5th Cir. Apr. 7, 2022), *reh'g en banc granted and vacated*, 2022 WL 2301458 (5th Cir. June 27, 2022) (reinstating nationwide stay); *Texas v. Becerra*, 2021 WL 6198109 (N.D. Tex. Dec. 31, 2021) & *Louisiana v. Becerra*, 2022 WL 16571 (W.D. La. Jan. 1, 2022) (staying Head Start Mandate in 25 states). The Healthcare Mandate

was stayed nationwide in *Louisiana v. Becerra*, 2021 WL 5609846 (W.D. La. Nov. 30, 2021), but that injunction was dissolved and the case remanded by the Supreme Court in *Biden v. Missouri*, 654–55 (2022). The healthcare worker mandate is now back before the district court to consider constitutional challenges not addressed in the Supreme Court's decision. As the Arizona court in *Brnovich v. Biden*, 562 F.Supp.3d 123, 154-55 (D.Ariz., 2022) stated, despite the government's assertions, that case, involving the Contractor Mandate (rather than the Healthcare Mandate) was "clearly distinct from *Biden v. Missouri*, 142 S. Ct. 647, ..."

Likewise, this case is distinguishable from *Biden v. Missouri* as that case was decided on very narrow facts, such as: (1) the challenged Rule was promulgated by the Secretary of Health, not the US President; (2) the Secretary's decision was based on data "showing that the COVID–19 virus can spread rapidly among healthcare workers and from them to patients, and that such spread is more likely when healthcare workers are unvaccinated;" (3) the Secretary further justified the Rule due to the implications of spreading COVID-19 to the elderly and poor in health (the primary populations served by Medicare and Medicaid); and (4) the Secretary found that "fear of exposure" due to unvaccinated staff could cause individuals to forego non-emergency procedures compounding the impacts to the already short-staffed

Circuit upheld (but limited in geographical scope) an injunction against implementation of EO 14042.[7] It is respectfully submitted that the above entitled Court should follow the path carefully honed by the Arizona District Court, the District Courts of other circuits, and by the Fifth, Sixth and Eleventh Circuits, and by the Supreme Court in *See Nat'l Fed'n of Indep. Bus. v. OSHA*, 142 S. Ct. 661 (2022).[8]

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medical industry. *Id.* For these reasons, and for the reasons discussed in *Brnovich v. Biden at 154-55*, *Biden v. Missouri* is fully distinguishable from the case at bar.

[7] *Georgia v. Biden*, 46 F.4th 1283, 1285(11th Cir., 2022).

[8] If the legislation creating OSHA, which deals specifically with occupational safety, did not provide sufficient authority for a vaccine mandate, then the Procurement Act which is not at all focused on occupational safety, does not provide any such authority.

VI. SUMMARY OF THE ARGUMENT

The District Court erred in dismissing the Plaintiff's case under Fed. R. Civ. Pro. 12. The Second Amended Complaint, ER026-ER120, asserts facts as to each individual Plaintiff in detail. A vast number of the religious exemptions were approved, but no accommodations were provided, thus creating an immediate requirement for termination. By way of example only: (1) Plaintiff, Pamela Hartsock, had received a Notice of Right to Sue letter from the EEOC, ¶332, (2) Plaintiff, Thomas Krasner, was granted a religious exemption, but no accommodation and was forced to early retirement, ¶171, and (3) Plaintiff, Gale Lyon, was granted a religious exemption, and a temporary accommodation which required weekly testing, at his personal expense.

Upon similar facts, and pleading the same theories, the plausibility of Plaintiffs' claims was established by their acceptance by, among others, the Arizona District Court, which issued a *permanent* injunction covering that District. Where one Court in this Circuit has found the legal theories posited by Plaintiffs, upon similar facts, not only plausible, but ultimately correct, it was clear error for the Eastern Washington District Court to dismiss this case.[9]

The EOs should have been enjoined, and/or the case should have survived the Motion to Dismiss, or leave to amend should, at minimum, been granted, for several independent reasons. The Procurement Act does not authorize the EOs; the

implementation of the EOs violated the APA and the Federal Procurement Policy [Procurement Policy Act] as the EOs and the associated OMB guidance failed to provide adequate notice and an opportunity for public comment; the EOs violate the FPASA as the EOs exceeded scope of the FPASA by seeking to control individual health decisions; the EOs fun afoul of Federalism by, on its face, attempting to supersede any contrary law within the State's traditional Police Powers; the EOs run afoul of RFRA by either employing means which do not achieve the express compelling government purpose and/or by not employing least restrictive means to do so.

VII. STATEMENT OF FACTS

Because this case was dismissed pursuant to Rule 12(b)(6), the facts relevant to the dismissal are those set forth in the operative Complaint. ER026-ER120. The District Court was obligated to consider those facts as true and correct,[10] and made no findings to the contrary. Accordingly, the Second Amended Complaint, ER026-ER120, is here incorporated, as though fully set forth, as the Plaintiffs' Statement of Facts.

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[10] *Nayab v. Capital One Bank (U.S.)*, 942 F.3d 480, 487 (9th Cir. 2019) *citing Eichenberger v. ESPN, Inc.*, 876 F.3d 979, 981 (9th Cir. 2017).

VIII. STANDARD OF REVIEW

This Appeal is from two Orders from the lower court: a denial of injunctive relief and the dismissal of all claims with prejudice. Regarding the District Court's denial of Appellants' request for Injunctive Relief, "[a] district court's decision regarding preliminary injunctive relief is subject to 'limited review' on appeal." *See Arizona v. Arpaio*, 821 F.3d 1098, 1103 (9th Cir. 2016) *Citing Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.,* 654 F.3d 989, 993–94 (9th Cir.2011). The limited discretion allows this Court to set aside the lower court's decision, if the court "'abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact.'" *Id.* See also: *Pom Wonderful LLC v. Hubbard*, 775 F.3d 1118, 1123 (9th Cir. 2014) citing *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir.2011). Thus, this Court's standard of review for a denial of a Preliminary Injunction is an erroneous legal or on a clearly erroneous finding of fact, which will be reviewed de novo. *Id.*

Prior to dismissal, the District Court abused its discretion in denying the Plaintiffs' request for Preliminary Injunction as it failed to apply the "correct legal rule…to the relief requested" and the District Court's misapplication of the standard "was ... illogical, ... implausible, or ... without support in inferences that may be drawn from the facts in the record.'" *Associated Press v. Otter*, 682 F.3d 821, 824 (9th Cir. 2012) *citing: Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012). Plaintiffs-Appellants' burden was to "demonstrate a fair chance of success on the merits, or questions serious enough to require litigation." *Guzman v. Shewry*, 552 F.3d 941, 948 (9th Cir. 2008). "[A] stronger showing of one element may offset a weaker showing of another." *Alliance for the Wild Rockies,* 632 F.3d 1127, 1131 (9th Cir. 2011). Plaintiffs-Appellants met that burden and certainly met threshold pleading standards to state a claim for relief under RFRA and that the challenged EOs are not authorized by the Procurement Act, as several other courts have correctly found.

This Court reviews the lower court's decision on a Motion to Dismiss *de novo* and applies the abuse of discretion standard. *Benavidez v. Cty. of San Diego*, 993 F.3d 1134, 1141–42 (9th Cir. 2021). "A motion under Rule 12(b)(6) should be granted only if 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief,' construing the complaint in the light most favorable to the plaintiff." *Bain v. Cal. Teachers Ass'n*, 891 F.3d 1206,

1211 (9th Cir. 2018) citing *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1061 (9th Cir. 2004).

Where the lower court dismisses a matter with prejudice and without leave to amend, it must be "'clear on *de novo* review that the complaint could not be saved by amendment.'" *Webb v. Trader Joe's Co.*, 999 F.3d 1196, 1204 (9th Cir. 2021) citing *Eminence Cap., LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (per curiam). Thus, dismissal is improper where the complaint contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face,'" and where a "claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 570 (2007).

IX. ARGUMENT

The District Court erred in denying Appellants' request for a Preliminary Injunction and in Dismissing the case with Prejudice as Plaintiff-Appellants raised sufficient allegations, supported by fact, to demonstrate that Defendant-Appellees had engaged in the alleged conduct, acting outside the scope of their authority *and* violating Plaintiffs' rights, meeting the grant of injunctive relief. ER241.

On September 9, 2021, the President directed "[e]xecutive departments and agencies" to include a clause in almost all new procurement contracts, contract

extensions, and renewals, requiring the contractor (and subcontractors) to "comply with all guidance … published by the" Safer Federal Workforce Task Force, for "the duration of the contract." EO 14042, §§ 2, 5. In issuing Executive Order 14043, the President declared it "is necessary to require COVID-19 vaccination for all Federal employees, subject to such exceptions as required by law." EO 14043, § 1. The President took the actions claiming authority under the Constitution and the laws of the United States of America, including, specifically, the Procurement Act. *See* EO 14042, Introduction. Not surprisingly, the issuance of the challenged Executive Orders occurred *after* President Biden stated he would take no action and *after* the CDC confirmed that vaccinated persons can contract and transmit COVID-19, and after the CDC recognized the prophylactic value of natural immunity, rendering the Federal Government's refusal to change course independently arbitrary and capricious.[11] These reasons alone suffice to overturn the District Court's decision, but they are not the lone reasons for so doing. The basis for this Court to overturn the lower decision includes:

I. The Procurement Act does not authorize the EOs;

II. The implementation of the EOs violated the APA and the Federal Procurement Policy Act;

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[11] *See: Supra*, FN 3.

IV. The EOs violate the FPASA;

V. The EOs fun afoul of Federalism; and

VI. Standing in contrast to the more lenient OSHA mandate, already struck by the Supreme Court, these EOs run afoul of RFRA.

Each reason alone provides the basis for this Court overturning the District Court's denial of Plaintiffs' request for injunctive relief. Each should have survived dismissal or, at minimum, leave to amend should have been granted.

A. This Case Remains Justiciable and Ripe.

The challenged EOs remain in effect as does the COVID-19 Public Health Emergency, which was renewed by Secretary of Health and Human Services, Xavier Becerra on October 13, 2022.[12] While the Department of Energy's Hanford Site leadership has placed a pause on the requirement "to provide proof of vaccination status," the guidance provides that it "may be revisited depending on court decisions or future CDC guidance," providing no assurances to the federal employee-plaintiffs

[12] *Renewal of Determination that a Public health Emergency Exists.* Secretary Xavier Becerra October 13, 2022. https://aspr.hhs.gov/legal/PHE/Pages/covid19-13Oct2022.aspx. Last accessed: October 17, 2022.

impacted by EO 14043.[13] Notwithstanding the DOE Hanford Site guidance, the Hanford contractors have not modified the guidance, and all 300 plus contractor-Plaintiffs remain at risk of enforcement of EO 14042, leaving these plaintiffs in the untenable position of requiring them to violate their religious rights in order to retain employment. And several of the Plaintiffs have already been injured by enforcement of the Contractor Mandate, and can be aided by an equitably crafted injunction, which can include mandatory provisions.

As nearly all Plaintiffs sought religious exemptions from the COVID-19 vaccine, RFRA is a critical element to this case. Importantly, the Fifth Circuit recently held that RFRA applies to all branches of the United States government, including "every 'branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States[.]' 42 U.S.C. § 2000bb-2(1).'" *U.S. Navy SEALs 1-26 v. Biden*, 27 F.4th 336, 345-46 (5th Cir. 2022), quoting *United States v. Sterling*, 75 M.J. 407, 410 (C.A.A.F. 2016), cert. denied, 137 S. Ct. 2212 (2017). The Court further held that "'RFRA, in turn, sets the standards binding every department of the United States to recognize ***and accommodate*** sincerely held religious beliefs.'" *Id.* In this case, the failure of the United States Department of

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[13] DOE Hanford Document: HNF-67450, Rev. 3, September 2022: *Hanford Site COVID-19 Workplace Safety Plan for Federal Employees*, at 2.

Energy and its contractors "to recognize and accommodate sincerely held religious beliefs" constitute a violation of RFRA by an "agency" (Department of Energy) and an "instrumentality" (contractors) of the United States. Moreover, the continued failure to accommodate religious beliefs leaves each plaintiff at risk of termination or violation of an individual's sincerely held religious belief.

Appellee-Defendants' RFRA violations, as evidenced by the continued risk of termination or religious violation, is the ripeness of this matter. To be ripe, the threat a plaintiff faces must be "actual and imminent, not conjectural or hypothetical." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). As Judge Brown in the Southern District of Texas held, "[t]he court does not have to speculate as to what the outcome of the administrative process will be. Many plaintiffs have not only declined to assert any exemption but have also submitted affidavits swearing they will not. The court takes them at their word." *Feds for Medical Freedom v. Biden*, No. 3:21-cv-356 (N.D. Tx. Jan. 21, 2022). Here, the court need not speculate what might happen to Plaintiffs, because many Plaintiffs' religious accommodations were denied, and the few accommodations that were granted were temporary in nature (60 days) and expired in March 2022. *See* ER34, ER37, ER44, ER47, ER53, ER55, ER58, ER61, ER65, ER66, ER67, ER69, ER73, ER74, ER76, ER87-ER88, ER90, ER 92.

. Plaintiffs are forced to continue through the religious accommodation process as some Plaintiffs were placed, on administrative leave without pay over one year ago, and remain in that status. ER42, ER43, ER57. Leave without pay has recently been held to violate individual religious rights. *Sambrano v. United Airlines, Inc.*, No. 21-11159, at *5-6 (5th Cir. Feb. 17, 2022). It should also be noted that even if the President were to rescind the EO's, this appeal remains justiciable. [cite 'flick of a pen' case].

B. Plaintiffs have Standing to Challenge the Executive Orders.

Focusing solely on the RFRA aspect of this action lends to one logical conclusion: **all** Plaintiffs who have sought and been denied a final religious accommodation from the COVID-19 vaccine, or whose religious exemption has expired, or who have not received a reasonable accommodation, have standing to support their claims in this lawsuit; Plaintiffs also maintain standing through the following ripe causes of action to challenge the EOs under RFRA, the Federal Procurement Act, and the Administrative Procedures Act.

Plaintiffs' standing is demonstrable through their individualized showing of an actual or imminent injury-in-fact that is traceable to Appellee-Defendants' conduct, which this Court can redress through a favorable ruling. *Bain v. Cal. Teachers Ass'n*, 891 F.3d 1206, 1212 (9th Cir. 2018) Citing *Lujan v. Defenders of*

Wildlife, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Here, Plaintiffs "are suffering 'immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case,'" as Plaintiffs' religious rights and employment continue to be pitted against one another. *Oklevueha Native American Church of Hawaii, Inc. v. Holder*, 676 F.3d 829, 839 (9th Cir. 2012). Moreover, the United States government continues to require the COVID-19 vaccine, which was mandated outside of the President's authority as the EOs are not authorized by the Procurement Act. Each claim grants standing to Plaintiff-Appellants in this matter.

C. Reversal and Remand are Appropriate.

I. THE PRESIDENT EXCEEDED THE SCOPE OF AUTHORITY OUTLINED IN THE PROCUREMENT ACT OF 1949.

"[T]he Procurement Act is all about—creating an "economical and efficient system" for federal contracting. 40 U.S.C. § 101. That is worlds away from conferring general authority for every agency to insert a term in every solicitation and every contract establishing health standards for contractors' employees." *Georgia v. Biden*, 46 F.4th 1283, 1296 (11th Cir. 2022). That Court subsequently concluded that "no statutory provision contemplates the power to implement an across-the-board vaccination mandate. It follows that the President likely exceeded his authority under the Procurement Act when directing executive agencies to enforce such a mandate." *Id.* at 21.

Congress enacted the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 101 *et seq.*—known as the Procurement Act—with the aim of "provid[ing] the Federal Government with an economical and efficient system" for "[p]rocuring and supplying property and nonpersonal services and performing related functions including contracting." *Id.* § 101. The Act empowers the President to "prescribe policies and directives that the President considers necessary to carry out this subtitle. ***The policies must be consistent with this subtitle***." *Id.* § 121(a).[14]

The text of the Procurement Act is clear: the President can direct internal government policies to provide the "Federal Government" a more efficient "system for" contracting. 40 U.S.C. §§101, 121. It says nothing about authority to impose forced vaccinations (or other medical procedures) on employees of private, contracting entities in an effort to make them supposedly more efficient. For this reason, the Sixth and Eleventh Circuits have held the Contractor Mandate invalid. *Kentucky*, 23 F.4th at 605; *Georgia*, 46 F.4th at 1295. The Eleventh Circuit further held that the "delegation to carry out those provisions does not grant the President free-wheeling authority to issue any order he wishes relating to the federal government's procurement system. What he can lawfully carry out under § 121(a) are the provisions in a specified part of the U.S. Code." *Id.*, at *12. The Court then

[14] Emphasis added.

noted that the President's authority is limited by four words: "consistent with this subtitle," calling these four words out as "explicit legislative policies" and "cabining the President's authority." *Id.* at 13. The Eleventh Circuit further held that "[a] presidential directive can stand only if those subordinate officials have the statutory authority that they are told to exercise" and that both the President and the subordinate agencies lacked such authority. *Id.* at 15.

In sum, the Procurement Act gives the President the authority to direct subordinate executive actors as they carry out its specific provisions; directing them to go beyond the statute's boundaries would neither "carry out" the Act nor be 'consistent with' it. 40 U.S.C. § 121(a). A presidential directive can stand only if those subordinate officials have the statutory authority that they are told to exercise. *Georgia v. Biden*, at 15. The Eleventh Circuit, in noting these limitations, relied on "The 'pertinent inquiry'" the Court explained, was whether the agency action was 'reasonably within the contemplation' of any 'statutory grants of authority' relied on by the regulating agency." *Id.* at * 16 citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 306, 99 S. Ct. 1705 (1979). 306 (emphasis omitted).

Nothing in the Act contemplates that every executive agency can base every procurement decision on the health of the contracting workforce. Instead, the statutory scheme establishes a framework through which agencies can articulate

specific, output-related standards to ensure that acquisitions have the features they want. *Id.* at * 17.

"In short, the President's authority to issue Executive Order 14042, and executive agencies' authority to implement it, depend on whether Congress delegated the power to require widespread vaccination through the Procurement Act. All signs suggest that Congress has retained this power rather than passing it on. Agencies' bare authority to set contract specifications and terms is not enough to show that when Congress passed the Procurement Act it contemplated the general power to mandate vaccination." *Id.* at * 30.

Since the passage of the Procurement Act in 1949, the President has enjoyed a considerable degree of deference over decisions to improve the "economy and efficiency" of federal contracting. But the contractor mandate moves far beyond previous Procurement Act cases and now ventures into regulating healthcare for approximately one-fifth of the U.S. workforce. The mandates, with their far-reaching implications, lack a sufficient nexus with improvement of economy and efficiency in federal contracting. The district court's denial of the preliminary injunction should be overturned for multiple reasons.

Even when such deference is afforded, even the D.C. Circuit recognizes that the President does not have a "blank check" and can impose procurement policies only if they have a "close nexus" to "likely savings to the Government." *Khan*, 618

F.2d at 792-93. But, the EOs have little to do with efficiency, nor was it the real goal of this "work-around" to mandate vaccines for as many Americans as possible. *BST Holdings, LLC v. OSHA*, 17 F.4th 604, 612 (5th Cir. 2021). The Administration's "own documents confirm" as much: it is "naked pretext to invade traditional state prerogatives." *Kentucky*, 23 F.4th at 609 & n.15.

The text of the Procurement Act does not support the exercise of authority contained in Executive Order 14042. Second, the contractor mandate is not reasonably related to the Procurement Act's goals of an economic and efficient system for procurement. The connection between the mandate and economy and efficiency is not a sufficient nexus to justify the regulation. Third, the contractor mandate goes beyond even previous extensions of presidential authority under the Procurement Act. Previous cases have read the President's authority broadly, but even those cases could demonstrate a more direct link between the order at issue and efficient operations related to procurement.

The challenged EOs inherently regulate public health that secondarily impact economic conditions; this is clear from a plain reading of the EOs. Section 1 of EO 14043 reads in part:

> It is the policy of my Administration to halt the spread of coronavirus disease 2019 (COVID–19), including the B.1.617.2 (Delta) variant, by relying on the best available data and science-based public health measures. The Delta variant, currently the predominant variant of the virus in the United States, is highly contagious and has led to a rapid rise in cases and hospitalizations…The Centers for Disease Control and

> Prevention (CDC) within the Department of Health and Human Services has determined that the best way to slow the spread of COVID–19 and to prevent infection by the Delta variant or other variants is to be vaccinated…
>
> …I have determined that ensuring the health and safety of the Federal workforce and the efficiency of the civil service requires immediate action to protect the Federal workforce and individuals interacting with the Federal workforce. It is essential that Federal employees take all available steps to protect themselves and avoid spreading COVID–19 to their co-workers and members of the public. The CDC has found that the best way to do so is to be vaccinated.

This reads like an OSHA regulation, and the Supreme Court has now told us that OSHA does not have authority to issue such a mandate. *NFIB v. Dep't of Labor*, 142 S. Ct. 661, 671 (2022).

EO 14042, *Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors*, fares no better in this regard as it attempts to cloak itself in the Procurement Act by invoking the act.

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

While veiling itself as promoting "economy and efficiency in Federal procurement," the EO quickly moves to "ensuring" that Contractors provide "adequate COVID-19 safeguards to their workers." The EO then fully

displays its motives: "These safeguards will decrease the spread of COVID-19." Under these circumstances, EO 14042 is clearly not a tool that inherently promotes economic efficiency.

At the lower court Defendants argued that "[c]ourts find a nexus even when '[t]he link may seem attenuated" and even if one can "advance an argument claiming opposite effects or no effects at all.'" ER181. *UAW-Labor Emp. and Training Corp. v. Chao*, 325 F.3d 360, 366-67 (D.C. Cir. 2003) (quoting *Kahn*, 618 F.2d at 789). Defendants then noted that EO 14042 is "concerned with protecting the federal government's financial and operational interests as a contracting party Ensuring that its contractors do not suffer major disruptions from COVID-19 accomplishes just that." *Id.* Defendants then proclaimed that "[t]o anyone who has lived through the COVID-19 pandemic and its resulting economic turmoil, the nexus between reducing the spread of COVID-19 and economic efficiency should be self-evident." *Id.* at 19-20. Finally, Defendants concluded, after noting that six -foot distancing is not always available for workers on the Hanford Site, that a "fully vaccinated workforce will reduce these burdens on Hanford's mission" and summarily concluded that "the Executive Order's explanation is sufficient to show the required nexus between the policy and promoting economy and efficiency." *Id.* at 21.

Appellees' statements demonstrate the Government's position: comply as it's self-evident that COVID-19 is a compelling interest and that the vaccine mandate was narrowly tailored; no more explanation or supporting evidence is provided. These conclusory statements miss the mark of legitimate justification of finding themselves "consistent with" the Procurement Act and leave Appellees' short of legal or logical justification demonstrating the District Court's error in not granting Plaintiff-Appellants' injunction.

And the President cannot expand the breadth of his authority in the face of non-delegation principals, and particularly the Major Questions Doctrine. Defendants "must point to 'clear congressional authorization' for the power [that Defendants] claim[]." *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (citation omitted).

Such clear authorization is lacking here and the Sixth and Eleventh Circuits have held that the Procurement Act authority question here is a major question. *Kentucky*, 23 F.4th at 606-08; *Georgia*, 46 F.4th at 1295-96.

Likewise, the Supreme Court has already held explicitly that the authority to issue the OSHA workplace mandate was a major question because it "ordered 84 million Americans to either obtain a COVID-19 vaccine or undergo weekly medical testing at their own expense." *NFIB*, 142 S. Ct. at 665. That was so as it was "a significant encroachment into the lives—and health—of a vast number of

employees," and thus constituted an "'exercise [of] powers of vast economic and political significance.'" *Id.* (quoting *Alabama Realtors*, 142 S. Ct. at 2489). Defendants cannot credibly distinguish this mandate from the OSHA mandate because it impacts *only* 33 million workers. Notably, the mandate here is more intrusive than the OSHA mandate, which allowed for masking and testing – and the OSHA mandate had some precedent upon which to rely (*see, e.g.*, *West Virginia*, 142 S. Ct. at 2608 (quoting *Utility Air*, 573 U.S. at 324)). The Government has no precedent under the Procurement Act to so rely.

These EOs clearly trigger a major question analysis. First, this case involves "a matter of great 'political significance.'" *West Virginia*, 142 S. Ct. at 2620 (Gorsuch, J., concurring) (quoting *NFIB*, 142 S. Ct. at 665). Second, these EOs "seek[] to regulate 'a significant portion of the American economy.'" *West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring) (quoting majority opinion, quoting Utility Air, 573 U.S. at 324). Third, it invades traditional state authority, discussed in-depth below. Fourth, the EOs lack any limiting principal. Under the Government's theory it could use the Procurement Act to "mandate that covered employees also wear masks in perpetuity" at "family gatherings, concerts, sporting events, and so on" (*Kentucky*, 23 F.4th at 608) or "refrain from consuming soda or eating fast food." *Brnovich* 562 F.Supp.3d at 152.

In *Chrysler Corp. v. Brown*, the Supreme Court "suggested that the President's authority [under the Procurement Act] should be based on a 'specific reference' within the Act." *Georgia*, 46 F.4th at 1294 (quoting *Chrysler Corp.*, 441 U.S. at 304 n.34). More recently, this Court's sister circuits have held that the best reading of the Procurement Act's plain text is that it grants authority only for the President "to implement systems making the government's entry into contracts less duplicative and inefficient," but does not provide authority to regulate federal contractors to "enhance their personal productivity" (*Kentucky*, 23 F.4th at 605-06) and ""[n]othing in the Act contemplates that every executive agency can base every procurement decision on the health of the contracting workforce… Instead, the statutory scheme establishes a framework through which agencies can articulate specific, output-related standards to ensure that acquisitions have the features they want" (*Georgia*, 46 F.4th at 1295).

The OSH Act speaks explicitly to workers' health and safety, but that more lenient mandate was stricken down by the Supreme Court. By contrast, the text of the Procurement Act makes no mention of worker health and cannot support the more stringent Contractor Mandate.

II. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE EXECUTIVE ORDERS DID NOT VIOLATE THE FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT ("FPASA").

FAPASA's purpose is to provide the Federal Government with an "economical and efficient system" for, among other things, procuring and supplying property and nonpersonal services. 40 U.S.C. § 101. The Executive Orders, however, have actually and materially undermined the efficient and economical delivery of property and services by disrupting the continuity of the federal and federal-contractor workforce, and rendering federally operated nuclear facilities unsafe by leaving these individuals in a position where their jobs may be taken at any moment on a political whim, notwithstanding their religious objection to and employer-granted religious exemption from the COVID-19 vaccine mandate.

i. The EOs Violate FPASA's Section 101 and 121 as they Lack a Nexus to Government Contracting Efficiency.

While the FPASA "vest[s] broad discretion in the President" it does not provide the President with "a blank check to fill at his will." *Chamber of Commerce of the United States v. Reich,* 74 F.3d 1322, 1330 (D.C. Cir. 1996) quoting *AFL-CIO v. Kahn*, 618 F.2d 784, 793 (D.C. Cir. 1979) (en banc). "The procurement power must be exercised consistently with the structure and purposes of the statute that delegates that power." *Id*. at 1330-31. The FPASA empowers the President to "prescribe policies and directives that [he] considers necessary to carry out [the FPASA.]" 4 U.S.C. § 121(a). Those policies "*must* be consistent with" the FPASA's

purpose, i.e., promoting economy and efficiency in federal contracting. *Id*. § 121(a) (emphasis added). Accordingly, the President must demonstrate a "nexus" between the Executive Orders and the FPASA's purpose of promoting an "economical and efficient system" for federal contracting. 40 U.S.C. § 101; *see Am. Fed'n of Lab. & Cong. of Indus. Organizations v. Kahn*, 618 F.2d 784, 793 (D.C. Cir. 1979) (explaining that the FPASA is violated when the President does not demonstrate a "nexus" between executive action and the FPASA's policy). The FPASA's text obligates the President to exercise his statutory authority "consistently with [the Act's] structure and purposes," and he failed to do so with EOs 14042 and 14043 *Id.*

Further, the President's power under § 121(a) is limited to what is "necessary" to carry out FPASA. "Necessary" is a "word of limitation" and is often synonymous with "required," "indispensable," and "essential." *Vorcheimer v. Phila. Owners Ass'n,* 903 F.3d 100, 105 (3d Cir. 2018) (quotations omitted); *accord In re Microsoft Corp. Antitrust Litig.*, 355 F.3d 322, 327 (4th Cir. 2004). Rather than explaining why a vaccine mandate is required, indispensable, or essential to carrying out FPASA, the government offers only a "threadbare and conclusory rationalization." *Florida v. Nelson*, 2021 WL 6108948, at *11–12 (M.D.Fla. Dec. 22, 2021).

While the term "necessary" is sometimes given a broader reading, *see Ayestas v. Davis*, 138 S. Ct. 1080, 1093 (2018), Congress did not use that word in a broad sense in § 121. In that section, Congress imposed a mandatory duty on the GSA

Administrator to issue regulations that are "necessary" but gave him discretion as to other regulations. 40 U.S.C. § 121(c)(1)–(2) (using "may" in (1) and "shall" in (2)). Congress thus used "necessary" to designate those regulations that GSA must issue. Interpreting "necessary" to mean "simply useful" would read that distinction out of the statute. *See In re MCP No. 165*, 21 F. 4th 357, 392 (6th Cir. 2021) (Larsen, J., dissenting) (quotations omitted). The word "necessary" in § 121(a)—appearing in an identical phrase—should be given the same limited meaning. *See Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932) ("[T]here is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning.").

Neither § 101 nor § 121 even plausibly support the government's mandate on their plain text. This is especially true as the government "deploy[s] [FPASA] to mandate a medical procedure for one-fifth (or more) of our workforce," a considerable segment of the economy that can be detrimentally placing all of those workers in a position to violate their religious rights in the furtherance of continued employment. *Kentucky, supra*, at 607–08. Congress does not delegate decisions of major economic and social significance "in so cryptic a fashion." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160–61 (2000). And "[i]f administrative agencies seek to regulate the daily lives and liberties of millions of Americans, . . .

they must at least be able to trace that power to a clear grant of authority from Congress." *NFIB*, *supra*, at 668 (Gorsuch, J., concurring).

Moreover, regulation of vaccination is "a matter traditionally committed to the state." *Nelson*, 2021 WL 6108948, at *13. The government cannot overcome the presumption that Congress "preserves the constitutional balance between the National Government and the States," *Bond v. United States*, 572 U.S. 844, 862 (2014), because Congress must "enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power," *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021). For these reasons, neither § 101 nor § 121 authorize the Executive Order.

ii. The Government Cannot Meet its Burden to Demonstrate that it Did Not violate FPASA Section 1707.

Because § 1707 applies, the government must rely on the "urgent and compelling circumstances" exception in § 1707(d). See 86 Fed. Reg. at 63,423 (making such a finding in the alternative). The government cannot satisfy that exception, which is more demanding than the APA's "good cause" exception, itself an exacting standard. Compare 41 U.S.C. § 1707(d), with 5 U.S.C. § 553(b)(3)(B). *See Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012). The government has not made that showing, as its procurement efficiency rationale is "merely a

hastily manufactured but unproven hypothesis about recent history and a contrived speculation about the future," which does not justify "summary disregard of the requirements of administrative law and rulemaking." *Nelson,* 2021 WL 6108948, at *12. This statement rings especially true with the requirements of EO 14042, which created the Safer Federal Workforce Task Force ("Task Force") and the Task Force's Guidance ("Guidance"), subject to OMB Director approval. EO 14042, which was signed September 9, 2021, required the publication of the Guidance by September 24, 2021. EO 14042, Sec. 2(b). EO 14042 also required that the Federal Acquisition Regulatory Council amend the Federal Acquisition Regulations by October 8, 2021. EO 14042, Sec. 3.

Additionally, the government's own delay in adopting the EO and the regulation betrays any claimed urgency. If OMB had simply complied with § 1707 when it issued its first order on September 28, 2021, it could have completed the 60-day notice and comment period well before its vaccination deadline of January 18, 2022. See 86 Fed. Reg. at 63,424. The government's delay— caused by its own mistakes—cannot itself create the circumstances justifying good cause. *See Nat. Res. Def. Council v. NHTSA,* 894 F.3d 95, 114 (2d Cir. 2018). The Government did not comply with § 1707 and cannot justify a departure from that statute. Thus, the OMB determination, the key predicate for the mandate's operation, is invalid and the

Government failed to comply with § 1707 and the District Court erred in concluding that the Government complied with § 1707.

III. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE EXECUTIVE ORDERS DID NOT VIOLATE THE ADMINISTRATIVE PROCEDURE ACT.

The Eleventh Circuit concluded that the challenged EOs exceeded the APA, holding that "[a] presidential directive can stand only if those subordinate officials have the statutory authority that they are told to exercise" as the President and the subordinate agencies lacked authority to issue such a directive. *Id.* at 15. While the President's issuance of an EO is exempt from the APA, there is no basis for extending that Presidential exemption to his delegees as the APA applies to "each authority of the [g]overnment of the United States," 5 U.S.C. § 551 (defining "agency"), and restricts "agency action," *id.* § 706. When agency officials act pursuant to a presidential delegation, as was done here through the Department of Energy's implementation of EOs 14042 and 14043, they are unquestionably taking "agency action."

Moreover, even if the APA were silent on whether agency action is subject to review—and it is not—any such silence would yield the opposite result as applied to an *agency* given the APA's "basic presumption of judicial review for one suffering legal wrong because of agency action." *See DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020) (quotations omitted). Just as agencies cannot invoke

Congress's express APA exemption when exercising delegations from Congress, so, too, they cannot invoke the President's implied exemption. *See Franklin v. Massachusetts*, 505 U.S. 788, 828–29 (1992) (Scalia, J., concurring in part and concurring in the judgment) (explaining that "[r]eview of the legality of Presidential action" can be obtained in the same manner as review of "unlawful legislative action," by suing the "agents who carry" it out). Thus, it is proper for this Court to review the President and the Department of Energy's challenged actions in this matter.

The APA applies to "each authority of the [g]overnment of the United States," 5 U.S.C. § 551 (defining "agency"), and restricts "agency action," *Id.* § 706. When agency officials act pursuant to a presidential delegation, they are unquestionably taking "agency action." Moreover, unlike, for example, Congress, *see Id.* § 701(b)(1)(A), the President's APA exemption is found nowhere in the text of the APA, *see Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992) ("[T]extual silence is not enough to subject the President to the provisions of the APA."). But even if the APA were silent on whether agency action is subject to review—and it is not—any such silence would yield the opposite result as applied to an agency given the APA's "basic presumption of judicial review for one suffering legal wrong because of agency action." *See DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020) (quotations omitted). Just as agencies cannot invoke Congress's express

APA exemption when exercising delegations from Congress, so too they cannot invoke the President's implied exemption. *See Franklin*, 505 U.S. at 828–29 (Scalia, J., concurring in part and concurring in the judgment) (explaining that "[r]eview of the legality of Presidential action" can be obtained in the same manner as review of "unlawful legislative action," by suing the "agents who carry" it out).

IV. THE EXECUTIVE ORDERS VIOLATE THE FEDERAL PROCUREMENT POLICY, 41 U.S.C. § 1707(A).

The Federal Procurement Policy statute requires "procurement polic[ies], regulation[s], procedure[s], or form[s]" to go through notice and comment, so long as they "relate[] to the expenditure of appropriated funds" and either have "a significant effect beyond the internal operating procedures of" the issuing agency or "a significant cost or administrative impact on contractors or offerors." 41 U.S.C. § 1707(a)–(b). ER104-105. The OMB determination implementing EOs 14042 and 14043 was published without those procedures in defiance of this statutory requirement.

Section 1707 applies due to its significant administrative effect on contractors; thus, the government must rely on the "urgent and compelling circumstances" exception in § 1707(d). *See* 86 Fed. Reg. at 63,423 (making such a finding in the alternative). The government cannot satisfy that exception as the government delayed the adoption of the EOs, dampening its proclaimed urgency. If OMB had simply complied with § 1707 when it issued its first order on September 28, 2021, it

could have completed the 60-day notice and comment period well before its vaccination deadline of January 18, 2022. *See* 86 Fed. Reg. at 63,424. The government's delay—especially when caused by the government's own mistakes—cannot itself create the circumstances justifying good cause. *See Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 114 (2d Cir. 2018).

V.THE EO'S RUN AFOUL OF FEDERALISM

The President's new-found use of the Procurement Act invades traditional concepts of Federalism. There can be no question on this point where the EO expressly claims to "supercede[] any contrary State or local law."

When the President invokes authority that would "significantly alter the balance between federal and state power," Congress must authorize that change with "exceedingly clear language." *Alabama Realtors*, 141 S. Ct. at 2489 (citation omitted). A federal statute to "intrude[] on the police power of the States" only when clearly authorized by Congress. *Bond v. United States*, 572 U.S. 844, 859-60 (2014).

"It is a traditional exercise of the States' police powers to protect the health and safety of their citizens." *Hill v. Colorado*, 530 U.S. 703, 715 (2000) (citation omitted). That includes "compulsory vaccination." *Zucht v. King*, 260 U.S 174, 176 (1922). *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985) ("[T]he regulation of health and safety matters is primarily, and historically, a matter of local concern."); Compulsory vaccination policy is a traditional realm of state

authority, which the Contractor Mandate manifestly intrudes upon: the "contractor mandate seeks to ... transfer[] this traditional prerogative from the states to the federal government." *Kentucky*, 23 F.4th at 609 (emphasis added). While the "States may have no power to dictate what and how much of something the federal government may buy … they certainly have a traditional interest in regulating public health and, specifically, in determining whether to impose compulsory vaccination on the public at large." *Id*. at 610.[15]

Here, the President cannot invade the province of the States and the District Court should not have dismissed Plaintiffs' cause of action based upon this bedrock principal.

VI. THE EO'S CANNOT PASS RFRA SCRUTINY.

"RFRA did more than merely restore the balancing test used in the *Sherbert* line of cases; it provided even broader protection for religious liberty than was available under those decisions." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 n.3 (2014); *accord Holt v. Hobbs*, 574 U.S. 352, 357 (2015) (RFRA "provide[s] greater protection for religious exercise than is available under the First

[15] Of course, the State's too, may only do so without violating their Constitutions and the Federal Constitution, but that is a matter for another day.

Amendment.") RFRA restored this order through "requir[ing] the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person' —the particular claimant whose sincere exercise of religion is being substantially burdened." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006) (quoting 42 U.S.C. § 2000bb-1); *Hobby Lobby*, 573 U.S. at 726. "The least-restrictive means standard is exceptionally demanding..." *Hobby Lobby*, 573 U.S. at 728.

Defendants expect to meet this "exceptionally demanding" test by merely "accepting[ing] the merits of [the] exemption" while denying reasonable accommodations in boilerplate denials. ER234-ER237; ER210-ER214; ER203.] The law requires more than than lip service; it requires the Government to apply the appropriate legal standard, which did not occur here.

RFRA was enacted with "singularly bi-partisan support" at a time when one party controlled the Presidency and both Houses of Congress for the express purpose of restoring "the protection for Free Exercise suddenly eroded by the Supreme Court." *Col. Fin. Mgmt. Officer v. Austin*, No. 8:22-CV-1275-SDM-TGW, 2022 WL 3643512 *14 (M.D. Fla. Aug. 18, 2022)) ("*CMFO*") *citing Employment Division v. Smith*, 494 U.S. 872 (1990). "By enacting RFRA, Congress exercised this plenary authority to guarantee the "'broad protection for religious liberty.'" *CMFO*, at *15 *quoting Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706 (2014). "To ensure

comprehensive protection of Free Exercise," RFRA allows "[a] person whose religious exercise has been burdened in violation of this section" to "assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." *Id.*, at *14, *see also:* 42 U.S.C. § 2000bb-1(c). As such, "RFRA warrants heightened and focused attention and diligent compliance by the government, including the military, and discerning enforcement by the courts." *Id.*

To prevail on a RFRA claim, Appellants must demonstrate two elements. First, Appellants must demonstrate that the activities burdened by the government action are an "exercise of religion." *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1068 (9th Cir. 2008). Second, the government action must "substantially burden" Appellants' exercise of religion. *Id.* Once those elements are demonstrated, the burden shifts to the government to prove that the challenged action is in furtherance of a "compelling government interest" and is implemented by "the least restrictive means to achieve its purpose, unless the plaintiff first proves the government action substantially burdens his exercise of religion." *Id.* at 1069. As the United States Supreme Court has held, "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006). That requires courts "to look to the

marginal interest" in enforcing the government mandate in similar cases. *Hobby Lobby Stores*, 573 U.S. at 727. Wholly independent of whether or not the President has authority to issue the EO's, they also violate RFRA.

RFRA protects "the individual from a forced choice between a government benefit and the individual's religion." *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1069 (9th Cir. 2008). In *Navajo Nation,* Appellants challenged the United States Forest Services' application of recycled wastewater to a small portion (one percent of the mountain's entire area) of a sacred mountain to create artificial snow, claiming that the application violated RFRA. *Id.* The Court held that the lack of a "threat of civil or criminal sanctions" or other penalty that prohibited plaintiffs from practicing their religion "in any way" weighed against the finding of a RFRA violation. *Id.* The Court concluded that Defendant had "guaranteed" plaintiffs' access to the remainder of the sacred area (the 99 percent of the mountain) "for religious purposes" and that the government's action did not constitute a "substantial burden on Plaintiffs' religious rights:

> Under RFRA, a 'substantial burden' is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*). Any burden imposed on the exercise of religion short of that described by *Sherbert* and *Yoder* is not a 'substantial burden' within the meaning of RFRA and does not require the application of the compelling interest test set forth in those two cases. *Id.*, at 1070.

Here, unlike *Navajo Nation*, the United States Government, the President of the United States of America, through two Executive Orders, has presented the US government's employees and contractors with a "take it or leave it" approach to the COVID-19 vaccine. These millions of individuals (including the 317 Plaintiffs-Appellants) are presented a Hobson's choice approach: continue with government employment and violate your religious tenants **or** stay true to individual religious principles and lose employment. This paradox violates RFRA.

A. The Vaccine Mandate Does Not Achieve a Compelling Government Interest as they Failed to Cease Transmission of the Virus.

It is not in dispute that stemming Covid-19 is a compelling government interest. What is in dispute is whether the vaccines forward that interest. By December of 2021, the CDC's guidance on COVID-19 insolation and quarantine addressed the "general population" and ceased distinguishing between the vaccinated and unvaccinated populations,[16] treating them alike, in part, due to the failure of the vaccine to prevent transmission. Nonetheless, the President of the United States persisted in distinguishing between the vaccinated and unvaccinated populations, including stating, without support, that "For unvaccinated, we are looking at a winter of severe illness and death — if you're unvaccinated — for themselves, their families, and the hospitals they'll soon overwhelm."[17] Five days later, the President stated that "Almost everyone who has died from COVID-19 in the past many months has been unvaccinated. Unvaccinated…. Vaccinated people who get COVID may get ill, but they're protected from severe illness and death. That's why you should still remain vigilant… But uptake slowed this summer as vaccine resistance among some hardened. Look, the unvaccinated are responsible for their own choices… Because Omicron spreads easily, especially among the unvaccinated, it's critically important that we know who's infected."[18]

While the President of the United States may freely *opine* on the COVID-19 vaccines, neither he, nor the agencies he directs, has power to direct personal medical decisions of government employees or employees of organizations offering contracted services to the United States government. This is particularly so when the opinion conflicts with the science and the statements of his own government advisors

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[16] Center for Disease Control: *CDC Updates and Shortens Recommended Isolation and Quarantine Period for General Population.* December 27, 2021. Available at: https://www.cdc.gov/media/releases/2021/s1227-isolation-quarantine-guidance.html. Last accessed: September 9, 2022.

[17] *Remarks by President Biden After Meeting with Members of the COVID-19 Response Team.* December 16, 2021. Available at: https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/12/16/remarks-by-president-biden-after-meeting-with-members-of-the-covid-19-response-team/. Last accessed: September 9, 2022.

[18] *Remarks by President Biden on the Fight Against COVID-19.* December 21, 2021. https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/12/21/remarks-by-president-biden-on-the-fight-against-covid-19/. Last accessed: September 9, 2022.

stating that the required vaccines are not shown to prevent achieve the stated goals of his Executive Orders: ceasing or slowing transmission of the disease (Covid-19) to certain employees.

The failure is incontrovertible. Data was widely available to the public, including to the District Court judge, prior to Plaintiffs' filing of the Complaint.[19]

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[19] *See, e.g.*, https://brownstone.org/articles/16-studies-on-vaccine-efficacy/, an October 2021 report from the Brownstone Institute itemizing 50 studies and reports from around the world concluding, as the CDC had concluded, that "vaccines are important to reduce severe disease and death but unable to prevent the disease from spreading and eventually infect most of us. As such, COVID vaccines should not be expected to contribute to eliminating the communal spread of the virus or the reaching of herd immunity. This unravels the rationale for vaccine mandates and passports." *See also, https://www.cdc.gov/mmwr/volumes/70/wr/mm7031e2.htm,* a landmark July 2021 CDC published report on a large public event in Barnstable County, Massachusetts where 469 COVID-19 cases were identified among Massachusetts residents who traveled to the town during July 3-17, 2021, in which the report concluded that 346, or 74% of the positive COVID-19 cases occurred in fully vaccinated persons, and testing confirmed the Delta variant was found in 90% of the specimens from 133 of the patients.

Shortly after Plaintiffs filed the complaint, official government data from the Province of Ontario (December 25, 2021) showed a higher infection rate among the vaccinated than the unvaccinated population.[20] The same is true in Denmark, [21]

[20] https://covid-19.ontario.ca/data.

[21] According to Danish government data, 89.7% of the country's Omicron cases are in vaccinated individuals (many with a booster vaccine). Statens Serum Institut, COVID-19 Rapport on omikronvarianten at 6, table 4 (Dec. 21, 2021), https://www.docdroid.com/C9UY7Ef/dk-serum-institut-rapport-omikronvarianten-21122021-14tk-pdf. Because that figure is higher than the percentage of vaccinated individuals in the population as a whole, *see* Johns Hopkins Univ. Coronavirus Resource Center, Denmark, https://coronavirus.jhu.edu/region/denmark (79% of Denmark population vaccinated), this means the rate of Omicron infection among the vaccinated is higher than among the unvaccinated.

Scotland, [22] and the UK.[23] Moreover, those semi-effective vaccines were, and are, only authorized for emergency use ("EUA"), which, under the Food, Drug and Cosmetic Act ("FDCA"), is a temporary authorization that is legally, factually, and scientifically distinct from full Food and Drug Administration approval.[24] These data

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[22] Public Health Scotland, COVID-19 & Winter Statistical Report As At 31 January 2022, at 41 (Table 14), https://web.archive.org/web/20220207172220/https://publichealthscotland.scot/media/11597/22-02-02-covid19-winter _publication_report.pdf.

[23] UK Health Security Agency, COVID Vaccine Surveillance Report, Week 7, Feb. 17, 2022 at 44 (Table 13) (showing infection rates for vaccinated adults over *twice as high* as infection rates for unvaccinated adults), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1055620/Vaccine_surveillance_report_-_week7.pdf.

[24] 21 U.S.C. § 360bbb-3(b)(1) authorizes the FDA to grant EUA where "there is no [1] adequate, [2] approved, and [3] available alternative to the product for diagnosing, preventing, or treating" the disease in question. 21 U.S.C. § 360bbb-3(c)(3). EUA is granted on: (1) scientific evidence "if available," "it is reasonable to believe," the product "may be effective" in treating or preventing the disease; (2)

sets support Plaintiffs' position that the President lacks authority to mandate such vaccines in violation of individual religious rights. The District Court's error in dismissing these claims give rise to this appeal.

As a recent study concluded, the vaccines' ability to stop infection and transmission of the Omicron variant is "negligible." Heba Altarawneh, et al., *Effects of Previous Infection and Vaccination on Symptomatic Omicron Infections*, 387 NEW ENG. J. MED. 21 (June 15, 2022), *at* https://www.nejm.org/doi/pdf/10.1056/NEJMoa2203965. ("The effectiveness of vaccination with two doses of BNT162b2 and no previous infection was negligible." And, "No discernable differences in protection against symptomatic BA.1 and BA.2 infection were seen with previous infection, vaccination, and hybrid immunity.")

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limited/minimal safety requirements, which require that the FDA conclude that the "known and potential benefits … outweigh the known and potential risks" of the product, considering the risks of the disease; and, (3) EUA products are exempt from certain manufacturing and marketing standards, enjoy broader product liability protections, and cannot be mandated due to informed consent laws and regulations. 21 U.S.C. §360bbb-3(c)(2)(A), (B).

The Omicron variant now accounts for all COVID-19 infections in the United States. *See* CDC COVID Data Tracker, https://covid.cdc.gov/covid-data-tracker/#variant-proportions (updated Sept. 7, 2022). Yet the Omicron variant "dramatically evades neutralizing antibody responses," and so it is able to infect those with prior vaccine-induced immunity.[25] And, Dr. Fauci has grudgingly

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[25] Jinyan Liu et al., *Vaccines Elicit Highly Conserved Cellular Immunity to SARS-CoV-2 Omicron*, 603 NATURE 493, 495 (2022). Those facts, coupled with the waning of vaccine-mediated immunity over time, means that any vaccine-mediated immunity a person may have against Omicron largely disappears within six months of vaccination. *See, e.g.*, N. Andrews et al., *COVID-19 Vaccine Effectiveness Against the Omicron (B.1.1.529) Variant*, 386 NEW ENG. J. MED. 1532, 1537 (2022) (Pfizer vaccine's effectiveness against symptomatic Omicron infection went from 65.5 percent in the first month to 8.8 percent after six months. Even boosters, which the Mandate does not require, fail to provide long-term protection against infection and transmission. *See* Yinon M. Bar-On et al., *Protection by a Fourth Dose of BNT162b2 Against Omicron in Israel*, 386 NEW ENG. J. MED. 1712 (Apr. 5, 2022), *at* https://www.nejm.org/doi/full/10.1056/NEJMoa2201570 ("Protection against confirmed infection appeared short-lived" after "a fourth dose of BNT162b2 vaccine").

conceded that, "because of the high degree of transmissibility of this virus," the vaccines "don't protect overly well … against infection."[26] Thus, even if regulating health was appropriate through the EOs was legally proper, the mandated vaccines fail in the claimed scope of "safeguard[ing]" the government's contractor workforce and "ensuring the health and safety of the Federal workforce."

Having demonstrated standing and ripeness and having discussed the ineffectiveness of the COVID-19 vaccine, Plaintiff-Appellants have demonstrated the District Court's errors that warrant this Court's overturning of the lower Court's decision.

Here, all but 3 Plaintiffs have asserted religious rights by seeking a religious exemption and an accommodation from the COVID-19 vaccine, and the government has shown no compelling interest in mandating the vaccine. ER241-ER278 (excepting ER244, ER259, and ER265, the three Plaintiffs that did not file religious exemptions). Plaintiffs have plead facts that demonstrate that the EOs substantially burden each Plaintiff's religious exercise by seeking a religious exemption and

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[26] *Fauci admits that COVID-19 vaccines do not protect 'overly well' against infection*, FOX NEWS (July 12, 2022), *at* https://www.foxnews.com/media/fauci-admits-covid-19-vaccines-protect-overly-well-infection.

accommodation to the COVID-19 vaccine and asserting that taking/receiving the COVID-19 vaccine violates their religious beliefs. *Id.* see also: ER030-ER084. All Plaintiffs were initially informed by their employer that no accommodation could be made to allow the individual to forego taking the vaccine, and 22 were granted a temporary exemption that has long expired. *Id.* See: *See* ER32, ER37, ER44, ER47, ER53, ER55, ER58, ER61, ER65, ER66, ER67-ER68, ER69, ER73, ER74, ER76, ER87-ER89, ER90, ER92 noting the 22 Plaintiffs who were granted temporary accommodations. Moreover, when religious exemptions submitted, requesting accommodations, employers did not challenge the sincerity of the individual's religious beliefs. *See:* ER224-ER237, ER206-ER217 and ER200-ER205.

B. The Government Has Not Employed the Least Restrictive Means to Achieve the Proclaimed interest in Contracting Efficiency.

In addition to forwarding a compelling government interest, RFRA demands that the least restrictive means necessary be employed. Under a Fed. R. Civ. Pro. 12 standard, the District Court erred by determining that the Government had carried its burden of showing that, even accepting Plaintiffs' pleadings as true, compulsory vaccination is the least restrictive means of reducing the disruption of the procurement of government contracts. This element was noted in *OSHA*, where the Court concluded that the mandate was both overinclusive (in its application to all industries) as well as underinclusive (by its stringent numeric limitation of 99

employees). *OSHA*, at 611. Finally, the Court noted that the world had suffered the pandemic for nearly two years and that OSHA spent over two months developing the regulations; thus, the Administration's reliance on an "emergency" was "unavailing" to the court as the regulation "grossly exceeds OHSA's statutory authority." *Id.* These under and overinclusive standards were the crux of the Court's decision that OSHA failed to meet this threshold burden of proper tailoring as "this kind of overbreadth plagues the Mandate generally," and the Court's final dagger was the uncertainty that COVID-19 qualifies as an emergency that warranted OSHA emergency actions. *Id.* at 613-14. The challenged EOs fare no better when the burden shifts to Defendants.

Shifting the burden to Defendants to show that the EOs further a compelling governmental interest and is the least restrictive means of furthering that interest. Defendants have not carried that burden; rather, Defendants summarily "accepted" Plaintiffs' requests while refusing to accommodate these requests. Additionally, throughout the pleadings at the lower court, Defendants never satisfied the burden of demonstrating that the vaccine requirement was the least restrictive means, nor did they show a compelling interest in the implementation or enforcement of the EOs.

C. RFRA Has No Exhaustion Requirement.

Defendants sought, and wrongly obtained dismissal, on ripeness matters, claiming that Plaintiff-Appellants first need to exhaust administrative (Equal Employment Opportunity Commission and RFRA) remedies prior to seeking an injunction. ER021. As Defendant-Appellees noted, while Plaintiffs' "exemption requests remain pending, any infringement of the plaintiffs' constitutional rights is purely theoretical." ER172. But, as Plaintiffs noted in briefing submitted to the District Court (ER029) the Ninth Circuit and United States Supreme Court have held, RFRA contains no exhaustion remedy:

> We decline, however, to read an exhaustion requirement into RFRA where the statute contains no such condition, *see* 42 U.S.C. §§ 2000bb–2000bb–4, and the Supreme Court has not imposed one. Indeed, the Supreme Court has reviewed a RFRA-based challenge to the CSA without requiring that the plaintiffs first seek a religious use exemption from the DEA. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006). In so doing, it recognized that RFRA 'plainly contemplates that courts would recognize exceptions [to the CSA]—that is how the law works.' *Id.* at 434, 126 S.Ct. 1211. *Oklevueha Native American Church of Hawaii, Inc. v. Holder*, 676 F.3d 829, 838 (9th Cir. 2012)

Thus, seeking to impose an exhaustion remedy flies in the face of RFRA, itself, and this Court and the United States Supreme Court's jurisprudence.

X. CONCLUSION

The President's attempt to maximize vaccination, in an end-run of the States' sovereignty, and contrary to RFRA, cannot be done through the Procurement Act. The District Court erred in not granting the Plaintiffs' requested preliminary injunction and erred again in dismissing their case without leave to amend.

DATED this 24th day of October 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains **13,523 words**, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

DATED this 24th day of October 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

DATED this 24th day of October, 2022.

/s/Korri Oosting

Korri Oosting

ADDENDUM

Authorization for Medical Products for Use in Emergencies

21 U.S.C. § 360bbb(b)(1)

(a)In general

(1)Emergency uses

Notwithstanding any provision of this chapter and section 351 of the Public Health Service Act [42 U.S.C. 262], and subject to the provisions of this section, the Secretary may authorize the introduction into interstate commerce, during the effective period of a declaration under subsection (b), of a drug, device, or biological product intended for use in an actual or potential emergency (referred to in this section as an "emergency use").

(2)Approval status of product

An authorization under paragraph (1) may authorize an emergency use of a product that—

(A)is not approved, licensed, or cleared for commercial distribution under section 355, 360(k), 360b, or 360e of this title or section 351 of the Public Health Service Act [42 U.S.C. 262] or conditionally approved under section 360ccc of this title (referred to in this section as an "unapproved product"); or

(B)is approved, conditionally approved under section 360ccc of this title, licensed, or cleared under such a provision, but which use is not under such provision an approved, conditionally approved under section 360ccc of this title, licensed, or cleared use of the product (referred to in this section as an "unapproved use of an approved product").

(3)Relation to other uses

An emergency use authorized under paragraph (1) for a product is in addition to any other use that is authorized for the product under a section of this chapter or the Public Health Service Act [42 U.S.C. 201 et seq.] referred to in paragraph (2)(A).

(4)Definitions

For purposes of this section:

(A)The term "biological product" has the meaning given such term in section 351 of the Public Health Service Act [42 U.S.C. 262].

(B)The term "emergency use" has the meaning indicated for such term in paragraph (1).

(C)The term "product" means a drug, device, or biological product.

(D)The term "unapproved product" has the meaning indicated for such term in paragraph (2)(A).

(E)The term "unapproved use of an approved product" has the meaning indicated for such term in paragraph (2)(B).

(b)Declaration of emergency or threat justifying emergency authorized use

(1)In general

The Secretary may make a declaration that the circumstances exist justifying the authorization under this subsection for a product on the basis of—

(A)a determination by the Secretary of Homeland Security that there is a domestic emergency, or a significant potential for a domestic emergency, involving a heightened risk of attack with a biological, chemical, radiological, or nuclear agent or agents;

(B)a determination by the Secretary of Defense that there is a military emergency, or a significant potential for a military emergency, involving a heightened risk to United States military forces, including personnel operating under the authority of title 10 or title 50, of attack with—

(i)a biological, chemical, radiological, or nuclear agent or agents; or

(ii)an agent or agents that may cause, or are otherwise associated with, an imminently life-threatening and specific risk to United States military forces;

(C)a determination by the Secretary that there is a public health emergency, or a significant potential for a public health emergency, that affects, or has a significant potential to affect, national security or the health and security of United States citizens living abroad, and that involves a biological, chemical, radiological, or nuclear agent or agents, or a disease or condition that may be attributable to such agent or agents; or

(D)the identification of a material threat pursuant to section 319F–2 of the Public Health Service Act [42 U.S.C. 247d–6b] sufficient to affect national security or the health and security of United States citizens living abroad.

(2)Termination of declaration

(A)In general

A declaration under this subsection shall terminate upon the earlier of—

(i)a determination by the Secretary, in consultation as appropriate with the Secretary of Homeland Security or the Secretary of Defense, that the circumstances described in paragraph (1) have ceased to exist; or

(ii)a change in the approval status of the product such that the circumstances described in subsection (a)(2) have ceased to exist.

(B)Disposition of product

If an authorization under this section with respect to an unapproved product ceases to be effective as a result of a termination under subparagraph (A) of this paragraph, the Secretary shall consult with the manufacturer of such product with respect to the appropriate disposition of the product.

(3)Advance notice of termination

The Secretary shall provide advance notice that a declaration under this subsection will be terminated. The period of advance notice shall be a period reasonably determined to provide—

(A)in the case of an unapproved product, a sufficient period for disposition of the product, including the return of such product (except such quantities of product as are necessary to provide for continued use consistent with subsection (f)(2)) to the manufacturer (in the case of a manufacturer that chooses to have such product returned); and

(B)in the case of an unapproved use of an approved product, a sufficient period for the disposition of any labeling, or any information under subsection (e)(2)(B)(ii), as the case may be, that was provided with respect to the emergency use involved.

(4)Publication

The Secretary shall promptly publish in the Federal Register each declaration, determination, and advance notice of termination under this subsection.

(5)Explanation by Secretary

If an authorization under this section with respect to an unapproved product or an unapproved use of an approved product has been in effect for more than 1 year, the Secretary shall provide in writing to the sponsor of such product an explanation of the scientific, regulatory, or other obstacles to approval, licensure, or clearance of such product or use, including specific actions to be taken by the Secretary and the sponsor to overcome such obstacles.

(6)Military emergencies

In the case of a determination described in paragraph (1)(B), the Secretary shall determine, within 45 calendar days of such determination, whether to make a declaration under paragraph (1), and, if appropriate, shall promptly make such a declaration.

(c)Criteria for issuance of authorization

The Secretary may issue an authorization under this section with respect to the emergency use of a product only if, after consultation with the Assistant Secretary for Preparedness and Response, the Director of the National Institutes of Health, and the Director of the Centers for Disease Control and Prevention (to the extent feasible and appropriate given the applicable circumstances described in subsection (b)(1)), the Secretary concludes—

(1)that an agent referred to in a declaration under subsection (b) can cause a serious or life-threatening disease or condition;

(2)that, based on the totality of scientific evidence available to the Secretary, including data from adequate and well-controlled clinical trials, if available, it is reasonable to believe that—

(A)the product may be effective in diagnosing, treating, or preventing—

(i)such disease or condition; or

(ii)a serious or life-threatening disease or condition caused by a product authorized under this section, approved or cleared under this chapter, or licensed under section 351 of the Public Health Service Act [42 U.S.C. 262], for diagnosing, treating, or preventing such a disease or condition caused by such an agent; and

(B)the known and potential benefits of the product, when used to diagnose, prevent, or treat such disease or condition, outweigh the known and potential risks of the product, taking into consideration the material threat posed by the agent or agents identified in a declaration under subsection (b)(1)(D), if applicable;

(3)that there is no adequate, approved, and available alternative to the product for diagnosing, preventing, or treating such disease or condition;

(4)in the case of a determination described in subsection (b)(1)(B)(ii), that the request for emergency use is made by the Secretary of Defense; and

(5)that such other criteria as the Secretary may by regulation prescribe are satisfied.

(d)Scope of authorization

An authorization of a product under this section shall state—

(1)each disease or condition that the product may be used to diagnose, prevent, or treat within the scope of the authorization;

(2)the Secretary's conclusions, made under subsection (c)(2)(B), that the known and potential benefits of the product, when used to diagnose, prevent, or treat such disease or condition, outweigh the known and potential risks of the product; and

(3)the Secretary's conclusions, made under subsection (c), concerning the safety and potential effectiveness of the product in diagnosing, preventing, or treating such diseases or conditions, including, to the extent practicable given the circumstances of the emergency, an assessment of the available scientific evidence.

(e)Conditions of authorization

(1)Unapproved product

(A)Required conditions

With respect to the emergency use of an unapproved product, the Secretary, to the extent practicable given the applicable circumstances described in subsection (b)(1), shall, for a person who carries out any activity for which the authorization is issued, establish such conditions on an authorization under this section as the Secretary finds necessary or appropriate to protect the public health, including the following:

(i)Appropriate conditions designed to ensure that health care professionals administering the product are informed—

(I)that the Secretary has authorized the emergency use of the product;

(II)of the significant known and potential benefits and risks of the emergency use of the product, and of the extent to which such benefits and risks are unknown; and

(III)of the alternatives to the product that are available, and of their benefits and risks.

(ii)Appropriate conditions designed to ensure that individuals to whom the product is administered are informed—

(I)that the Secretary has authorized the emergency use of the product;

(II)of the significant known and potential benefits and risks of such use, and of the extent to which such benefits and risks are unknown; and

(III)of the option to accept or refuse administration of the product, of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks.

(iii)Appropriate conditions for the monitoring and reporting of adverse events associated with the emergency use of the product.

(iv)For manufacturers of the product, appropriate conditions concerning recordkeeping and reporting, including records access by the Secretary, with respect to the emergency use of the product.

(B)Authority for additional conditions

With respect to the emergency use of an unapproved product, the Secretary may, for a person who carries out any activity for which the authorization is issued, establish such conditions on an authorization under this section as the Secretary finds necessary or appropriate to protect the public health, including the following:

(i)Appropriate conditions on which entities may distribute the product with respect to the emergency use of the product (including limitation to distribution by government entities), and on how distribution is to be performed.

(ii)Appropriate conditions on who may administer the product with respect to the emergency use of the product, and on the categories of individuals to whom, and the circumstances under which, the product may be administered with respect to such use.

(iii)Appropriate conditions with respect to collection and analysis of information concerning the safety and effectiveness of the product with respect to the use of such product during the period when the authorization is in effect and a reasonable time following such period.

(iv)For persons other than manufacturers of the product, appropriate conditions concerning recordkeeping and reporting, including records access by the Secretary, with respect to the emergency use of the product.

(2)Unapproved use

With respect to the emergency use of a product that is an unapproved use of an approved product:

(A)For a person who carries out any activity for which the authorization is issued, the Secretary shall, to the extent practicable given the applicable circumstances described in subsection (b)(1), establish conditions described in clauses (i) and (ii) of paragraph (1)(A), and may establish conditions described in clauses (iii) and (iv) of such paragraph or in paragraph (1)(B).

(B)

(i)If the authorization under this section regarding the emergency use authorizes a change in the labeling of the product, but the manufacturer of the product chooses not to make such change, such authorization may not authorize distributors of the product or any other person to alter or obscure the labeling provided by the manufacturer, except as provided in section 360bbb–3a of this title with respect to authorized changes to the product expiration date.

(ii)In the circumstances described in clause (i), for a person who does not manufacture the product and who chooses to act under this clause, an authorization under this section regarding the emergency use shall, to the extent practicable given the circumstances of the emergency, authorize such person to provide appropriate information with respect to such product in addition to the labeling provided by the manufacturer, subject to compliance with clause (i). While the authorization under this section is effective, such additional information shall not be considered labeling for purposes of section 352 of this title.

(C)In establishing conditions under this paragraph with respect to the distribution and administration of the product for the unapproved use, the Secretary shall not impose conditions that would restrict distribution or administration of the product when distributed or administered for the approved use.

(3)Good manufacturing practice; prescription

With respect to the emergency use of a product for which an authorization under this section is issued (whether an unapproved product or an unapproved use of an approved product), the Secretary may waive or limit, to the extent appropriate given the applicable circumstances described in subsection (b)(1)—

(A)requirements regarding current good manufacturing practice otherwise applicable to the manufacture, processing, packing, or holding of products subject to regulation under this chapter, including such requirements established under section 351 or 360j(f)(1) of this title, and including relevant conditions prescribed with respect to the product by an order under section 360j(f)(2) of this title;

(B)requirements established under subsection (b) or (f) of section 353 of this title or under section 354 of this title; and

(C)requirements established under section 360j(e) of this title.

(4)Advertising

The Secretary may establish conditions on advertisements and other promotional descriptive printed matter that relate to the emergency use of a product for which an authorization under this section is issued (whether an unapproved product or an unapproved use of an approved product), including, as appropriate—

(A)with respect to drugs and biological products, requirements applicable to prescription drugs pursuant to section 352(n) of this title; or

(B)with respect to devices, requirements applicable to restricted devices pursuant to section 352(r) of this title.

(f)Duration of authorization

(1)In general

Except as provided in paragraph (2), an authorization under this section shall be effective until the earlier of the termination of the declaration under subsection (b) or a revocation under subsection (g).

(2)Continued use after end of effective period

Notwithstanding the termination of the declaration under subsection (b) or a revocation under subsection (g), an authorization shall continue to be effective to provide for continued use of an unapproved product with respect to a patient to whom, or an animal to which, it was administered during the period described by paragraph (1), to the extent found necessary by such patient's attending physician or by the veterinarian caring for such animal, as applicable.

(g)Review and revocation of authorization

(1)Review

The Secretary shall periodically review the circumstances and the appropriateness of an authorization under this section. As part of such review, the Secretary shall regularly review the progress made with respect to the approval, conditional approval under section 360ccc of this title, licensure, or clearance of—

(A)an unapproved product for which an authorization was issued under this section; or

(B)an unapproved use of an approved product for which an authorization was issued under this section.

(2)Revision and revocation

The Secretary may revise or revoke an authorization under this section if—

(A)the circumstances described under subsection (b)(1) no longer exist;

(B)the criteria under subsection (c) for issuance of such authorization are no longer met; or

(C)other circumstances make such revision or revocation appropriate to protect the public health or safety.

(h)Publication; confidential information

(1)Publication

The Secretary shall promptly publish in the Federal Register a notice of each authorization, and each termination or revocation of an authorization under this section, and an explanation of the reasons therefor (which may include a summary of data or information that has been submitted to the Secretary in an application under section 355(i) [1] 360b(j), or 360j(g) of this title, even if such summary may indirectly reveal the existence of such application). The Secretary shall make any revisions to an authorization under this section available on the Internet Web site of the Food and Drug Administration.

(2)Confidential information

Nothing in this section alters or amends section 1905 of title 18 or section 552(b)(4) of title 5.

(i)Actions committed to agency discretion

Actions under the authority of this section by the Secretary, by the Secretary of Defense, or by the Secretary of Homeland Security are committed to agency discretion.

(j)Rules of construction

The following applies with respect to this section:

(1)Nothing in this section impairs the authority of the President as Commander in Chief of the Armed Forces of the United States under article II, section 2 of the United States Constitution.

(2)Nothing in this section impairs the authority of the Secretary of Defense with respect to the Department of Defense, including the armed forces, under other provisions of Federal law.

(3)Nothing in this section (including any exercise of authority by a manufacturer under subsection (e)(2)) impairs the authority of the United States to use or manage quantities of a product that are owned or controlled by the United States (including quantities in the stockpile maintained under section 319F–2 of the Public Health Service Act [42 U.S.C. 247d–6b]).

(4)Nothing in this section shall be construed as authorizing a delay in the review or other consideration by the Secretary of any application or submission pending before the Food and Drug Administration for a product for which an authorization under this section is issued.

(k)Relation to other provisions

If a product is the subject of an authorization under this section, the use of such product within the scope of the authorization shall not be considered to constitute a clinical investigation for purposes of section 355(i), 360b(j), or 360j(g) of this title or any other provision of this chapter or section 351 of the Public Health Service Act [42 U.S.C. 262].

(l)Option to carry out authorized activities

Nothing in this section provides the Secretary any authority to require any person to carry out any activity that becomes lawful pursuant to an authorization under this section, and no person is required to inform the Secretary that the person will not be carrying out such activity, except that a manufacturer of a sole-source unapproved product authorized for emergency use shall report to the Secretary within a reasonable period of time after the issuance by the Secretary of such authorization if such manufacturer does not intend to carry out any activity under the authorization. This section only has legal effect on a person who carries out an activity for which an authorization under this section is issued. This section does not modify or affect activities carried out pursuant to other provisions of this chapter or section 351 of the Public Health Service Act [42 U.S.C. 262]. Nothing in this subsection may be construed as restricting the Secretary from imposing conditions on persons who carry out any activity pursuant to an authorization under this section.

(m)Categorization of laboratory tests associated with devices subject to authorization

(1)In general

In issuing an authorization under this section with respect to a device, the Secretary may, subject to the provisions of this section, determine that a laboratory examination or procedure associated with such device shall be deemed, for purposes of section 353 of the Public Health Service Act [42 U.S.C. 263a], to be in a particular category of examinations and procedures (including the category described by subsection (d)(3) of such section) if, based on the totality of scientific evidence available to the Secretary—

(A)such categorization would be beneficial to protecting the public health; and

(B)the known and potential benefits of such categorization under the circumstances of the authorization outweigh the known and potential risks of the categorization.

(2)Conditions of determination

The Secretary may establish appropriate conditions on the performance of the examination or procedure pursuant to such determination.

(3)Effective period

A determination under this subsection shall be effective for purposes of section 353 of the Public Health Service Act [42 U.S.C. 263a] notwithstanding any other provision of that section during the effective period of the relevant declaration under subsection (b).

Interlocutory Decisions

28 U.S.C. § 1292(a)(1)

(a)Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1)Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2)Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3)Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b)When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c)The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

(1)of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and

(2)of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

(d)

(1)When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit

an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(2)When the chief judge of the United States Court of Federal Claims issues an order under section 798(b) of this title, or when any judge of the United States Court of Federal Claims, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(3)Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Court of Federal Claims, as the case may be, unless a stay is ordered by a judge of the Court of International Trade or of the Court of Federal Claims or by the United States Court of Appeals for the Federal Circuit or a judge of that court.

(4)

(A)The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from an interlocutory order of a district court of the United States, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, granting or denying, in whole or in part, a motion to transfer an action to the United States Court of Federal Claims under section 1631 of this title.

(B)When a motion to transfer an action to the Court of Federal Claims is filed in a district court, no further proceedings shall be taken in the district court until 60 days after the court has ruled upon the motion. If an appeal is taken from the district court's grant or denial of the motion, proceedings shall be further stayed until the appeal has been decided by the Court of Appeals for the Federal Circuit. The stay of proceedings in the district court shall not bar the granting of preliminary or injunctive relief, where appropriate and where expedition is reasonably necessary. However, during the period in which proceedings are stayed as provided in this subparagraph, no transfer to the Court of Federal Claims pursuant to the motion shall be carried out.

(e)The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).

Purpose

40 U.S.C. § 101

The purpose of this subtitle is to provide the Federal Government with an economical and efficient system for the following activities:

(1)Procuring and supplying property and nonpersonal services, and performing related functions including contracting, inspection, storage, issue, setting specifications, identification and classification, transportation and traffic management, establishment of pools or systems for transportation of Government personnel and property by motor vehicle within specific areas, management of public utility services, repairing and converting, establishment of inventory levels, establishment of forms and procedures, and representation before federal and state regulatory bodies.

(2)Using available property.

(3)Disposing of surplus property.

(4)Records management.

Administrative

40 U.S.C. § 121

(a)Policies Prescribed by the President.—

The President may prescribe policies and directives that the President considers necessary to carry out this subtitle. The policies must be consistent with this subtitle.

(b)Accounting Principles and Standards.—

(1)Prescription.—

The Comptroller General, after considering the needs and requirements of executive agencies, shall prescribe principles and standards of accounting for property.

(2)Property accounting systems.—

The Comptroller General shall cooperate with the Administrator of General Services and with executive agencies in the development of property accounting systems and approve the systems when they are adequate and in conformity with prescribed principles and standards.

(3)Compliance review.—

From time to time the Comptroller General shall examine the property accounting systems established by executive agencies to determine the extent of compliance with prescribed principles and standards and approved systems. The Comptroller General shall report to Congress any failure to comply with the principles and standards or to adequately account for property.

(c)Regulations by Administrator.—

(1)General authority.—

The Administrator may prescribe regulations to carry out this subtitle.

(2)Required regulations and orders.—

The Administrator shall prescribe regulations that the Administrator considers necessary to carry out the Administrator's functions under this subtitle and the head of each executive agency shall issue orders and directives that the agency head considers necessary to carry out the regulations.

(d)Delegation of Authority by Administrator.—

(1)In general.—

Except as provided in paragraph (2), the Administrator may delegate authority conferred on the Administrator by this subtitle to an official in the General Services Administration or to the head of another federal agency. The Administrator may authorize successive redelegation of authority conferred by this subtitle.

(2)Exceptions.—The Administrator may not delegate—

(A)the authority to prescribe regulations on matters of policy applying to executive agencies;

(B)the authority to transfer functions and related allocated amounts from one component of the Administration to another under paragraphs (1)(C) and (2)(A) of subsection (e); or

(C)other authority for which delegation is prohibited by this subtitle.

(3)Retention and use of rental payments.—

A department or agency to which the Administrator has delegated authority to operate, maintain or repair a building or facility under this subsection shall retain the portion of the rental payment that the Administrator determines is available to operate, maintain or repair the building or facility. The department or agency shall directly expend the retained amounts to operate, maintain, or repair the building or facility. Any amounts retained under this paragraph shall remain available until expended for these purposes.

(e)Assignment of Functions by Administrator.—

(1)In general.—The Administrator may provide for the performance of a function assigned under this subtitle by any of the following methods:

(A)The Administrator may direct the Administration to perform the function.

(B)The Administrator may designate or establish a component of the Administration and direct the component to perform the function.

(C)The Administrator may transfer the function from one component of the Administration to another.

(D)The Administrator may direct an executive agency to perform the function for itself, with the consent of the agency or by direction of the President.

(E)The Administrator may direct one executive agency to perform the function for another executive agency, with the consent of the agencies concerned or by direction of the President.

(F)The Administrator may provide for performance of a function by a combination of the methods described in this paragraph.

(2)Transfer of resources.—

(A)Within administration.—

If the Administrator transfers a function from one component of the Administration to another, the Administrator may also provide for the transfer of appropriate allocated amounts from the component that previously carried out the function to the component being directed to carry out the function. A transfer under this subparagraph must be reported to the Director of the Office of Management and Budget.

(B)Between agencies.—

If the Administrator transfers a function from one executive agency to another (including a transfer to or from the Administration), the Administrator may also provide for the transfer of appropriate personnel, records, property, and allocated amounts from the executive agency that previously carried out the function to the executive agency being directed to carry out the function. A transfer under this subparagraph is subject to approval by the Director.

(f)Advisory Committees.—

The Administrator may establish advisory committees to provide advice on any function of the Administrator under this subtitle. Members of the advisory committees shall serve without compensation but are entitled to transportation and not more than $25 a day instead of expenses under section 5703 of title 5.

(g)Consultation With Federal Agencies.—

The Administrator shall advise and consult with interested federal agencies and seek their advice and assistance to accomplish the purposes of this subtitle.

(h)Administering Oaths.—

In carrying out investigative duties, an officer or employee of the Administration, if authorized by the Administrator, may administer an oath to an individual.

Publication of Proposed Regulations

41 U.S.C. § 1707(a)–(b)

(a)Covered Policies, Regulations, Procedures, and Forms.—

(1)Required comment period.—Except as provided in subsection (d), a procurement policy, regulation, procedure, or form (including an amendment or modification thereto) may not take effect until 60 days after it is published for public comment in the Federal Register pursuant to subsection (b) if it—

(A)relates to the expenditure of appropriated funds; and

(B)

(i)has a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure, or form; or

(ii)has a significant cost or administrative impact on contractors or offerors.

(2)Exception.—

A policy, regulation, procedure, or form may take effect earlier than 60 days after the publication date when there are compelling circumstances for the earlier effective date, but the effective date may not be less than 30 days after the publication date.

(b)Publication in Federal Register and Comment Period.—

Subject to subsection (c), the head of the agency shall have published in the Federal Register a notice of the proposed procurement policy, regulation, procedure, or form and provide for a public comment period for receiving and considering the views of all interested parties on the proposal. The length of the comment period may not be less than 30 days.

Unlawful Employment Practices

42 U.S.C. § 2000bb-1(c)

(a)In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b)Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1)is in furtherance of a compelling governmental interest; and

(2)is the least restrictive means of furthering that compelling governmental interest.

(c)Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

Unlawful Employment Practices

42 U.S.C. § 2000bb-2(1)

(1)the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;

(2)the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3)the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4)the term "exercise of religion" means religious exercise, as defined in section 2000cc–5 of this title.

Administrative Procedure Act

5 U.S.C. § 551

(1)"agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A)the Congress;

(B)the courts of the United States;

(C)the governments of the territories or possessions of the United States;

(D)the government of the District of Columbia;

or except as to the requirements of section 552 of this title—

(E)agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F)courts martial and military commissions;

(G)military authority exercised in the field in time of war or in occupied territory; or

(H)functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix; [1]

(2)"person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3)"party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4)"rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5)"rule making" means agency process for formulating, amending, or repealing a rule;

(6)"order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7)"adjudication" means agency process for the formulation of an order;

(8)“license” includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9)“licensing” includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10)“sanction” includes the whole or a part of an agency—

(A)prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B)withholding of relief;

(C)imposition of penalty or fine;

(D)destruction, taking, seizure, or withholding of property;

(E)assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F)requirement, revocation, or suspension of a license; or

(G)taking other compulsory or restrictive action;

(11)“relief” includes the whole or a part of an agency—

(A)grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B)recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C)taking of other action on the application or petition of, and beneficial to, a person;

(12)“agency proceeding” means an agency process as defined by paragraphs (5), (7), and (9) of this section;

(13)“agency action” includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

(14)“ex parte communication” means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.

Federal Registrar

86 Fed. Reg. at 63,423

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 circumstances to warrant making this determination immediately effective.

Federal Registrar

86 Fed. Reg. at 63,424

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.

Executive Order

Executive Order 14042

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

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

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

(c) Prior to the Task Force publishing new Guidance related to COVID-19 for contractor or subcontractor workplace locations, including the Guidance developed pursuant to subsection (b) of this section, the Director shall, as an exercise of the delegation of my authority under the Federal Property and Administrative Services Act, see 3 U.S.C. 301, determine whether such Guidance will promote economy and efficiency in Federal contracting if adhered to by Government contractors and subcontractors. Upon an affirmative determination by the Director, the Director's approval of the Guidance, and subsequent issuance of such Guidance by the Task Force, contractors and subcontractors working on or in connection with a Federal Government

contract or contract-like instrument (as described in section 5(a) of this order), shall adhere to the requirements of the newly published Guidance, in accordance with the clause described in subsection (a) of this section. The Director shall publish such determination in the Federal Register.

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

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

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

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

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

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

(i) it is a procurement contract or contract-like instrument for services, construction, or a leasehold interest in real property;

(ii) it is a contract or contract-like instrument for services covered by the Service Contract Act, 41 U.S.C. 6701 et seq.;

(iii) it is a contract or contract-like instrument for concessions, including any concessions contract excluded by Department of Labor regulations at 29 C.F.R. 4.133(b); or

(iv) it is a contract or contract-like instrument entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public;

(b) This order shall not apply to:

(i) grants;

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

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

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

(v) subcontracts solely for the provision of products.

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

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

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

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

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

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

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

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

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

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

Executive Order

Executive Order 14043

Executive Order 14043 of September 9, 2021

Requiring Coronavirus Disease 2019 Vaccination for Federal Employees

By the authority vested in me as President by the Constitution and the laws of the United States of America, including sections 3301, 3302, and 7301 of title 5, United States Code, it is hereby ordered as follows:

Section 1. Policy. It is the policy of my Administration to halt the spread of coronavirus disease 2019 (COVID–19), including the B.1.617.2 (Delta) variant, by relying on the best available data and science-based public health measures. The Delta variant, currently the predominant variant of the virus in the United States, is highly contagious and has led to a rapid rise in cases and hospitalizations. The nationwide public health emergency, first declared by the Secretary of Health and Human Services on January 31, 2020, remains in effect, as does the National Emergency Concerning the Coronavirus Disease 2019 (COVID–19) declared pursuant to the National Emergencies Act in Proclamation 9994 of March 13, 2020 (Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID–19) Outbreak). The Centers for Disease Control and Prevention (CDC) within the Department of Health and Human Services has determined that the best way to slow the spread of COVID–19 and to prevent infection by the Delta variant or other variants is to be vaccinated. COVID–19 vaccines are widely available in the United States. They protect people from getting infected and severely ill, and they significantly reduce the likelihood of hospitalization and death. As of the date of this order, one of the COVID–19 vaccines, the Pfizer-BioNTech COVID–19 Vaccine, also known as Comirnaty, has received approval from the Food and Drug Administration (FDA), and two others, the Moderna COVID–19 Vaccine and the Janssen COVID–19 Vaccine, have been authorized by the FDA for emergency use. The FDA has determined that all three vaccines meet its rigorous standards for safety, effectiveness, and manufacturing quality. The health and safety of the Federal workforce, and the health and safety of members of the public with whom they interact, are foundational to the efficiency of the civil service. I have determined that ensuring the health and safety of the Federal workforce and the efficiency of the civil service requires immediate action to protect the Federal workforce and individuals interacting with the Federal workforce. It is essential that Federal employees take all available steps to protect themselves and avoid spreading COVID–19 to their co-workers and members of the public. The CDC has found that the best way to do so is to be vaccinated. The Safer Federal Workforce Task Force (Task Force), established by Executive Order 13991 of January 20, 2021 (Protecting the Federal Workforce and Requiring Mask-Wearing), has issued important guidance to protect the Federal workforce and individuals interacting with the Federal workforce. Agencies have also taken important actions, including in some cases requiring COVID–19 vaccination for members of their workforce. Accordingly, building on these actions, and in light of the public health guidance regarding the most effective and necessary defenses against COVID–19, I have determined that to promote the health and safety of the Federal workforce and the efficiency of

the civil service, it is necessary to require COVID–19 vaccination for all Federal employees, subject to such exceptions as required by law.

Sec. 2. Mandatory Coronavirus Disease 2019 Vaccination for Federal Employees. Each agency shall implement, to the extent consistent with applicable law, a program to require COVID–19 vaccination for all of its Federal employees, with exceptions only as required by law. The Task Force shall issue guidance within 7 days of the date of this order on agency implementation of this requirement for all agencies covered by this order.

Sec. 3. Definitions. For the purposes of this order: (a) The term ‘‘agency’’ means an Executive agency as defined in 5 U.S.C. 105 (excluding the Government Accountability Office). (b) The term ‘‘employee’’ means an employee as defined in 5 U.S.C. 2105 (including an employee paid from nonappropriated funds as referenced in 5 U.S.C. 2105(c)).

Sec. 4. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect: (i) the authority granted by law to an executive department or agency, or the head thereof; or (ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals. (b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations. (c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. (d) If any provision of this order, or the application of any provision to any person or circumstance, is held to be invalid, the remainder of this order and the application of any of its other provisions to any other persons or circumstances shall not be affected thereby.

Federal Act

Federal Property and Administrative Services Act of 1949 (Procurement Act)

Federal Property And Administrative Services Act Of 1949, As Amended

Pub. L. 152, Ch. 288, 63 Stat 377

(Codified as amended in scattered sections of 40 U.S.C. and 41 U.S.C.)

The General Services Administration (GSA) was officially created in June 1949 with the enactment of the Federal Property and Administrative Services Act of 1949 (Property Act). The act was designed, in part, to increase the efficiency and economy of Federal government operations with regard to the procurement, utilization and disposal of property. Since its enactment, the Property Act functions of GSA have been amended by numerous pieces of legislation. Discussed below are sections of the Property Act as codified in 40 U.S.C., Chapter 10--Management and Disposal of Government Property. Chapter 10 contains six subchapters: Subchapter I--General Provisions, Subchapter II--Property Management, Subchapter III--Foreign E xcess Property, Subchapter IV--Reconstruction Finance Corporation Property (repealed), S ubchapter V--Urban Land Utilization and Subchapter VI--Selection of Architects and Engineers. Although government property comprises everything from desks to depots, the primary purpose of this document is the discussion of the Property Act as it relates to Federal real property.

SUBCHAPTER 1 -- GENERAL PROVISIONS

Section 471. Congressional declaration of policy.

States the intent of Congress to provide for the Government an economic and efficient system for (a) the procurement and supply of personal property and nonpersonal services and performance of related functions; (b) the utilization of available property; (c) the disposal of surplus property; and (d) records management.

Section 472. Definitions.

Provides the definition of terms used in titles I through VI of the Property Act. Several definitions require special note. "Property" includes all interests in property except (1) the public domain; national forest or national park lands; minerals in withdrawn or reserved public domain lands which the Secretary of the Interior determines are suitable for disposition under the public-land mining and mineral leasing laws; withdrawn or reserved public domain lands (except those determined by the Secretary of the Interior, with the concurrence of the Administrator of General Services, to be unsuitable for return to the public domain status, by virtue of their having been substantially changed in character by improvements, etc.); (2) major classes of naval vessels; and (3) records of the Federal Government. "Excess property" means any property under the control of any Federal agency not required for its needs and responsibilities as determined by the head thereof. "Surplus property" means any property which has been declared excess by a particular Federal agency and which, after a survey of the needs of other Federal agencies, is determined by the Administrator to be no longer required by the Federal Government as a whole.

Section 473. Applicability of existing procedures.

Continues in effect all existing policies, procedures, and directives until superseded or amended under authority of the Property Act.

Section 474. Congress, departments, agencies, corporations, and persons exempted from provisions.

Provides that the authority conferred by the Property Act be in addition and paramount to any authority conferred by any other law--thus firming up the authority of the Administrator to accomplish the purposes of the act. Exempts from operations under the Property Act a number of specified agencies or programs requiring special treatment (Note: Exemption is limited only to the extent that compliance with the Property Act will "impair or affect" operation of their program). Exempts the Senate or the House of Representatives (including Architect of the Capitol) from provisions of the Property Act but contains provision that services or facilities be made available, on a reimbursable basis, upon request.

Section 475. Authorization of appropriations; fund transfer authority.

Authorizes appropriations to carry out provisions of Property Act and authorizes Federal agency use of appropriated funds for the care and handling and disposition of property.

Section 476. Sex discrimination prohibited.

Sex discrimination prohibited under any program or activity carried on or receiving Federal assistance under Property Act.

SUBCHAPTER II -- PROPERTY MANAGEMENT

Section 481. Procurement, warehousing and related activities.

Authorizes the Administrator, where it is advantageous to the Government, to regulate the policies and methods of executive agencies with respect to the procurement and supply of personal property and nonpersonal services including related functions such as contracting, transportation, management of public utility services.

Section 482. Clarification of status of Architect of Capitol under this chapter.

Clarifies the term "the Senate and the House of Representatives", as used in the Property Act, includes the Architect of the Capitol and any activities under his direction, and any of the services authorized under such Act be made available upon request.

Section 483. Property utilization.

(a) Policies and methods; transfer of excess property among Federal agencies and other organizations; transfer of real property located in Indian reservations to the Secretary of the Interior.

(1) Charges the Administrator with overall responsibility to prescribe the policies and methods to promote the greatest use of excess property and to provide for the transfer of such property

among Federal agencies. The Administrator, with the approval of the Director of the Office of Management and Budget (OMB), determine the extent of reimbursement for such transfers of excess property.

(2) Directs the Administrator to transfer, without compensation, certain excess real property to the Secretary of the Interior to be held in trust for use and benefit of Indian Tribes.

(b) Duties of executive agencies.

Imposes upon each executive agency the responsibility (1) to maintain adequate inventory controls and accountability systems for its property; (2) to survey its property continuously to determine which is excess to its needs and promptly report excess property to the Administrator, (3) to care for such excess property, and (4) transfer or dispose of such property in accordance with authority delegated and regulations prescribed by the Administrator.

(c) Additional duties of executive agencies.

Similarly imposes upon each executive agency the responsibility to reassign property among activities within such agency, to transfer its excess property to other agencies, and to obtain for its use property which is excess to the needs of other agencies.

(d) Acquisition of excess personal property by Federal agencies for grantees prohibited; exceptions. With exceptions, prohibits Federal agencies from obtaining excess personal property for purposes of furnishing such property to grantees of such agencies.

(e) Annual report by executive agencies to Administrator on excess personal property furnished to recipient other than a Federal agency; acquisition, identification, and disposition; report by Administrator to Congress. Directs each executive agency to submit to the Administrator an annual report reflecting the use and/or disposition of personal property. The Administrator submits an analytical summary of such reports to Congress.

(f) Repealed.

(g) Temporary assignment of excess real property space.

Authorizes the Administrator to assign and reassign space in excess real property to any Federal agency for office, storage, or related facilities on a temporary rather than permanent basis.

(h) Abandonment, destruction, or donation of property.

Authorizes the abandonment, destruction, or donation to public bodies of property having no commercial value, or of which the estimated cost of continued care and handling would exceed the estimated proceeds from its sale.

Section 484. Disposal of surplus property.

(a) Supervision and direction.

Provides that the Administrator shall have supervision and direction over the disposition of property surplus to the needs of the entire Government.

(b) Care and handling.

Provides that the care and handling of surplus property pending its disposition, and the disposal of surplus property, may be performed by GSA or any executive agency designated by the Administrator. An agency other than the one in possession, however, cannot be designated to perform care and handling or disposal without its consent.

(c) Method of disposition.

Provides that any agency disposing of surplus property may do so by sale, exchange, lease, permit, or transfer, for cash, credit, or other property, with or without warranty, and may execute such documents for the transfer of the property as may be necessary.

(d) Validity of deed, bill of sale, lease, etc.

Makes instruments purporting to transfer title or other interest in surplus property under the Property Act, which are executed by an executive agency, conclusive evidence of compliance with the Act in the absence of notice of defects. Designed to protect the interest of bona fide grantees or transferees.

(e) Bids for disposal; advertising; procedure; disposal by negotiation; explanatory statement.

(1) Requires that surplus property be disposed of by public advertising, unless disposal is made by abandonment, destruction, or donation; through contract realty brokers; on a negotiated basis in the nine situations set for in paragraph (3); or, in case of personal property, by sales at fixed prices as provided in paragraph (5).

(2) Prescribes advertising procedures

(3) Authorizes negotiation of sales of surplus property, rather than public advertising, in the following nine situations. Negotiation procedure must be conducted under regulations prescribed by the Administrator and must include as much competition as is feasible under the circumstances.

(A) Necessary in the public interest during the period of a national emergency. Restricted to particular lots of personal property and for short periods of time.

(B) Public health, safety, or national security will be promoted by a particular disposal of personal property

(C) Public exigency will not allow the delay incident to advertising certain personal property

(D) Personal property, of such a nature and quantity, that if disposed of by public competitive bids, would impact an industry to the point of affecting the national economy and the estimated fair market value and other satisfactory terms can be obtained

(E) Estimated fair market value of the property involved does not exceed $15,000

(F) Where bid prices after advertising are not reasonable, or have not been independently arrived at in open competition.

(G)Real property, where the character or condition of the property or unusual circumstances, make it impractical to advertise publicly for competitive bids and the estimated fair market value and other satisfactory terms of disposal can be obtained

(H) Disposals to State and local governments and the estimated fair market value and other satisfactory terms of disposal can be obtained

(I) Where otherwise authorized by the Property Act or other law

(4) Realty brokers retained by the Administrator under contract will observe the usual commercial practices in disposing of realty and will give wide public notice of properties for sale or lease.

(5) Authorizes negotiated sales of surplus personal property at fixed prices, either directly or through disposal contractors.

(6) Establishes requirements for the submission to Congress of explanatory statements and annual reports covering negotiated disposals

(f) Contractor inventories.

Subject to regulations of the Administrator, provides that contractors or subcontractors with executive agencies may be authorized to retain or dispose of their contractor inventories.

(g) Agricultural commodities, foods, and cotton or woolen goods.

Requires the Administrator to consult with the Secretary of Agriculture in formulating policies for the disposal of surplus agricultural commodities, etc.

(h) Transfer to Department of Agriculture for price support or stabilization reasons; deposit of receipts; limitation on sale of surplus farm commodities.

When necessary as determined by the Secretary, requires the Administrator to transfer at no cost to the Department of Agriculture any surplus agricultural commodity

(i) Vessels; laws governing sales.

Establishes the Maritime Administration as the statutory disposal agency for surplus vessels of 1,500 gross tons.

(j) Transfers for donation of property to State agencies; State plan of operation; "public agency" and "State" defined.

Authorizes and establishes policy concerning the transfer of surplus personal property to a designated State agency who provides for the fair and equitable distribution of such property to eligible recipients within the State.

(k)Disposals by Secretary of Education, Secretary of Health and Human Services, Secretary of the Interior, Secretary of Housing and Urban Development and Secretary of Defense.

(1)(A) Under sponsorship of the Department of Education authorizes discounted conveyances of surplus real property to units of State and local government or eligible nonprofit entities for school, classroom, or other educational use.

(1)(B) Under sponsorship of the Department of Health and Human Services authorizes discounted conveyances of surplus real property to units of State and local government or eligible nonprofit entities for public-health purposes, including research.

(2) Under sponsorship of the Department of the Interior authorizes discounted conveyances of surplus real property to units of State and local government for public park or recreational purposes.

(3)Under sponsorship of the Department of the Interior authorizes cost-free conveyances of suitable surplus real and related property to units of State and local government for use as a historic monument.

(4) Places responsibility in the sponsoring agencies listed above(and the Secretary of Defense with respect to property conveyed under the Surplus Property Act of 1944, for use in training civilian components of the armed forces) to enforce compliance, to amend instruments of transfer, and grant releases from any terms, conditions and restrictions contained therein.

(5) Under sponsorship of the Corporation for National Community Service authorizes discounted conveyances of surplus property to entities receiving financial assistance under the National and Community Service Act of 1990.

(6) Under sponsorship of the Department of Housing and Urban Development authorizes discounted conveyances of surplus property to units of State and local government or eligible nonprofit entities for housing or housing assistance for low-income individuals or families.

(l) Donations to American Red Cross.

Authorizes donation to the Red Cross for charitable purposes, surplus property which was processed, produced, or donated to the Government by the Red Cross.

(m) Possession of abandoned or unclaimed property on Government premises; disposal; claims by former owners.

Authorizes Administrator to take possession of abandoned and other unclaimed property on premises owned or leased by the Government and, subject to certain conditions, to utilize, transfer or otherwise dispose of such property. Provides limited period of time for former owners to file claim.

(n) Cooperative agreements with State agencies.

Provides authority to enter into cooperative agreements with State surplus personal property distribution agencies designated in conformity with subjection (j).

(o) Annual reports to Congress.

Requires that every two years the Administrator submit to Congress and the Comptroller General, a report evaluating the operation of and providing statistical information on the personal property program.

(p) Transfer or conveyance of property for correctional facility, law enforcement, and emergency management use; consideration-free transfers; reimbursement for interim transfers; reversion option; terms and conditions.

Under sponsorship of the Department of Justice authorizes cost-free conveyances of surplus real and related personal property to units of State and local government for correctional facility or law enforcement use; under sponsorship of the Federal Emergency Management Agency authorizes cost-free conveyances to units of State and local government for emergency management response purposes, including fire and rescue services.

(q) Transfers or conveyance of property for the development or operation of a port facility.

Under sponsorship of the Department of Transportation authorizes cost-free conveyances of surplus real property to units of State and local government for the development or operation of a port facility.

(r) Authorization to donate surplus law enforcement canines to their handlers.

Authorizes the donation of Federal law enforcement canines that are no longer needed for official purposes to individuals with experience handling canines in the performance of law enforcement duties.Section 485. Proceeds from transfer, sale, etc., of property.

(a) Disposition of receipts.

Except as provided in subsection (b), (c), (d), (e), and (h) below provides for the deposit into the U.S. Treasury of net funds received from the transfer of excess property and the disposition of surplus property. (Note: 16 U.S.C. 460l-5(a) diverts funds received from the disposition of surplus real property to the Land and Water Conservation Fund administered by the Secretary of the Interior to assist communities in acquisitions of public park and recreational facilities.)

(b) Deposit of proceeds from sales; use; report.

Subject to limitations authorizes the use of proceeds from surplus real property to pay direct expenses incurred for the utilization of excess property and the disposal of surplus property for fees of appraisers, auctioneers, and realty brokers, for costs of environmental and historic preservation studies, and for advertising and surveying.

(c) Credit to reimbursable fund or appropriation on certain transactions.

Provides that in cases where property was acquired by funds either not appropriated from the general fund of the Treasury, or appropriated therefrom and by law reimbursable, the net proceeds of the disposition or transfer of such property shall be credited to the reimbursable fund or appropriation or paid to the agency declaring such property excess.

(d) Special account deposits.

Authorizes any Federal agency disposing of surplus property to deposit in a special account with the Treasurer, such amount of the proceeds as it deems necessary to permit appropriate refunds to purchasers when a disposition is rescinded or does not become final.

(e) Sale proceeds offset against price or cost of contractor's work.

Recognizes that contractual provisions authorizing proceeds of sales of property to be credited to price or cost of the work covered by a contract are controlling and therefore not subject to the requirements of the Property Act relating to disposition of proceeds.

(f) Acceptance of property in lieu of cash.

Permits an executive agency to accept, in lieu of cash, any property determined by the President to be strategic or critical material for payment of amounts due the Government under leases or sales of surplus property.

(g) Management of credit, leases, and permits on property.

Authorizes the Administrator to administer and manage any credit, lease, or permit taken in connection with the disposition of surplus property.

(h) Property under control of a military department.

Directs real property excess to a military department be made available for transfer without reimbursement to the other military departments. If property is not transferred it is reported to GSA for disposal under Property Act. Subject to appropriation, net proceeds from the disposition of such property are made available for facility maintenance and repair or environmental restoration as follows: (1) 50% at the military installation where the property is located, and (2) 50% by the military department that had jurisdiction over the property. Provision specifically excludes property located at a military installation designated for closure or realignment under the Military Base Closure Acts and damaged or deteriorated military family housing facilities conveyed under 10 U.S.C. 2854a.

(i) Retention of funds to offset costs incurred in conducting sales; deposit in General Supply Fund.

Provides that proceeds from sales of personal property be deposited in General Supply Fund and used to pay disposal expenses.

Section 486. Policies, regulations, and delegations.

(a) Promulgation by President.

Authorizes the President, if he deems it advisable, to prescribe over-all policies and directives which shall govern the Administrator and executive agencies in operations under the Property Act.

(b) Accounting principles and standards.

Requires the Comptroller General to prescribe principles and standards of accounting for property, to cooperate with the Administrator and executive agencies in developing property accounting systems, to approve satisfactory systems, to examine agency systems to determine compliance and report to Congress cases of failure to comply or adequately account for property.

(c) Regulations by Administrator.

Requires the Administrator to prescribe regulations to put in effect his functions under the Act, and also requires the heads of agencies to issue orders and directives as are necessary to carry out such regulations.

(d) Delegation and redelegation of authority by Administrator; exceptions.

Authorizes the Administrator to redelegate his authority, excepting, however the authority to issue policy regulations, the authority to make reorganizations with GSA, and as otherwise provided in the Act.

(e) Delegation of functions by Administrator.

Authorizes the Administrator to designate other executive agencies to perform various procurement, utilization, or disposal functions with the proviso that any designation or assignment of functions or delegation of authority shall be made only with the consent of the agency concerned or upon direction of the President.

(f) Transfer of personnel, property, funds, etc., to agency receiving delegated functions.

When an agency is designated to carry out a function, the Administrator may, with the approval of OMB, provide for the transfer of appropriate personnel, funds, etc., to the affected agency.

(g) Establishment of advisory committee; compensation; expenses.

Authorizes the Administrator to establish committees to advise in carrying out functions under the Act.

(h) Consultations between Administrator and Federal agencies.

Mandates that the Administrator advise and consult with Federal agencies in carrying out the purposes of the Act.

(i) Administration of oaths by certain officers and employees.

Provides authority for GSA employees having investigatory functions to administer oaths.

Section 487. Surveys of Government property and management practices.

(a) Authorization for surveys, inventory levels, supply catalog system and standardized forms and procedures.

Authorizes the Administrator, after notice to agencies concerned and with due regard to the requirement of the Department of Defense, (1) to survey Government property and property management practices and obtain reports from executive agencies, (2) to cooperate with

executive agencies in the establishment of reasonable inventory levels and report excessive stocking to Congress and OMB, (3) to establish and maintain a uniform Federal supply catalog system to identify and classify personal property, and (4) to prescribe standardized purchase and contract forms, procedures and specifications.

(b) Utilization by Federal agencies of supply catalogue system and standardized forms and procedures.

Except as otherwise provided by the Administrator, requires Federal agencies to use uniform supply catalog system and standardized forms and procedures and standard purchase specifications.

(c) Audit of property accounts by General Accounting Office.

Requires the General Accounting Office to audit all types of property accounts and transactions, such audit to include an evaluation of the effectiveness of internal controls and audits, and a general audit of the discharge of the duty to account for property.

Section 488. Disposal of property.

(a) Except as provided by (c), requires any executive agency contemplating disposing of any plant, plants, or other property to any private interest to first seek the advice of the Attorney General as to whether the proposed disposal would tend to create or maintain a situation inconsistent with the antitrust laws. When such notice is submitted to the Attorney General by an executive agency other than GSA, a copy of such notice must be simultaneously submitted to the Administrator. Requires that the Attorney General respond within 60 days.

(b) Request by Attorney General for information.

Requires GSA or any other executive agency to assist the Attorney General by furnishing any information appropriate or necessary to the determination.

(c) Applicability of provisions.

Excludes the disposal of real property or personal property (other than a patent, process, technique, or invention) if the estimated fair market value is less than $3 million.

(d) Provisions held not to impair, amend, etc., antitrust laws.

Provides that nothing in the Property Act shall modify or limit the applicability of the antitrust laws to persons who acquire property under the provisions of the Act.

Section 489. Civil remedies and penalties.

(a) Immunity of officers or employees of Government.

Exempts officers and employees of the Government disposing of property under Property Act from liability with respect to such disposition, except for their own fraud, and from liability for the collection of any purchase price determined to be uncollectible.

(b) Fraudulent tricks, schemes, or devices.

Deals with the civil liability of persons who engage in fraudulent activities for obtaining any payment, property, or other benefit from the United States in connection with procurement, transfer, or disposition of property.

(c) Jurisdiction and venue.

Confers jurisdiction on the courts to hear, try, and determine the suits provided for in subsection (b).

(d) Additional remedies.

Provides that civil remedies provided for under this section shall be in addition to all other criminal penalties and civil remedies provided by law.

Section 490. Operation of buildings and related activities by Administrator.

(a) General duties.

When authorized by any provision of law to maintain, operate, and protect any building, property, or grounds situated in or outside the District of Columbia, including the construction, repair, preservation, demolition, furnishing, and equipment thereof, the Administrator is authorized in the discharge of his duties:

(1) to purchase, repair, and clean uniforms for civilian employees of GSA who are required by law or regulation to wear uniform clothing;

(2) to furnish arms and ammunition for the protection force maintained by GSA;

(3) to pay ground rent for buildings owned by the U.S. or occupied by Federal agencies, and to pay such rent in advance when required by law or when the Administrator determines such action to be in the public interest;

(4) to pay per diem rates to personnel employed in connection with the functions of operation, maintenance and protection of property. Such rates may not exceed rates currently paid by private industry for similar services;

(5) without regard to the provisions of 40 U.S.C. 278a, to pay rental and make repairs, alterations, and improvements under leases entered into by, or transferred to, GSA for the housing of any Federal agency prior to July 1, 1950;

(6) to obtain payment, through advances or otherwise, for services, space, quarters, maintenance, repair, or other facilities furnished on a reimbursable basis to any other Federal agency, any mixed-ownership corporation or the District of Columbia and credit such payments to the applicable GSA appropriation;

(7) to maintain and repair and make payment of any obligation arising in connection with the pneumatic tube system connecting buildings owned by the U.S. or occupied by Federal agencies in New York City;

(8) to exempt from the 25% limitation imposed by 40 U.S.C. 278a, the repair, alteration, and improvement of rented premises where the Administrator determines that such work is advantageous to the Government in terms of economy, efficiency, or national security. A copy of the determination must be furnished to GAO and show that total cost to the Government for the expected life of the lease is less that the cost of alternative space;

(9) to pay sums in lieu of taxes on real property declared surplus by Government corporations, pursuant to the Surplus Property Act of 1944, where legal title to such property remains in the corporation;

(10) where not provided from other sources, to furnish utilities and other services to persons, firms, or corporations occupying or utilizing plants or portions of plants which constitute (a) a part of the National Industrial Reserve or (b) surplus real property;

(11) to permit the Secretary of Defense to direct the use of proceeds received by the U.S. from insurance against damage to properties in the National Industrial Reserve, for repair or restoration of the damaged properties;

(12) to acquire, by purchase, condemnation, or otherwise, land or interest therein when authorized by subsequent acts of Congress;

(13) to enter into leases of Federal building sites and additions to sites, including improvements, until they are needed for construction purposes. Such leases may be negotiated without public advertising if the lessee is the former owner or his tenant in possession, and the lease is negotiated incident to or in connection with the acquisition of property. Rental monies received under such leases goes into the Federal Building Fund established under subsection (f) ;

(14) to enter into 3 year contracts for the inspection, maintenance, and repair of fixed equipment in federally owned buildings;

(15) to render direct assistance to and perform special services for the Inaugural Committee during an inaugural period;

(16) to lease space on major pedestrian access levels, courtyards and rooftops of public buildings, at prevailing commercial rates, to persons, firms, or organizations engaged in commercial, cultural, education, or recreational activities (leases may be negotiated but promote as much competition as possible);

(17) to make available, on occasion, or to lease, auditoriums, meeting rooms, courtyards, rooftops, and lobbies of public buildings to persons, firms, or organization engaged in cultural, educational, or recreational activities (lease rates conditions determined by the Administrator and activities may not disrupt normal operations);

(18) to authorize sums received from leases and rentals entered into under paragraphs (16) and (17) to be deposited in the Federal Building Fund established under subsection (f) of this section; and

(19) to furnish utilities, maintenance, repair, and other services, during or outside regular working hours, to persons, firms or organization leasing space authorized under paragraphs (16) and (17).

(b) Buildings owned by United States.

Authorizes the Administrator, at the request of any Federal agency, or any mixed-ownership corporation, or the District of Columbia, to operate, maintain, and protect any building owned by the U.S., or by a wholly-owned or mixed-ownership Government corporation, and occupied by the agency or instrumentality making the request.

(c) Acquisition of land; surveys; construction services.

Authorizes the Administrator, at the request of any Federal agency or any mixed-ownership corporation or the District of Columbia, (1) to acquire land for buildings and projects authorized by Congress; (2) to survey and prepare plans and specifications for projects; and (3) to contract for and supervise the construction of projects. Appropriated funds available for any such building or project may be transferred to GSA.

(d) Transfer of functions.

With certain specified exceptions, directs the Director of OMB, when determined that such action is in the interest of economy or efficiency, to transfer to the Administrator all functions vested in any other Federal agency with respect to the operation, maintenance, and custody of any office building owned by the U.S. or any office building occupied by any Federal agency under lease.

(e) Assignment and reassignment of space.

Consistent with policies prescribed by the President and after consultation with heads of agencies affected, authorizes the Administrator to assign and reassign space of all executive agencies in Government-owned and leased buildings. Requires the Administrator, where practicable, to give priority in the assignment of space on any major pedestrian access level not leased under the terms of subsections (a)(16) or (17) to Federal activities requiring regular contact with members of the public.

(f) Fund for real property management and related activities; establishment; deposit of revenues and collections; merger of unexpended balances; assumption of liabilities, obligations, and commitments; appropriation of advances; special services.

Provides for the establishment of the Federal Buildings Fund to be available for real property management and related activities performed by GSA in such amounts as are specified in annual appropriation acts. Revenues to the fund include: user charges under subsection (j); proceeds from leases authorized under subsections (a) and (h); receipts from carriers and others for loss of, or damage to, property belonging to the fund; rebates or other cash incentives related to energy savings; proceeds from the sale of recycled materials; amounts received for special services provided by GSA on a reimbursable basis; and appropriated funds.

(g) Office furniture; movement and supply.

Provides that, whenever an agency is moved from a GSA-controlled space to another, only such furniture and furnishings shall be moved as cannot more economically and efficiently be made available at the new location. Promotes economy and efficiency by allowing GSA to provide furnished rather than unfurnished space and by making available furniture at the new location rather than moving furniture from the old location.

(h) Lease agreements for period not exceeding twenty years.

Authorizes the Administrator to enter into leases for periods not in excess of 20 years for the accommodation of Federal agencies in buildings which are in existence or may be erected by lessors and to assign and reassign space therein to Federal agencies. If an unexpired portion of any such lease of space is determined surplus and disposed of by sublease, rental receipts go into the Federal Buildings Fund under subsection (f).

(i) Installation, repair, and replacement of sidewalks.

Under regulations prescribed by the Administrator, authorizes executive agencies to install, repair, and replace sidewalks around buildings, installations or grounds under their control.

(j) Charges for space and services furnished by Administrator; determination of rates, exemption from charges.

Authorizes the Administrator to charge agencies for furnished services, space, quarters, maintenance, repairs or other facilities at rates determined by him. Rates must approximate commercial charges for comparable space and services. However, in case of those buildings for which the Administrator is responsible for alterations only, the rates charged must be sufficient to recover only the applicable cost of the alteration. The Administrator may exempt agencies from charges contingent on a determination that the charges would be infeasible or impractical. If exemptions are granted, appropriations are authorized to reimburse the Federal Building Fund (subsection (f)) for the lost revenue.

(k) Charges for space and services furnished by executive agencies; approval of rates by Administrator; credit to appropriation or fund.

Provides that any executive agency, other than GSA, which provides space and services to other agencies, may do so at rates approved by the Administrator.

Section 491. Motor vehicle pools and transportation systems.

Provides for the establishment and operation of motor vehicle pools and systems for transportation of Government personnel and property.

Section 492. Reports to Congress.

Requires the Administrator to submit to Congress in January of each year a report regarding the administration of his function under the Property Act, together with any recommendations for amendments which he may deem appropriate.

Section 493. Repealed.

SUBCHAPTER III -- FOREIGN EXCESS PROPERTY

Section 511. Disposal of foreign excess property; agency responsibility; foreign policy controlling; use of foreign currencies and credit; duties of State Department.

Provides that, except where commitments were in effect on July 1, 1949, all excess property located in foreign areas shall be disposed of by the owning agency. The head of the agency in question is directed to conform to the foreign policy of the US in making such disposals. The Secretary of State will administer existing agreements.

Section 512. Methods and terms of disposal.

(a) Authority of executive agency

Foreign excess property, not disposed of under subsections (b) and (c) below, may be disposed of by sale, exchange, lease, or transfer, for cash, credit or other property, with or without warranty, and upon such other terms and conditions as the head of the executive agency concerned deems proper. Such property may be disposed of for foreign currencies or credits, or substantial benefits or the discharge of claims. Disposals may be made without advertising when determined by the executive agency to be the most practicable and advantageous to the Government. The responsible agency head may execute necessary transfer documents and may authorize the abandonment, destruction, or donation of foreign property under his control which has no commercial value or the estimated cost of care and handling would exceed the estimated proceeds of sale.

(b) Donation of medical supplies.

Medical materials or supplies, not disposed of under subsection (c), may be donated to nonprofit medical or health organizations, without cost (except for costs of care and handling), for use in any foreign country.

(c) Return of foreign excess property; determination of interest of the United States, costs.

Subject to regulations prescribed by the Administrator, personal property may be returned to the U.S. for handling as excess or surplus property under the Property Act. Requires that the transportation costs incident to such return be borne by the Federal agency, State agency, or done receiving the property.

Section 513. Proceeds from disposals; foreign currencies; United States currency; disposition.

Provides that proceeds from the disposition of foreign excess property, if in the form of foreign currencies or credits, be administered in accordance with procedures prescribed by the Secretary of the Treasury and, if in U.S. currency or when reduced to U.S. currency, be covered into the Treasury as miscellaneous receipts. Provisions of 40 U.S.C. 485(c) relating to reimbursable funds or appropriations apply to proceeds of foreign excess property disposed of for U.S. currency. Authorizes establishment of a special account from which appropriate refunds to purchasers may be made.

Section 514. General provisions.

(a) Promulgation of policies.

Authorizes the President to prescribe policies concerning the disposition of excess foreign property.

(b) Delegation of authority.

Authority conferred upon an executive agency head may be delegated to officials within such agency or to the head of another executive agency.

(c) Employment of personnel.

Subject to limitations, authorizes executive agency head to appoint and fix the compensation of necessary personnel.

(d) Transfer of functions.

Directs that records, personnel, property determined by OMB to relate to the functions transferred to another agency under this subchapter be transferred from the Department of State to that agency.

SUBCHAPTER IV -- RECONSTRUCTION FINANCE CORPORATION PROPERTY

Sections 521 to 524. Repealed.

SUBCHAPTER V -- URBAN LAND UTILIZATION

Section 531. Declaration of purpose and policy.

Directs that urban land transactions (acquisition, use, and disposition) entered into for GSA or on behalf of other Federal agencies, to the greatest extent practicable, be consistent with zoning and land-use practices and in accordance with planning and development objectives of the local governments and local planning agencies concerned.

Section 532. Disposal of urban lands.

Directs the Administrator, prior to offering urban land for sale, to notify and provide the local zoning office an opportunity of zoning for the use of such land in accordance with local comprehensive planning. Further directs the Administrator to furnish prospective purchases with information concerning zoning and availability of utilities to urban property.

Section 533. Acquisition or change of use of real property.

Directs the Administrator, when proposing to acquire or change the use of any real property situated in an urban area, to notify the local zoning and land-use office and, to the extent practical, comply with and conform to regulations and the planning and development objectives of the local government.

Section 534. Waiver of procedures for disposal of urban lands, acquisition or change of use of real property.

Authorizes the waiver of sections 532 and 533 during national emergencies.

Section 535. Definitions.

Provides the definition of terms used in Subchapter V--Urban Land Utilization.

SUBCHAPTER VI -- SELECTION OF ARCHITECTS AND ENGINEERS

Section 541. Definitions.

Provides the definition of terms used in Subchapter VI.

Section 542. Congressional declaration of policy.

States the intent of Congress that the Federal Government publicly announce all requirements for architectural and engineering services, and to negotiate contracts for such services on the basis of demonstrated competence, qualifications and fair and reasonable prices.

Section 543. Requests for data on architectural and engineering services.

Directs an agency head, for each proposed project, to evaluate statements of qualifications and performance data and conduct discussions with no less than 3 firms and select therefrom, in order of preference, no less than 3 firms deemed to be the most qualified to perform the services required.

Section 544. Negotiation of contracts for architectural and engineering services.

(a) Negotiation with highest qualified firm.

Directs the agency head to negotiate a contract with qualified firm at fair and reasonable compensation taking into account the estimated value of the services to be rendered, the scope, complexity and professional nature thereof.

(b) Negotiation with second and third, etc., most qualified firms.

Should the agency head be unable to negotiate a satisfactory contract with the highest qualified firm, negotiates should be formally terminated. The agency head should then undertake negotiations with the second most qualified firm. Failing accord with the second firm, the agency head should terminate negotiations and undertake negotiations with the third most qualified.

(c) Selection of additional firms in event of failure of negotiation with selected firms.

Failing to negotiate a satisfactory contract with any of the selected firms, the agency head should select additional firms in order of their competence and qualification and continue negotiations in accordance with this section until an agreement is reached.