

No. 21-14269

**In the United States Court of Appeals
for the Eleventh Circuit**

JOSEPH R. BIDEN, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED
STATES, ET AL.,

Defendants-Appellants,

v.

THE STATE OF GEORGIA, ET AL.,

Plaintiffs-Appellees.

On Appeal from the United States District Court
for the Southern District of Georgia
No. 1:21-cv-00163 (Baker, J.)

**PLAINTIFFS-APPELLEES'
PETITION FOR INITIAL HEARING EN BANC**

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CERTIFICATE OF INTERESTED PERSONS

No. 21-14269, *Joseph R. Biden, et al. v. The State of Georgia, et al.*

The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case.

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7. Associated Builders and Contractors of Georgia, Inc. – Intervenor
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13. Black, Gary W. in his official capacity as Commissioner of the Georgia Department of Agriculture
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21. Criswell, Deanne in her official capacity as Administrator of Federal Emergency Management Agency
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28. Idaho State Board of Education
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46. Nelson, Bill in his official capacity as Administrator of the National Aeronautics and Space Administration
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48. Panchanathan, Sethuraman in his official capacity as Director of the National Science Foundation
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December 10, 2021

s/ Harold D. Melton

Harold D. Melton

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RULE 35(B) AND 11TH CIR. RULE 35-5(C) STATEMENT

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

1. Whether the district court abused its discretion in preliminarily enjoining the Contractor Mandate when it determined that the Contractor Mandate was unlawful on multiple grounds and imposed serious, irreparable harm on the federal contractor Plaintiffs, multiple sovereign States, and State-affiliated parties.
2. Whether the Contractor Mandate is unlawful and/or unconstitutional.

s/ Harold D. Melton

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Appellees State of Georgia, et al.*

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STATEMENT OF ISSUES

1. Whether the district court abused its discretion in preliminarily enjoining the Contractor Mandate when it determined that the Contractor Mandate was unlawful on multiple grounds and imposed serious, irreparable harm on the federal contractor Plaintiffs, multiple sovereign States, and State-affiliated parties.
2. Whether the Contractor Mandate is unlawful and/or unconstitutional.

INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 35, the Plaintiffs-Appellees—a group of States, universities, governors, and state agencies—respectfully request that this Court consider en banc the Defendants’ appeal of the district court’s order preliminarily enjoining the Contractor Mandate.

This appeal undoubtedly presents “question[s] of exceptional importance.” Fed. R. App. P. 35(a)(2). The Contractor Mandate applies to federal contractors nationwide, impacting nearly a fourth of this Nation’s workforce. *Kentucky v. Biden*, __ F.Supp.3d __, 2021 WL 5587446, at *1 (E.D. Ky. Nov. 30, 2021). The Mandate attempts to impose a public health scheme by enacting an inflexible vaccination mandate, thereby intruding into the states’ police powers. This unprecedented executive reach is unlawful and unconstitutional. *See Ala. Ass’n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021). Among other things, it offends the requirement that

Congress must “speak clearly” when authorizing the Executive Branch to exercise “powers of ‘vast economic and political significance.’” *Id.* (quoting *Util. Air. Reg. Grp. v. EPA*, 573 U.S. 302, 324 (2014)). Given these important issues and the Mandate’s far reach, this case presents multiple issues of exceptional importance. Indeed, the Defendants agree that this case is deeply important. Mot. For Stay, *Georgia, et al. v. Biden, et al.*, No. 21-14269 at 16–17 (11th Cir. Dec. 10, 2021).

This Court’s initial en banc review is the only way to prevent chaos for federal contractors and subcontractors nationwide. Without clarity from this entire Court about whether the Mandate will remain enjoined, contractors all over the country will not know whether they must engage in costly measures to comply with this unlawful Mandate, ***including firing employees en masse in just a couple of weeks.*** As the recent 2-1 decision from *Florida v. Department of Health & Human Servs.*, ___ F. 4th ___, 2021 WL 5768796 (11th Cir. Dec. 6, 2021), shows, the judges of this Court may well be divided on important issues in dispute between the parties here, including the proper interpretation of the major questions doctrine and whether the federal government can bypass the statutory notice-and-comment period due to COVID-19. It is sensible for decisions of the nationwide magnitude at issue here to be decided by this full Court, sitting en banc, especially when the stakes are so high and time is so short.

BACKGROUND

A. The Procurement Act

The Federal Property and Administrative Services Act (the “Procurement Act”) gives the President limited authority to issue “policies and directives” that have a reasonably close nexus to “provid[ing] the Federal Government with an economical and efficient system for . . . contracting.” 40 U.S.C. § 101; *see* 40 U.S.C. § 121(a). Courts have previously weighed in on the Procurement Act, finding some of the President’s actions under the Act were lawful, *see, e.g., Am. Fed’n of Labor and Congress of Indus. Orgs. v. Kahn*, 618 F.2d 784, 786–87 (D.C. Cir. 1979), and some were unlawful, *see, e.g., Liberty Mut. Ins. Co. v. Friedman*, 639 F.2d 164, 170 (4th Cir. 1981). But no federal court has ever upheld use of the Act “to promulgate such a wide and sweeping public health regulation as mandatory vaccination for all federal contractors and subcontractors,” which the President imposed for the first time with the Mandate here. *Kentucky*, 2021 WL 5587446, at *9.

B. The Contractor Mandate

Despite the Administration’s initial statements that it is “not the role of the federal government” to mandate vaccinations, on September 9, 2021, President Biden announced that his patience was “wearing thin” with unvaccinated Americans. Office of Public Engagement, Transcript, Press Briefing by Press Secretary Jen Psaki (July 23, 2021), <https://bit.ly/303pHZt> (last visited Nov 5, 2021);

see also Office of Public Engagement, Transcript, Remarks by President Biden on Fighting the COVID-19 Pandemic (Sept. 9, 2021), <https://bit.ly/3wgXRVR>. President Biden generalized that “[m]any of us are frustrated with the nearly 80 million Americans who are still not vaccinated.” *Id.*

As a result, President Biden signed Executive Order 14042, Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors (“EO 14042” or “Order”). Pl. Br. Ex. 11 at Ex. A. EO14042 relied on the Procurement Act to direct federal agencies to implement a mass vaccination requirement for employees of federal contractors and subcontractors. Pl. Br. Ex. 11 at Ex. A. Without further explanation, the President asserted that the vaccine mandate “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.” *Id.* at 1. Two weeks later, various executive agencies began carrying out EO 14042’s mandatory directives.

Pursuant to EO 14042, on September 24, 2021 the Safer Federal Workforce Task Force (the “Task Force”) issued its first guidance under EO 14042—without adhering to notice-and-comment procedures. Pl. Br. Ex. 11 at Ex. B. This initial guidance required “covered contractor employees” in “covered contractor workplaces” to have 100% full vaccination and comply with CDC guidelines for masking and physical distancing by December 8, 2021. Pl. Br. Ex. 11 at Ex. B. A

“covered contractor employee” is “any full-time or part-time employee of a covered contractor” who is working “at a covered contractor workplace.” *Id.* at Ex. C at 3. The definition of a “covered contractor workplace” requires employees who do not work on federal contracts to be vaccinated unless a federal contractor “can affirmatively determine that none of its employees on another floor or in separate areas of the building will come into contact with” an employee who works on federal contracts. *Id.* at Ex. B at 10, Q11. It is the scope of these provisions that gives the challenged mandate its near universal reach. After a November 10, 2021 revision to the guidance, Defendants imposed a new January 18, 2022 deadline for full vaccination. *Id.* at Ex. C. The guidance is constantly updated to reflect additional requirements and new, obligatory instructions based upon the Task Force’s responses to Frequently Asked Questions. *Id.* at Ex. C. at 9.

On September 28, at the President’s direction, the OMB Director published a determination in the Federal Register, without notice and comment, and stated without explanation that the Mandate “will improve economy and efficiency by reducing absenteeism and decreasing labor costs for contractors and subcontractors working on or in connection with a Federal Government contract.” *Id.* at Ex. D at 2.; *see also id.* at Ex. E (OMB’s Revised Determination, issued on Nov. 16, 2021).

The Federal Acquisition Regulatory Council issued Class Deviation Clause 52.223-99 (“FAR Deviation Clause”) on September 30, 2021, committing

contractors to comply “with all guidance, including guidance conveyed through Frequently Asked Questions, as amended during the performance of this contract, for contractor or subcontractor workplace locations published [on the Task Force website].” *Id.* at Ex. F. Many federal agencies have since forced the FAR Deviation Clause into their existing and future contracts, causing contractors to frantically attempt to force a broad-sweeping Contractor Mandate on their employees. Reply Br. Ex 1, Ex. 2 at Ex. A–G.

C. The Impact of Executive Order 14042 on Plaintiffs

Under the Contractor Mandate, millions of employees of federal contractors nationwide must be vaccinated or summarily fired within weeks—regardless of whether they even work on federal contracts—if there was even a chance that they may come in contact with an employee who was working on a federal contract. Pl. Br. Ex. 11 at Ex. B–C. The Mandate provides no exceptions for employees who work alone, outdoors, or exclusively remotely and there is no allowance for minimal contact. *Id.* Non-contractor employees who might walk past coworkers in an outdoor parking lot are covered. *Id.* Even where federal contractor employees work in separate buildings, the otherwise non-covered employees would still be subject to the vaccination requirement unless the contractor can affirmatively establish, to some unspecified degree of certainty, that those employees will not interact. *Id.*

Plaintiffs have thousands of contracts and subcontracts with the Federal Government and thousands of Plaintiffs' employees fall within the Mandate. For example, Plaintiff Board of Regents for the University System of Georgia ("Board of Regents") maintains three research universities that generated approximately \$736,968,899.00 in revenue from federal contracts for fiscal year 2021. Pl. Br. Ex. 12 at ¶ 19. For the vast majority of contracts, federal agencies have either forced these contractors to insert the FAR Deviation Clause into their existing contracts by way of contract modification, or will impose the clause upon contract renewal. *Id.* at Exs. 1–3. Failure or inability to comply with the mandate jeopardizes millions of current contracting dollars and is not a realistic option. *Id.* Plaintiffs constantly bid on new contracts that require compliance with the Mandate to even be considered. *See* Prelim. Inj. Order (the "Order") at 15–16. One such bid opportunity is Georgia Tech's recent bid submission to NASA, which has forced Georgia Tech to undertake extraordinary lengths to achieve compliance. Reply Br. Ex. 1 at Ex. A, B.

In attempting compliance with the Mandate, Plaintiffs accumulated great costs and expended significant human resources. For example, before the district court's injunction, the Board of Regents' impacted institutions began: (1) tracking employee vaccination statuses; (2) creating a process to review requests for accommodation; (3) identifying impacted employees and locations; (4) expending their financial resources to ensure compliance; and (5) tracking the above data from

their subcontractors to ensure that they are likewise complying with the mandate. Pl. Br. Ex. 12 at ¶ 18. And even if Plaintiffs achieved total compliance by the January 18 deadline, doing so would lead to loss of personnel, loss of institutional knowledge vested in each employee, loss of specialized workers, damage to reputation, damage to good will, and inability to carry out their respective missions, all of which constitute irreparable harms. Pl. Br. Ex. 1 at ¶ 18, Ex. 2 at ¶ 15, Ex. 3 at ¶ 10, Ex. 4 at ¶ 10, Ex. 13 at ¶ 10. These harms are based on documented projections and conversations with impacted employees. *See* Order at 24–25.

D. The District Court’s Preliminary Injunction Order

Plaintiffs include the States of Georgia, Alabama, Idaho, Kansas, South Carolina, Utah and West Virginia; the governors of several of those states; and various state agencies, including the Board of Regents of the University System of Georgia. Am. Compl. Plaintiffs filed this suit seeking declaratory and injunctive relief against enforcement of EO 14042. *Id.* Shortly after Plaintiffs filed their initial Complaint, Intervening Plaintiff Associated Builders and Contractors, Inc. (“ABC”), a nationwide construction trade association, filed its Motion to Intervene seeking injunctive relief on behalf of its 21,000+ members. ABC M. to Intervene at Ex. 1. Both Plaintiffs and ABC filed motions for preliminary injunction. Docs. 50, 93.

On December 7, 2021, the District Court issued its Order (the “Order”), preliminarily enjoining the Mandate. Doc. 93. The Court held that these challenges

have a strong likelihood of success on the merits because the Mandate exceeds the President's authority under the Procurement Act. As the district court explained, "EO 14042 goes far beyond addressing administrative and management issues in order to promote efficiency and economy in procurement and contracting, and instead, in application, works as a regulation of public health, which is not clearly authorized under the Procurement Act." *Id.* at 20. The Court held that, as a health policy initiative, the Contractor Mandate "does not have a sufficient nexus to the purposes of the Procurement Act." *Id.* at 21.

The Court held that Plaintiffs and ABC would be irreparably harmed absent an injunction. *Id.* at 24–25. The Court pointed to Plaintiffs' tendered exhibits, live testimony from three Board of Regents representatives, and declarations of ABC representatives, all identifying substantial compliance costs already incurred and yet to be expended. *Id.* As for the balance of harms, the Court determined that Defendants' stated harms do not outweigh those of Plaintiffs because a preliminary injunction would "do nothing more than maintain the status quo; entities will still be free to encourage their employees to get vaccinated, and the employees will still be free to choose to be vaccinated." *Id.* at 25. Finding each element of a preliminary injunction satisfied, the Court granted Plaintiffs' and ABC's Motions. *Id.* at 26–28.

Next, because it had permitted ABC's intervention, the Court expanded the scope of its preliminary injunction nationwide, finding that ABC is an association

with members “all over the country” who “were awarded 57% of federal contracts exceeding \$25 million during fiscal years 2009–2020.” *Id.* at 26–27. As such, the Court reasoned that “limiting the relief to only those before the Court would prove unwieldy and would only cause more confusion.” *Id.* at 27.

The Task Force issued updated guidance on its website on December 9, 2021, stating that, for existing contracts, “[t]he Government will take no action to enforce the clause implementing requirements of Executive Order 14042. . . .” Safer Federal Workforce Task Force, What’s New? (last visited Dec. 10, 2021), <https://www.saferfederalworkforce.gov/new/>.

ARGUMENT

This Court has the authority to hear a case en banc when that case involves “a question of exceptional importance.” F.R.A.P. 35(a)(2). This Court may initially review a case en banc when doing so would promote “more effective judicial administration” and promote “finality of decision.” *Textile Mills Sec. Corp. v. Comm’r of Internal Revenue*, 314 U.S. 326, 335 (1941). This Court’s en banc initial consideration is appropriate—indeed, critically needed—in this case.

This case involves an issue of critical importance that affects parties in all 50 states and at every level of the economy: whether federal contractors must comply with an unlawful Mandate that would cause them to expend significant resources, risk losing employees, and risk losing valuable federal contracts that enable

provision of critical services. This Court’s initial en banc consideration would provide clarity on this vital question, including the January 18 deadline for compliance, absent the district court’s preliminary injunction. This Court’s prompt review would also avoid a situation, like that presaged by the 2-1 decision in *Florida v. Department of Health & Human Servs.*, ___ F. 4th ___, 2021 WL 5768796 (11th Cir. Dec. 6, 2021). Although the stay decision in *Florida* was not directly relevant because the underlying rule there was already stayed nationwide by a district court in another circuit, a divided panel decision here would throw contractors throughout the nation into chaos. It would be far better for this Court to settle any such issue en banc promptly, so that the losing party knows immediately whether it must seek emergency relief from the U.S. Supreme Court.

A. This Case Raises Issues of Exceptional Importance.

The legality and constitutionality of the Contractor Mandate, and whether it should continue to remain in force, is plainly a “question of exceptional importance.” Fed. R. App. P. 35(a)(2). Under the Contractor Mandate, millions of federal contractor employees nationwide must be vaccinated or terminated by January 18—regardless of whether they even work on federal contracts—if there is even a chance they might come into physical contact with an employee working on a federal contract. *See* Safer Federal Workforce Task Force, FAQs: Federal Contractors, <https://www.saferfederalworkforce.gov/faq/contractors/>; *see also* Pl. Br. Ex. 1 at ¶ 8,

Ex. 2 at ¶ 7, Ex. 3 at ¶ 6, Ex. 12 at ¶ 18–19. The Mandate is staggeringly overbroad and exceptionally rigid. As a result, covered contractor employees must choose either to keep their job by complying with an unlawful and unconstitutional mandate or risk their livelihoods. Pl. Br. Ex. 12 at ¶¶ 23–24. The Mandate also commands federal contractors to oversee their employees’ and subcontractors’ compliance with the Task Force’s Guidance while performing federal contracts. Pl. Br. Ex. 2 at ¶ 11, Ex. 6 at ¶ 13, Ex. 12 at ¶¶ 26. These issues spawn a host of logistical problems for federal contractors, directly threaten the funds they obtain from federal contracting, and impair their ability to perform their contractual obligations. Pl. Br. Ex. 2 at ¶ 7, Ex. 6 at ¶ 13, Ex. 12 at ¶ 26, Ex. 13 at ¶ 10.

This case presents weighty issues related to the scope of executive authority under the Procurement Act, which are exceptionally important such that they are proper for en banc review. *See, e.g., United States Dep’t of Health & Human Servs. v. FLRA*, 844 F.2d 1087, 1095-96 (4th Cir. 1988). If the Mandate does not exceed the statutory authorization, there would be little or no outer bound on what the Act could authorize, including—for example—requirements that contractors mandate that their employees stop smoking or follow a federal-government-mandated exercise and dieting regime, all in the name of reducing worker absenteeism.

Further, the grave separation of powers and state sovereignty issues that the Contractor Mandate implicates strongly support initial en banc review. *See Order at*

23. While the district court did not reach these constitutional issues, it acknowledged that other courts considering the lawfulness of COVID-19 vaccination mandates had “either express[ed] agreement with or at least concern about th[o]se arguments.” *Id.* (citing *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 616-18 (5th Cir. 2021); Kentucky, 2021 WL 5587446, at *9–10). Courts have routinely treated similar cases involving the scope of congressional authority as sufficiently important for en banc review. *See, e.g., United States v. Ballinger*, 395 F.3d 1218, 1222 (11th Cir. 2005) (rehearing *en banc* whether the Commerce Clause authorized the challenged Act); *United States v. Kebodeaux*, 687 F.3d 232, 233–34 (5th Cir. 2012) (same); *United States v. Faasse*, 265 F.3d 475, 480 (6th Cir. 2001) (same).

This case also raises questions of exceptional importance regarding when the Government can evade statutory notice-and-comment procedures. Defendants made no effort to provide notice and comment for two components of the Mandate—the Task Force Guidance and the FAR Deviation Clause—despite statutory and regulatory requirements that they do so. Plts’ Br. at 18–22. The Defendants’ lack of compliance, justified only by vague references to the dangers of COVID-19, is unlawful, especially for permanent vaccination requirements. *Id.*

B. Initial En Banc Consideration Is Badly Needed To Prevent Chaos For Contractors Nationwide Approaching the January 18 Deadline.

Initial en banc consideration of this case is the only way to protect Plaintiffs, as well as contractors all over the country, from chaos resulting from Defendants’

stay motion being decided first by a panel and thereafter by the en banc court, especially given the very short timeframe involved in the January 18 deadline. Thus, in this case, an initial en banc hearing is an “efficient means” of providing swift judicial finality for the Parties “without requiring the matter to percolate uselessly through a panel.” *Williams v. Catoe*, 946 F.3d 278, 279 (5th Cir. 2020).

Florida, No. 21-14098, shows why initial en banc is essential here. In *Florida*, the judges on the panel disagreed about fundamental issues relating to the scope of *Alabama Association of Realtors* and the major questions doctrine, *compare Florida*, No. 21-14098 at 33–34, *with id.* at 65–67 (Lagoa, J., dissenting), and whether an agency may still claim an emergency exemption from notice-and-comment rulemaking requirements give the availability of vaccines for almost a year, *compare id.* at 34–36, *with id.* at 69–74 (Lagoa, J., dissenting). If such a situation recurs in the present case, there will be grave uncertainty as to whether the losing party should seek relief en banc or go to the U.S. Supreme Court on an emergency basis. Meanwhile, contractors throughout the Nation will not know their obligations, including whether they need to fire their workers en masse in just a couple of weeks. Additionally, it would lead to great confusion if a motions panel, merits panel, and then the en banc Court each rule on this issue and possibly all reach different conclusions, all with a time-sensitive deadline looming. And the situation here is far more practically problematic than in *Florida* because the vaccine mandate

in that case is already enjoined nationwide by a court in a different circuit. Here, any interim panel decision would leave federal contractors—including Plaintiffs—in an impossible position, with the jobs of thousands of employees and tens of millions of dollars in federal contracts in the balance in a matter of weeks.

CONCLUSION

This Court should grant this Petition.

Respectfully submitted this 10th day of December, 2021.

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CERTIFICATE OF COMPLIANCE

This petition complies with the type-volume limitation of Federal Rule of Appellate Procedure 35(b)(2) because it contains 3,290 words, excluding the parts of the brief required by 11th Circuit Rule 35-5(a), (b), (c), (d), (j), and (k).

This petition also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared using Microsoft Word in Times 14-point font.

December 10, 2021

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed this brief with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on December 10, 2021. I served all counsel of record by CM/ECF.

December 10, 2021

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