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11 UNITED STATES DISTRICT COURT

12 DISTRICT OF ARIZONA

13 Mark Brnovich, in his official capacity
14 as Attorney General of Arizona; the
15 State of Arizona; John Doe; Phoenix
16 Law Enforcement Association
17 (“PLEA”); and United Phoenix
18 Firefighters Association Local 493,

19 Plaintiffs,

20 vs.

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

23 Defendants.

No. CV-21-01568-MTL

**DEFENDANT CITY OF PHOENIX’S
RESPONSE TO MOTION FOR
PRELIMINARY INJUNCTION**

24 The City of Phoenix hereby responds to Plaintiffs’ Third Motion for a Preliminary
25 Injunction, Doc. 72 (“PI Motion”).

INTRODUCTOIN

26 The PI Motion should be denied as against the City of Phoenix because it includes
27 no claims against Phoenix and the requested relief in the proposed order does not apply
28 to Phoenix. The PI Motion addresses the validity and enforceability of the federal
government’s Contractor and Employee Mandates. Phoenix did not issue these federal
mandates and had no role in the conduct challenged by the PI Motion. Phoenix is not



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1 engaged in, and generally cannot engage in, the actions that would be enjoined by the
2 proposed order (Doc. 72-1). For these reasons, the Court should deny the PI Motion as
3 to Phoenix. If the Court issues any injunction at all, it should specify which defendants
4 are being enjoined and clarify that the injunction does not apply to Phoenix.

5 **PRELIMINARY STATEMENT**

6 Although this lawsuit was filed in September (Doc. 1), Phoenix was not named as
7 a defendant until November 19, 2021 (Doc. 71). Phoenix was not served until November
8 24, 2021, the day before Thanksgiving.¹ November 25 (Thanksgiving Day) and
9 November 26 (the day after Thanksgiving) are official government holidays for Phoenix.
10 Phoenix approached counsel about this lawsuit two business days later, on November 30,
11 2021; counsel cleared conflicts the next day, on the afternoon of Wednesday, December
12 1, 2021.

13 This left Phoenix with two days before the December 3 deadline to respond to the
14 PI Motion, which was set by stipulation of the parties before Phoenix had been named as
15 a defendant, let alone served. (Doc. 64.)

16 In order to avoid delaying resolution of the pending PI Motion, Phoenix did not
17 seek addition time to respond. But Phoenix may seek leave to supplement its response in
18 light of the extremely short time it had to prepare this response.

19 **ARGUMENT**

20 **I. The PI Motion does not discuss any claims against Phoenix.**

21 Plaintiffs have not met their burden to show that they are likely to succeed on the
22 merits against Phoenix. The PI Motion focuses exclusively on the federal defendants; it
23 does not mention the City of Phoenix at all.

24 Plaintiffs seek a preliminary injunction based on three claims: the federal
25 Procurement Act claim (Count 1), the federal Procurement Policy Act claim (Count II),
26 and the Anti-Commandeering claim (Count VI). *See* PI Motion at 9-16. But Phoenix did

27 _____
28 ¹ Although the affidavit of service has not yet been filed, the Summons as to
Phoenix was not issued by the Court until November 24, 2021. (*See* Doc. 97 at 43.)

1 not promulgate the Contractor Mandate, so it cannot have violated the federal
2 procurement statutes in doing so. Moreover, the PI Motion does not identify any relevant
3 provision of the Procurement Act or the Procurement Policy Act for which Phoenix could
4 be held responsible in this lawsuit. As for Anti-Commandeering, that doctrine prevents
5 the federal government from commandeering state governments; Phoenix has no power
6 to commandeer state officers, and Plaintiffs have not claimed that it has done so.²

7 Because Plaintiffs have not met their burden to show a likelihood of success on
8 the merits against Phoenix, the Court should not enjoin Phoenix.

9 **II. The proposed injunction is inapplicable to Phoenix.**

10 The Court should also decline to enjoin Phoenix because Plaintiffs' proposed
11 injunction (Doc. 72-1), includes no terms that could plausibly apply to Phoenix. Plaintiffs
12 ask this Court to order Defendants not to "impose any COVID-19 vaccination
13 requirement on any federal contractor or sub-contractor" or "federal employee," "include
14 any clauses related to COVID-19 or vaccinations in any contract entered into with any
15 federal contractor or sub-contractor," or "impose any COVID-19-related procurement
16 requirements without first following the required notice-and-comment procedures of the
17 Procurement Policy Act." Doc. 72-1. Phoenix has not and could not engage in any of
18 these activities—it does not impose requirements or contract terms on federal contractors
19 or federal employees, nor does it have authority over federal procurement law.

20 Accordingly, the Court should not enjoin Phoenix (and if it does issue an
21 injunction pertaining to the federal defendants, it should state that the injunction applies
22 only to those defendants).

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24
25 ² The PI Motion also purports to incorporate by reference the legal arguments in
26 Plaintiffs' Renewed Motion for a Temporary Restraining Order and Preliminary
27 Injunction dated October 22, 2021, Doc. 34. *See* PI Motion at 1 n.1. That previous motion
28 was filed before Phoenix had been named as a defendant, and it asserted only two
additional claims against the Contractor Mandate: (1) an equal protection clause claim,
which Plaintiffs are no longer pursuing, *see* Doc. 71-1 at 66-68, and (2) a claim that the
federal defendants violated the Emergency Use Authorization Statute, without any
assertions that Phoenix has violated this statute.

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CONCLUSION

The Court should deny the PI Motion against Phoenix. If the Court issues a preliminary injunction at all, the injunction should specify that it does not apply to Phoenix. If the Court consolidates the PI Motion with the merits, the Court should grant judgment to Phoenix because Plaintiffs have failed to meet their burden on any claim against Phoenix.

DATED this 3rd day of December, 2021.

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