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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Mark Brnovich, in his official capacity as Attorney General of Arizona; and the State of Arizona;; John Doe; Phoenix Law Enforcement Association ("PLEA"); and United Phoenix Firefighters Association Local 493,

Plaintiffs,

v.

Joseph R. Biden in his official capacity as President of the United States; Alejandro Mayorkas in his official capacity as Secretary of Homeland Security; United

No. 2:21-cv-01568-MTL

PLAINTIFFS' THIRD MOTION FOR A PRELIMINARY INJUNCTION

REQUEST TO CONSOLIDATE TRIAL ON THE MERITS UNDER RULE 65(A)(2)

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States Department of Homeland Security; Troy Miller in his official capacity as Senior Official Performing the Duties of the Commissioner of U.S. Customs and Border Protection; Tae Johnson in his official capacity as Senior Official Performing the Duties of Director of U.S. Immigration and Customs Enforcement; Ur M. Jaddou in her official capacity as Director of U.S. Citizenship and Immigration Services; United States Office of Personnel Management; Safer Federal Workforce Task Force ("SFWTF"); Kiran Ahuja in her official capacity as director of the Office of Personnel Management and as co-chair of the SFWTF; General Services Administration; Robin Carnahan in her official capacity as administrator of the General Services Administration and as co-chair of the SFWTF; Office of Management and Budget; Shalanda Young in her official capacity as Acting Director of the Office of Management and Budget and as a member of the SFWTF; and Jeffrey Zients in his official capacity as co-chair of the SFWTF and COVID-19 Response Coordinator; L. Eric Patterson in his official capacity as Director of the Federal Protective Service and member of the SFWTF; James M. Murray in his official capacity as Director of the United States Secret Service and member of the SFWTF; Deanne Criswell in her official capacity as Director of the Federal Emergency Management Agency and member of the SFWTF; Rochelle Walensky in her official capacity as Director of the Centers for Disease Control and Prevention and member of the SFWTF; Defendant Centers for Disease Control and Prevention; the Federal Acquisition Regulatory Council; Mathew C. Blum, in his official capacity as Chair of the Federal Acquisition Regulatory Council and Acting

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Administrator of the Office of Federal Procurement Policy, Office of Management and Budget; Lesley A. Field, in her official capacity as a member of the Federal Acquisition Regulatory Council and Acting Administrator for Federal Procurement at the Office of Federal Procurement Policy, Office of Management and Budget; Karla S. Jackson, in her official capacity as a member of the Federal Acquisition Regulatory Council and Assistant Administrator for Procurement at the National Aeronautics and Space Administration; Jeffrey A. Koses, in his official capacity as a member of the Federal Acquisition Regulatory Council and Senior Procurement Executive at the General Services Administration; John M. Tenaglia in his official capacity as a member of the Federal Acquisition Regulatory Council and Principal Director of Defense Pricing and Contracting at the Department of Defense; the United States of America; and the City of Phoenix

Defendants.

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INTRODUCTION[1]

This case was the first state challenge to the Biden Administration's unconstitutional and illegal mass vaccine mandates on federal contractors and employees, but it will hardly the last.[2] The Contractor and Employee Mandates are part of the Administration's larger pattern of repeatedly transgressing statutory and constitutional limitations to impose unlawful vaccination mandates. As the Fifth Circuit has recognized, "After the President voiced his displeasure with the country's vaccination rate in September, the Administration pored over the U.S. Code in search of authority, or a 'work-around,' for imposing a national vaccine mandate." *BST Holdings, L.L.C. v. OSHA* ("*BST*"), __ F.4th __, 2021 WL 5279381, at *4 (5th Cir. Nov. 12, 2021). And these mandates too are part of the even larger pattern of letting no crisis go to waste when it comes to consolidating and aggrandizing federal power unlawfully. *See, e.g.*, *Alabama Association of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021). If Defendants succeed in their gambit, there will be little (if any) barrier to the federal government's use of the Procurement Act to demolish the reserved powers/liberties of the States and individuals.

Simply put, Defendants are unlawfully trying to jam an elephant (new, broad sweeping public health powers) into a mouse hole (the Procurement Act). *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001). It will not fit. The Procurement Act is not a license for President Biden to unilaterally exercise traditional police powers over *one-fifth* of the workers in this country. Congress wields the power of the purse, and Congress has not given the President any such authority. It's not the President's money; it's the people's money, and Congress has not authorized this. (And it is doubtful that it could.)

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[1] To avoid needless repetition and at the Court's suggestion, Plaintiffs incorporate by reference the factual background and legal arguments forth in their prior TRO and PI motion, Notice, and Reply (Doc. 34, 48, and 58) and only discuss facts and arguments not already raised.

[2] Twenty-six other states have now filed seven other federal lawsuits around the country challenging the unprecedented federal contractor mandate being imposed on them. *Florida v. Nelson*, 21-CV-02524 (M.D. Fla. Oct. 28, 2021) (filed by Florida); *Missouri v. Biden*, 21-CV-01300 (E.D. Mo. Oct. 29, 2021) (filed by MO, AR, NH, WY, NE, IA, ND, ND, AL, MT, and SD); *Texas v. Biden*, 21-CV-00309 (W.D. Tex. Oct. 29, 2021); *Georgia v. Biden*, 21-CV-00163 (S.D. Ga. Oct. 29, 2021) (GA, AL, ID, KS, SC, UT, and WV); *Kentucky v. Biden*, 21-CV-00055 (E.D. Ky. Nov. 4, 2021) (KY, OH, and TN); *Louisiana v. Biden*, 21-CV-03867 (W.D. La. Nov. 4, 2021) (LA, IN, and MS); *Oklahoma v. Biden*, 21-CV-01069 (W.D. Okla. Nov. 4, 2021).

Moreover, Defendants' vaccine mandates are arbitrary and nonsensical. There are no exceptions for employees who work alone, work outside, or work solely remotely, and there is no allowance for even minimal contact, such as employees simply walking past each other in a parking lot.[3] Nor does the Contractor Mandate give federal contractor employees the option to regularly test for COVID-19 instead of being vaccinated or permit alternative safety precautions such as social distancing, something that OSHA thought entirely sufficient.

The State thus finds itself in an impossible position: comply with Defendants' unlawful Contractor Mandate, which would require violating its own laws (and firing thousands of unvaccinated employees), or risk losing more than a billion dollars in federal funding.

OMB's publication of a notice that only contains one-third of the procurement policy at issue, and which contains only brief *post hoc,* pretextual justifications for the Contractor Mandate changes nothing. And it demonstrates that, Defendants' defiant protestations to the contrary, Defendants are acutely aware of the Contractor Mandate's legal vulnerabilities. They did not frantically promulgate a purported "cure" mere minutes before this Court's (11/10/21 Tr. at 48:18-49:2) hearing because they believe the State's claims have no merit. Defendants' actions speak louder than words.

FACTUAL BACKGROUND

"Debates over the Biden Administration's forthcoming vaccine mandates roiled the country throughout much of the Fall. For obvious reasons, the Mandate affects every person in America in one way or another." *BST,* 2021 WL 5279381, at *1 n.4.

The FAR Council

Both EO 14042 and the SFWTF contractor guidance provided that the Federal Acquisition Council (the "FAR Council"[4]) must conduct a "rulemaking" to amend the Federal Acquisition Regulation ("FAR")[5] to require federal contractors to comply with the SFWTF

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[3] *BST Holdings*, 2021 WL 5279381 at *3 (criticizing OSHA vaccine mandate for not "account[ing] for the obvious differences between the risks facing, say, a security guard on a lonely night shift, and a meatpacker working shoulder to shoulder in a cramped warehouse").

[4] The FAR Council was established direct and coordinate Government-wide procurement policy and regulatory activities, in accordance with Section 421 of the Procurement Policy Act.

[5] The FAR is the primary regulation for use by all executive agencies in their acquisition of

guidance. 86 Fed. Reg. 50985, 50986 (Sept. 9, 2021); Second Amended Complaint, "SAC," Ex. 2 at 3.) The SFWTF contractor guidance further recommended that prior to the FAR rulemaking, agencies should "exercise their authority to deviate from the FAR" to implement their own vaccine mandates. (SAC, Ex. 3 at 12.)

On September 30, the FAR Council issued Class Deviation Clause 52.223-99 ("FAR Deviation Clause") with accompanying guidance. Which commits the contractor to complying "with all guidance, including guidance conveyed through Frequently Asked Questions, as amended during the performance of this contract…" (*Id.* at 6.). Both the FAR Council Memorandum and the SFWTF contractor guidance emphasize that the Government can change the terms of the SFWTF Guidance at any time. (*Id.*; SAC, Ex. 2 at 3.) The FAR Deviation Clause has never been published in the Federal Register for notice and comment.

Economic and Political Significance of the Contractor Mandate

The Contractor Mandate will affect a large portion of the labor force. The Department of Labor recognizes that "workers employed by federal contractors" comprise "approximately **one-fifth** of the entire U.S. labor force."[6] The proportion in Arizona would be similar.

A recent survey by the Kaiser Family Foundation found that 72 percent of unvaccinated workers say they will quit their jobs if they are subjected to such a mandate, which would translate "to somewhere between 5% to 9% of workers leaving their jobs, depending upon what rules they face."[7]

Federal Attempts To Impose the Contractor Mandate On Arizona

A number of federal agencies have demanded that State agencies modify their contracts with the federal government to include the FAR Deviation Clause and thus implement the Contractor Mandate. The biggest single impact on the State has been on the Arizona Board of Regents ("ABOR"), which oversees the management, direction, and governance of

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supplies and services with appropriated funds. *See, e.g.*, https://bit.ly/3BKz39j.

[6] Office of Contract Compliance Programs, Dep't of Labor, History of Executive Order 11246 (last visited Nov. 16, 2021), tinyurl.com/3ddetdyf (emphasis added).

[7] Chris Isidore et al., "72% of unvaccinated workers vow to quit if ordered to get vaccinated," CNN (Oct. 28, 2021), at tinyurl.com/79uh7b39.

Arizona's three public universities: Arizona State University, Northern Arizona University, and the University of Arizona. All three universities are federal contractors, and for Fiscal Year 2021, their total federal revenues were $1,207,926,800. (SAC, Ex. 5 ¶ 3.)

Because they face the significant harm of losing more than a billion dollars if they do not submit to the Contractor Mandate, all three universities have been actively engaged in efforts to comply with that Mandate, even though such a mandate violates state law. Based on the current requirements of the Contractor Mandate, if covered contractor employees of ABOR do not obtain a final dose of a COVID-19 vaccine by January 4, 2022, those employees will have to be removed from working on federal contracts and relocated to a workplace that is not a covered contractor workplace, or be terminated. The employee discipline and termination process is lengthy, costly, and will require ABOR to expend extensive resources to ensure compliance. Plus, ABOR faces the loss of technically skilled employees, which will impact the universities' ability to perform the services required by their contracts, especially because it may not be possible to replace those employees in the current labor market.

Defendant GSA has made demands on at least two State agencies that they implement the Contractor Mandate. The Arizona Department of Transportation ("ADOT") owns property that it leases to the General Services Administration ("GSA"). GSA sent to ADOT a letter dated October 14, 2021 stating that a contract modification imposing a vaccine mandate "is ***mandatory*** and your acceptance is required in order to ensure compliance with E.O. 14042" and that contract "modifications must be finalized by **November 14, 2021**." (SAC, Ex. 6 ¶ 3 (emphasis in original).) And, as detailed previously, on October 18, 2021, GSA demanded that the Arizona state Retirement System ("ASRS") also impose the Contractor Mandate on its employees. (Doc. 48-4.)

On October 22, 2021, Defendant CDC demanded that the Arizona Department of Health Services ("ADHS") implement the Contractor Mandate and that ADHS "sign and return the modification via email to the Contracting Officer of record by November 9, 2021." (SAC, Ex. 7 ¶ 3.) This demand was based on two ADHS contracts with the CDC having a total value of approximately $520,000. *Id.*

As detailed previously, on November 2, 2021, the Equal Employment Opportunity Commission ("EEOC") requested that the Division of Civil Rights Section ("DCRS") of the Arizona Attorney General's Office renew a contract and workshare agreement whereby EEOC provides about $500,000 of funding to DCRS. (Doc. 48-3 and 58-1.)

On November 2, 2021, the National Park Service ("NPS") demanded that the Arizona Department of Public Safety ("DPS") implement the Contractor Mandate by modifying a DPS contract with the NPS to provide lab services. (SAC, Ex. 8 ¶ 3.) On September 28, 2021, the U.S. Forest Service demanded that the Arizona Department of Corrections, Rehabilitation, and Reentry ("ADCRR") comply with new COVID-19 safeguards, including mandatory "vaccine certification," in connection with a contract between the ADCRR and the Forest Service through which inmates perform work on Forest Service land (SAC, Ex. 9 ¶ 3.)

The Second OMB Notice

On November 10, 2021, Defendant Young, Acting Director of the OMB, issued for publication in the Federal Register a notice titled "Determination of the Acting OMB Director Regarding the Revised Safer Federal Workforce Task Force Guidance for Federal Contractors and the Revised Economy & Efficiency Analysis." The notice was published in the Federal Register on November 16, 2021. 86 Fed. Reg. 63418 (Nov. 16, 2021). The Second OMB Notice attempts to justify the Contractor Mandate as promoting economy and efficiency in procurement. It also re-publishes part of the SFWTF contractor guidance.

ARGUMENT

I. The Contractor Mandate Is Reviewable

A. The State Has Suffered Direct Injuries That Confer Constitutional Standing

"Well before the creation of the modern administrative state, [the Supreme Court] recognized that States are not normal litigants for the purposes of invoking federal jurisdiction.... [States are] entitled to special solicitude in [a] standing analysis." *Massachusetts v. E.P.A.*, 549 U.S. 497, 518, 520 (2007). Even without such "special solicitude," the State satisfies the constitutional standing requirement in at least five ways.

First, the federal contractor vaccine mandate invades the State's sovereignty by

1 regulating a matter that the U.S. Constitution reserves to the States. That encroachment
2 constitutes an injury in fact. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S.
3 592, 601 (1982); *Texas v. United States*, 809 F.3d 134, 153 (5th Cir. 2015), *aff'd by an equally divided*
4 *court* 136 S. Ct. 2271 (2016), "[T]he regulation of health and safety matters is primarily, and
5 historically, a matter of local concern." *Hillsborough Cnty, Fla. v. Automated Med. Lab'ys, Inc.*, 471
6 U.S. 707, 719 (1985); *see Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012) (referring
7 to the police power as a "general power of governing, possessed by the States but not by the
8 Federal Government"). Through the Contractor Mandate, the federal government grabbed
9 for itself a power the Constitution reserves for the States. *See BST*, 2021 WL 5279381, at *7–
10 8 (recognizing that, to the extent that the government would actually have the power to
11 institute a vaccine mandate, such power would be belong to the States).

12 *Second*, the Contractor Mandate claims to preempt "any contrary State of local law or
13 ordinance," (SAC, Ex. 3 at 15.) In doing so, the Contractor Mandate harms the State's interest
14 in enforcing its own laws and its own religious-liberty protections. *See, e.g.*, Ariz. Const. art.
15 XX, Par. 1; A.R.S. § 23-206 (right of employees to refuse an employer COVID-19 vaccine
16 mandate on the basis of "religious beliefs, practices or observances"); A.R.S. § 41-1493–
17 1493.04 (Arizona's Free Exercise of Religion Act). This injury confers standing, as "[a] state
18 has an interest in its 'exercise of sovereign power over individuals and entities within the
19 relevant jurisdiction,' which 'involves the power to create and enforce a legal code.'" *Hawaii v.*
20 *Trump*, 859 F.3d 741, 765 (9th Cir.), *vacated and remanded on other grounds*, 138 S. Ct. 377,

21 *Third*, a State has standing to "sue to protect its own proprietary interests that might be
22 congruent with those of its citizens, including responsibilities, powers, and assets." *Sierra Forest*
23 *Legacy v. Sherman*, 646 F.3d 1161, 1178 (9th Cir. 2011). The State itself, through its agencies
24 and political subdivisions, is a federal contractor subject to the Contractor Mandate. (*See* SAC
25 ¶¶82-92.) The State, therefore, will suffer financial injuries, including from lost workers who
26 must quit to escape the mandate and from overseeing costly compliance with the Contractor
27 Mandate. The increased unemployment from fired State employees and employees of private
28 contractors will likely increase the burden on the State's unemployment insurance funds, and

it will inflict economic disruption on the State's economy as a whole. Furthermore, employers critical to the supply chain that are also federal contractors will likely lose significant numbers of employees. It is entirely predictable, therefore, that the Contractor Mandate will exacerbate current supply chain issues. As a result, prices will continue to rise and cause direct injuries to the State as a purchaser. It will also harm the State's proprietary interest in the economic well-being of the State.[8] Or, if the State refuses to implement the Contractor Mandate, it will suffer the injury of lost federal revenue. The State, just like all other litigants, has standing to seek redress for these proprietary injuries. *See Snapp*, 458 U.S. at 601–02. Indeed, "if the complainant is an object of the action...at issue—as is the case usually in review of a rulemaking...—there should be little question that the action...has caused him injury." *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 733–34 (D.C. Cir. 2003) (internal quotation marks omitted).

Fourth, the Ninth Circuit has specifically held that federal policies affecting a state's public universities confer standing on the state, "grounded in its proprietary interests as an operator of [a] University." *Hawaii v. Trump*, 859 F.3d at 765, *vacated and remanded on other grounds*, 138 S. Ct. 377, 199 L. Ed. 2d 275 (2017). Injuries to the State's universities also "give the State[] standing to assert the rights of the [university] students, scholars, and faculty affected...." *Washington v. Trump*, 847 F.3d 1151, 1160 (9th Cir. 2017).

Fifth, the Contractor Mandate requires employees to prove vaccination status with documentation. Agencies of the State often possess such documentation. A predictable consequence of the Contractor Mandate is thus to increase the number of people seeking documentation from the State regarding vaccination status. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019). This will increase costs to the State and cause it injury.

B. Sovereign Immunity Does Not Apply

Sovereign immunity does not bar most claims for equitable relief against executive agencies because Congress "largely eliminat[ed] the federal sovereign immunity defense" when it amended 5 U.S.C. § 702 in 1976. *E. V. v. Robinson*, 906 F.3d 1082, 1092 (9th Cir. 2018). "On

[8] *See* Spencer Kimball, "Business Croups Ask White House to Delay Biden COVID Vaccine Mandate Until After the Holidays," CNBC (Oct. 25, 2021), tinyurl.com/4pbhmxny ("Worried that President Joe Biden's Covid vaccine mandate...could cause a mass exodus of employees, business groups are pleading...to delay the rule until after the holiday season.").

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its face, the 1976 amendment is an unqualified waiver of sovereign immunity in actions seeking nonmonetary relief against legal wrongs for which governmental agencies are accountable"; Congress stated that 'the time [has] now come to eliminate the sovereign immunity defense **in all equitable actions** for specific relief against a Federal agency or officer acting in an official capacity.'" *The Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 525 (9th Cir. 1989) (emphasis added) (quoting H.Rep. No. 1656, 94th Cong., 2d Sess. 9, reprinted in 1976 U.S.Code Cong. & Admin.News 6121, 6129). In a non-statutory cause of action seeking equitable relief, there is no requirement that the challenged action have been final agency action under the APA. "[T]he second sentence of § 702 waives sovereign immunity broadly for all causes of action that meet its terms, while § 704's 'final agency action' limitation applies only to APA claims." *Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1172 (9th Cir. 2017).

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

C. Plaintiffs Have Causes Of Action To Assert These Challenges

When "a statute...makes no provision for judicial review....[t]hat alone, of course, is not decisive" as to whether federal courts have jurisdiction to review. *Estep v. United States*, 327 U.S. 114, 119–20 (1946) (citations omitted). "Courts have long recognized the existence of an implied cause of action through which plaintiffs may seek equitable relief to remedy a constitutional violation." *Roman v. Wolf*, 977 F.3d 935, 941 (9th Cir. 2020) (citation omitted).

This is true also for actions challenging executive actions as *ultra vires*: "when Congress limits its delegation of power, courts infer (unless the statute clearly directs otherwise) that Congress expects this limitation to be judicially enforced. The passage of the APA has not altered this presumption. Prior to the APA's enactment courts had recognized the right of judicial review of agency actions that exceeded authority, and nothing in the subsequent enactment of the APA altered that doctrine of review to repeal the review of *ultra vires* actions.

1 When an executive acts *ultra vires*, courts are normally available to reestablish the limits on his
2 authority." *Sierra Club v. Trump*, 963 F.3d 874, 891 (9th Cir.) *vacated on other grounds sub nom.*,
3 *Biden v. Sierra Club*, No. 20-138, 2021 WL 2742775 (U.S. July 2, 2021) (cleaned up). Thus,
4 "review is ordinarily available when an agency exceeds its delegation of authority," *Id.* (citing
5 *Chamber of Commerce of the United States v. Reich*, 74 F.3d 1322, 1325–26 (D.C. Cir. 1996)).
6 When challenging "the President's statutory authority to issue [an] executive order," if
7 "a plaintiff is unable to bring his case predicated on either a specific or a general statutory
8 review provision, he may still be able to institute a non-statutory review action." *Sierra Club*,
9 963 F. 3d at 892 (quoting *Reich*, 74 F.3d at 1327). This is because "the responsibility of
10 determining the limits of statutory grants of authority is a judicial function entrusted to the
11 courts by Congress." *Id.* (quoting *Reich*, 74 F.3d at 1327) (cleaned up). And even where a statute
12 "expressly limit[s] judicial review...court[s] retain[] the ability to review whether [an agency]
13 exceeded the authority delegated by the statute" because "the presumption of judicial review
14 is particularly strong where an agency is alleged to have acted beyond its authority." *Id.*
15 (quoting *Dart v. United States*, 848 F.2d 217, 219, 223–34 (D.C. Cir. 1988)).

16 **D. Plaintiffs Request Consolidation With Trial On The Merits**

17 As more fully discussed in a separate motion filed concurrently with this one, and
18 pursuant to Fed. R. Civ. P. 65(a)(2), Plaintiffs request that the Court advance the trial on the
19 merits and consolidate it with the hearing on this PI motion.

II. Plaintiffs Are Likely To Prevail On The Merits Of Their Claims Against the
20 **Contractor Mandate**

A. The Contractor Mandate Violates the Procurement Act

21 **1. The Second OMB Notice Does Not Establish A Nexus With**
22 **Economy And Efficiency**

23 The Second OMB Notice makes only a weak, pretextual attempt to establish a nexus
24 with economy and efficiency. Indeed, before it makes any mention of economy and efficiency,
25 or even of procurement at all, it explicitly states that its actual main objective is to achieve
26 public health goals, specifically, "to get more people vaccinated." 86 Fed. Reg. at 63418. It
27 claims, without evidence, that the Contractor Mandate will "decrease worker absence, reduce
28 labor costs, and improve the efficiency of contracts and subcontractors. *Id.* It further makes
the circular argument that, because some private businesses have imposed vaccine mandates,

those private businesses' vague justifications somehow also justify the federal government's vague justifications *Id.* at 63421. This reasoning is upside-down, however, as the vast majority of businesses in the United States do not impose vaccine mandates. (*See* SAC ¶ 99.) To the extent that the decisions of private businesses to impose vaccine mandates is relevant to whether the Contractor Mandate has a nexus with economy and efficiency, the fact that the vast majority of private businesses have elected *not* to impose vaccine mandates thus reveals the pretextual nature of Defendants' economy and efficiency claims. Furthermore, the Second OMB Notice claims that the Contractor Mandate will reduce the spread of COVID-19, yet the only evidence it cites in support of this claim is a study that was conducted before the Delta variant of COVID-19 became dominant and that made no findings as to reductions in infection, but only found that the Pfizer and Moderna vaccines reduce the severity of COVID-19 infection.[9]

The Second OMB Notice acknowledges costs from "employees quitting" and also from "side effects from vaccination." *Id.* at 63,422. The Notice, however, makes no attempt to quantify these costs, and instead handwaves them away, claiming without evidence that "we expect few employees to quit" and that vaccine side effects will be less costly than COVID-19 infection. *Id.* It claims that there are only "anecdotal reports" of employees quitting from the Contractor Mandate and that "we know of no systematic evidence that this has been a widespread phenomenon, or that it would be likely to occur among employees of federal contractors." *Id.* OMB did have in its possession, however "systematic evidence" that imposing the Contractor Mandate would likely lead to loss of employees. The First Amended Complaint ("FAC") in this case cited such evidence. *See, e.g.*, Doc 14 ¶ 83.

Furthermore, as discussed *supra*, the Contractor Mandate is likely to lead to a substantial loss of federal contractor employees. Such mass resignations will impose drastic hardship on working families throughout the State and cause massive economic disruption for federal

[9] Mark W. Tenforde, et al., "Sustained Effectiveness of Pfizer-BioNTech and Moderna Vaccines Against COVID-19 Associated Hospitalizations Among Adults-United States, March–July 2021," 70 Morbidity & Mortality Weekly Rep. Aug. 27, 2021, pp. 1156–1162, tinyurl.com/vxhabbzm ("[p]rotection against severe COVID-19 resulting in hospitalization was sustained through 24 weeks after vaccination with mRNA COVID-19 vaccines").

contractors and for the economy at large. They will inevitably cause staffing shortages for federal contractors and exacerbate supply-chain woes. As a result, costs of federal contracts would rise and efficiency would fall. Thus, the Contractor mandate is the antithesis of "economy and efficiency" and has no nexus with likely savings to the government.

Despite the claims made in the Second OMB Notice, the Contractor Mandate is thus outside the scope of the Procurement Act. *See* 40 U.S.C. § 121(a) (requiring the President's policies and directives to be "consistent with this subtitle").

a. Defendants' Broad Reading of the Procurement Act Would Give the Federal Government Never-Before-Seen Power

Just like the eviction moratorium struck down in *Alabama Realtors*, the Second OMB Notice fails because it attempts to usurp broad power not conferred by the relevant statute. 141 S. Ct. at 2489. The Second OMB Notice's justification could just as easily be used to justify invasive government meddling in a multitude of areas in the private lives of all federal contractors. According to Defendant CDC, the following conditions make someone more likely to get "severely ill from COVID-19": smoking, diabetes, obesity, and pregnancy.[10] The same justifications for the Contractor Mandate would thus also just as reasonably justify using the Procurement Act to impose a no-smoking mandate, a sugar-free mandate, or a weight-loss mandate—or even a stomach-stapling mandate.

Nor can Defendants excuse these violations just because these contracts involve federal dollars. Only Congress can impose conditions under the Spending Clause—not the Executive Branch. U.S. Const. art. I, § 8, cl. 1. Moreover, any conditions must be unambiguous in the statutory text. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981); *South Dakota v. Dole*, 483 U.S. 203, 207–08 (1987). But nothing in the Procurement Act or Procurement Policy Act even hints at vaccine mandates, let alone unambiguously establishes them.

2. The Contractor Mandate Violates The Procurement Act By Unlawfully Attempting To Delegate To OMB And the SFWTF The Power To Make Government-Wide Procurement Regulations

EO 14042 violates the Procurement Policy Act by delegating to OMB and the SFWTF the power to make a government-wide procurement regulation when that power belongs to

[10] CDC, "People with Certain Medical Conditions," Oct 14, 2021, tinyurl.com/4pbrppj5 .

the FAR Council alone. The FAR Council is charged with "issu[ing] and maintain[ing]" a "single, [g]overment-wide procurement regulation" known as the Federal Acquisition Regulation ("FAR"). 41 U.S.C. § 1303(a)(1). That power is *exclusive*—no other agency may issue government-wide procurement regulations. *See id.* § 1303(a)(2) ("Other regulations...shall be limited to...satisfy the specific and unique needs of the agency."). Yet EO 14042 does exactly that. In violation of the Procurement Policy Act, the order unlawfully purports to delegate to OMB and the SFWTF power to make government-wide procurement regulations. *See* EO 14042 § 2(a). And it further putatively confers on the FAR Council the authority to circumvent traditional procedural requirements, *see* 41 U.S.C. § 1707(d), by the expedient of labeling such regulations mere "guidance," *see* EO 14042 § 3(a).

Moreover, EO 14042 and the FAR Deviation Clause allow the SFWTF to change the vaccine mandate whenever it wishes, *see* EO 14042 § 2(a) (requiring compliance with the "guidance ... published by" the SFWTF); (SAC, Ex. 1 at 6.) (requiring compliance with the SFWTF's guidance "as amended during the performance of this contract"), without the agreement of, or even notice to, the FAR Council and without the notice-and-comment period required by the Procurement Policy Act, *see* 41 U.S.C. §§ 1303(a), 1707(a)–(b).

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

3. The Contractor Mandate Violates The Anti-Commandeering Doctrine

The Tenth Amendment provides that: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." That amendment, along with basic structural features of the Constitution, deprives Congress of "the power to issue direct orders to the governments of the States." *Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018). The Constitution thus does not tolerate the federal government dragooning State officers "into administering federal law." *Printz v. United States*, 521 U.S. 898, 928 (1997). "[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.

1 Otherwise the two-government system established by the Framers would give way to a system
2 that vests power in one central government, and individual liberty would suffer. That insight
3 has led [the Supreme] Court to strike down federal legislation that commandeers a State's
4 legislative or administrative apparatus for federal purposes" or to "conscript state agencies
5 into the national bureaucratic army." *NFIB*, 567 U.S. at 577 (Roberts, C.J.) (cleaned up).

6 Yet that is exactly what Defendants are doing. The Contractor Mandate applies to
7 contracts between the federal government and state agencies, and Defendants compel those
8 agencies to implement the federal government's vaccination policy far beyond the confines of
9 federal contracts to state employees who have nothing to do with federal contracts or those
10 who are working remotely. State agencies will now become administrators of federal COVID-
11 19 vaccine mandates. *See Printz v. United States*, 521 U.S. 898, 914 (1997).

12 **B. The Contractor Mandate Violates 41 U.S.C. § 1707**

13 **1. The Second OMB Notice Did Not Properly Waive § 1707 And Omitted Two-Thirds Of The Controlling Guidance**

14 The notice-and-comment requirements of the Procurement Policy Act may only be
15 waived "if urgent and compelling circumstances make compliance with the requirements
16 impracticable." 41 U.S.C. § 1707(d). However, "society's interest in slowing the spread of
17 COVID-19 cannot qualify as compelling forever, for if human nature and history teach
18 anything, it is that civil liberties face grave risks when governments proclaim indefinite states
19 of emergency." *BST*, 2021 WL 5279381, at *3 n.10 (cleaned up) (quoting *Does 1–3 v. Mills*, —
20 U.S. — 2021 WL 5027177, at *3 (Oct. 29, 2021) (Gorsuch, J., dissenting)).

21 The Second OMB Notice's assertion that a waiver is now urgent and compelling is
22 facially senseless when the OMB, through the same document, delayed the mandate
23 compliance date from December 8, 2021, to January 14, 2022. *See BST,* 2021 WL 5279381, at
24 *3 (justification of OSHA vaccine mandate on the basis of "a purported 'emergency' that the
25 entire globe has now endured for nearly two years, and which OSHA itself spent nearly two
26 months responding to—is unavailing"). "The Administration's prior statements in this regard
27 further belie the notion that COVID-19 poses the kind of emergency that" would justify
28 invocation of the urgent and compelling exception to Section 1707. *Id.* at *5 "In reviewing

agency pronouncements, courts need not turn a blind eye to the statements of those issuing such pronouncements. In fact, courts have an affirmative duty not to do so. It is thus critical to note that the Mandate makes no serious attempt to explain why...the President himself [was] against vaccine mandates before [he was] for one here.... Because it is generally arbitrary or capricious to depart from a prior policy sub silentio, agencies must typically provide a detailed explanation for contradicting a prior policy, particularly when the prior policy has engendered serious reliance interests." *Id.* and n.17 (cleaned up) (citations omitted) (quoting President Biden's statement that "no I don't think vaccines should be mandatory.").

OMB's irrational and designed-for-litigation justification is further evidenced by the fact it issued the Second Notice with the 1707(d) waiver only after being repeatedly sued. *See supra* note 1. Indeed, this was the first case to raise the issue, and OMB waited to submit the Second OMB Notice until just minutes before the start of this Court's hearing on Plaintiffs' previous TRO/PI motion. (11/10/21 Tr. at 48:18-49:2.) *Dep't of Commerce*, 139 S. Ct. at 2573–74 (Although "[a] court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record[,]...we have recognized a narrow exception to th[is] general rule...[o]n a 'strong showing of bad faith or improper behavior[.]'").

Because Defendants did not make a valid invocation of compelling and urgent circumstances, the 60-day notice-and-comment requirements of § 1707 still apply, and the Second OMB Notice, therefore, may "not take effect ." 41 U.S.C. § 1707.

The Second OMB Notice also violates § 1707 because it omits two-thirds of the controlling SFWTF contractor guidance. The FAR Deviation Clause specifically requires compliance with the SFWTF FAQ. OMB omitted, however, the SFWTF contractor FAQ from the Second OMB Notice. (*See* SAC ¶ 80.) The SFWTF guidance published in the Second OMB Notice contains approximately 3,075 words. SFWTF FAQ contained on its website, however, is approximately 6,300 words.

By Defendants' own designation in the FAR Deviation Clause, the SFWTF guidance and FAQ *together* make up the Contractor Mandate. The entirety of the Contractor Mandate is approximately 9,375 words long, and the Second OMB Notice is therefore incomplete—

containing only about 1/3 of the procurement policy at issue in this case. But § 1707 requires publication of the *entire* procurement policy at issue. The omission of the FAQ is particularly significant, as most of the sweeping reach of the Contractor Mandate is only set forth in the FAQ. (SAC. ¶ 81.) Until the entire Contractor Mandate—including the FAQ—is properly published for the required 60-day notice-and-comment period, then the Contractor Mandate "may not take effect." 41 U.S.C. § 1707(a)(1).

2. The FAR Deviation Clause Violates Section 1707

The FAR Deviation Clause is a "procurement regulation," as it is a part of the Federal Acquisition Regulation issued by the FAR Council and governs federal contracting and procurement for certain executive agencies. Because it is the means through which the Contractor Mandate is imposed, it has "a significant cost or administrative impact on contractors or offerors," 41 U.S.C. § 1707(a)(1)(A)–(B). (*See* Doc. 34 at 19 (analyzing meaning of procurement "regulation" and "policy" and significance requirement under 41 U.S.C. § 1707).) Defendants never published the FAR Deviation Clause for public comment in the Federal Register nor sought to invoke any exception to the notice and comment requirement.

The FAR Council consists of two councils that must coordinate to revise the FAR, but primary responsibility to "prepare[], issue[], and maintain[]" the FAR lies jointly with the Secretary of Defense, the Administrator of General Services, and the NASA Administrator. 41 U.S.C. § 1303(a)(1); 48 C.F.R. § 1.103(b). A "significant revision" to the FAR is any revision that "alter[s] the substantive meaning of any coverage in the FAR [s]ystem," and has "a significant cost or administrative impact on contractors" or a "significant effect beyond the internal operating procedures of the issuing agency." 48 C.F.R. § 1.501-1. Before the FAR Council may make "significant revisions" to the FAR, it must provide an opportunity for public comments and consider those comments when making its decision. *Id.* §§ 1.501-1; 1.501-2. When initiating a public comment period, DOD, NASA, and GSA must jointly publish a notice in the Federal Register. *Id.* §§ 1.501-2(b); 1.201-1; 1.103. The notices must contain the text of the revision and provide at least 30 days, but preferably at least 60 days, for receipt of comments. Id. § 1.501-2(b), (c).

The FAR Deviation Clause implementing the SFWTF guidance is a significant revision

1 as defined by the FAR yet was not subject to notice-and-comment rulemaking. Deviation
2 Clause 52.223-99 alters the substantive meaning of contractors' obligations to their workforces
3 and workplace safety duties under FAR Subparts 22 and 23. *See* 48 C.F.R. §§ 22.000–23.1105.
4 Complying with the FAR Deviation Clause will have a crushing administrative impact on
5 federal contractors. To comply, contractors must ensure all their covered employees are
6 vaccinated, implement masking and social-distancing in workplaces, create and implement a
7 contact-tracing program, and monitor the SFWTF's website so they can scramble to comply
8 with any new guidance that the SFWTF may release at a moment's notice. Thus, the FAR
9 Deviation Clause is a significant revision and is thereby subject to notice and comment
10 procedures. But the FAR Council did not even attempt to comply. *See Sunoco, Inc. v. United*
11 *States*, 59 Fed. Cl. 390, 396 (Fed. Cl. 2004). Nor did the FAR Council even attempt to invoke
12 the "urgent and compelling circumstances" exception. 48 C.F.R. § 1.501-3(b).
13 Instead of providing public notice and a comment period for the Contractor Mandate,
14 the FAR Council began enforcing the Mandate as a purported FAR class deviation. That is
15 unlawful, first, because the FAR Deviation Clause does not fit the definition of a deviation,
16 which is meant to be a slight departure from an existing Case FAR clause or minimal change
17 to the procurement process for a particular contract. *See* 48 C.F.R. § 1.401(a)–(f). But, more
18 importantly, even class deviations must be submitted as a FAR revision and subjected to
19 notice-and-comment when they are implemented on a permanent basis. *Id.* at § 1.404(b). The
20 FAR Deviation Clause has no expiration date, yet there was no notice-and-comment.
21 The President directed the FAR Council to implement the SFWTF Guidance to ensure
22 federal agencies would incorporate the Contractor Mandate into contracts, and the executive
23 branch has provided no indication that those requirements are time limited. As a result, the
24 FAR Council was required to treat implementation of the SFWTF Guidance as a FAR revision
25 subject to notice-and-comment. It has failed to do so. That failure requires invalidation of the
26 FAR Deviation Clause. *Sunoco, Inc.*, 59 Fed. Cl. at 396; 48 C.F.R. §§ 1.501-1; 1.501-2.
27 **III. All The Other Requirements For An Injunction Are Met**
28 Plaintiffs' prior briefing already establishes that all other requirements for an injunction
are met. (Doc. 34 at 28-34.) Additionally, in this motion Plaintiffs explained in greater detail

1 *supra* I.A the injuries that the Contractor Mandate is causing and will cause. Those injuries also
2 further show the irreparable harm Plaintiffs will suffer if an injunction is not granted.
3 The Fifth Circuit's reasoning in *BST* applies equally here, where the court held that
4 "denial of the petitioners' proposed stay would do them irreparable harm. For one, the
5 Mandate threatens to substantially burden the liberty interests of reluctant individual recipients
6 put to a choice between their job(s) and their jab(s). For the individual petitioners, the loss of
7 constitutional freedoms 'for even minimal periods of time ... unquestionably constitutes
8 irreparable injury.'" *BST,* 2021 WL 5279381, at *8 (citation omitted). *BST* also held that a stay
9 was warranted because of the irreparable harm from "the business and financial effects of a
10 lost or suspended employee, compliance and monitoring costs associated with the Mandate,
11 [or] the diversion of resources necessitated by the Mandate." *Id.* Most notable, the Fifth Circuit
12 held "[t]he States, too, have an interest in seeing their constitutionally reserved police power
13 over public health policy defended from federal overreach....In contrast, a stay will do [the
14 federal government] no harm whatsoever. Any interest [it] may claim in enforcing an unlawful
15 (and likely unconstitutional) [Mandate] is illegitimate. Moreover, any abstract 'harm' a stay
16 might cause the Agency pales in comparison and importance to the harms the absence of a
17 stay threatens to cause countless individuals and companies." *Id.*
18 *BST* also held that a stay was "firmly in the public interest. From economic uncertainty
19 to workplace strife, the mere specter of the Mandate has contributed to untold economic
20 upheaval in recent months. Of course, the principles at stake when it comes to the Mandate
21 are not reducible to dollars and cents. The public interest is also served by maintaining our
22 constitutional structure and maintaining the liberty of individuals to make intensely personal
23 decisions according to their own convictions—even, or perhaps particularly, when those
24 decisions frustrate government officials." *Id.*
25 Furthermore, because of the nationwide scope of the mandates, and because of their
26 systemic impact, Plaintiffs reiterate their request for a nationwide injunction.
27 **CONCLUSION**
28 Plaintiffs therefore respectfully request a PI enjoining the vaccine mandates.

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RESPECTFULLY SUBMITTED this 19th day of November, 2021.

MARK BRNOVICH
ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of November, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Arizona using the CM/ECF filing system. Counsel for all Defendants, who have appeared, are registered CM/ECF users and will be served by the CM/ECF system pursuant to the notice of electronic filing. Other counsel will be served with this Motion when they are served pursuant to Rule 4 or otherwise accept service.

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

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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Mark Brnovich, in his official capacity as Attorney General of Arizona; *et al.*,

Plaintiffs,

v.

Joseph R. Biden in his official capacity as President of the United States; *et al.*,

Defendants.

No. 2:21-cv-01568-MTL

[PROPOSED] ORDER

Having considered the Plaintiffs' Third Motion for a Preliminary Injunction, **IT IS HEREBY ORDERED** granting the motion.

IT IS FURTHER ORDERED that:

1. Defendants shall not impose any COVID-19 vaccination requirement on any federal contractor or sub-contractor.

2. Defendants shall not impose any COVID-19 vaccination requirement on any federal employee.

3. Defendants shall not include any clauses related to COVID-19 or vaccinations in any contract entered into with any federal contractor or sub-contractor, nor shall Defendants enforce any such clauses in any contracts already entered into.

4. Defendants shall not impose any COVID-19-related procurement requirements without first following the required notice-and-comment procedures of the Procurement Policy Act.