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11 UNITED STATES DISTRICT COURT
12 FOR THE EASTERN DISTRICT OF WASHINGTON
13

14 DAVID G. DONOVAN, *et al.*,

No. 4:21-CV-05148-TOR

15 Plaintiffs,

16 v.

**DEFENDANTS’ MOTION TO
DISMISS SECOND AMENDED
COMPLAINT**

17 JOSEPH R. BIDEN, in his official
18 capacity as President of the United States
19 of America, JENNIFER
20 GRANHOLM, in her official capacity as
21 Secretary of the UNITED STATES
22 DEPARTMENT OF ENERGY, BRIAN
23 VANCE in his official capacity as
24 Manager of the UNITED STATES
25 DEPARTMENT OF ENERGY Hanford
26 Site,
27

05/09/2022
Without Oral Argument

28 Defendants.

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1 Defendants Joseph R. Biden, Jennifer Granholm, and Brian Vance, through
2 counsel, respectfully move to dismiss Plaintiffs' Second Amended Complaint (ECF
3 No. 74) with prejudice pursuant to Fed. R. Civ. P. 12(b)(1) and (6).
4

5 **I. Introduction and Procedural History**

6 The ongoing COVID-19 pandemic poses a serious threat to public health and
7 the economy. The illness and mortality caused by COVID-19 have led to serious
8 disruptions for organizations, employees, and contractors across the United States, and
9 the federal government is no exception. Accordingly, on September 9, 2021, the
10 President issued two Executive Orders aimed at preventing disruptions in the
11 provision of government services by federal employees and contractors by combatting
12 the spread of COVID-19. *See* Requiring Coronavirus Disease 2019 Vaccination for
13 Federal Employees, Exec. Order No. 14043, 86 Fed. Reg. 50,989, (Sept. 9, 2021)
14 (“Employee Order”); Ensuring Adequate COVID Safety Protocols for Federal
15 Contractors, Exec. Order No. 14,042, 86 Fed. Reg. 50,985 (Sept. 9, 2021)
16 (“Contractor Order”).¹
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22 ¹ Both Executive Orders are presently preliminarily enjoined on a nationwide basis.
23 *Feds for Medical Freedom v. Biden*, --- F. Supp. 3d ---, 2022 WL 188329 (S.D. Tex.
24 Jan. 21, 2022), *appeal docketed*, No. 22-40043 (5th Cir. Jan. 26, 2022) (Employee
25 Order); *Georgia v. Biden*, --- F. Supp. 3d ---, 2021 WL 5779939 (S.D. Ga. Dec. 7,
26 2021), *appeal docketed*, No. 21-14269 (11th Cir. Dec. 10, 2021) (Contractor Order).
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1 Plaintiffs, a group of federal employees and federal contractor employees
2 associated with the Department of Energy (“DOE”) Hanford Site, filed an initial
3 Complaint seeking to challenge these vaccination mandates. ECF No. 1. Plaintiffs
4 sought preliminary injunctive relief, which the Court denied. ECF No. 58.
5 Defendants then moved to dismiss the initial Complaint. ECF No. 59. Plaintiffs
6 responded by filing their First Amended Complaint as a matter of course. ECF No.
7 60. Defendants moved to dismiss the First Amended Complaint, raising nearly
8 identical procedural arguments in support of this second motion to dismiss. ECF No.
9 68. By written stipulation of all parties, Plaintiffs then filed their Second Amended
10 Complaint. ECF No. 74.

14 The Second Amended Complaint differs from the First Amended Complaint in
15 that it eliminates all claims asserted against the former Federal Contractor Defendants
16 and eliminates the claims for violation of the Americans with Disabilities Act,
17 wrongful termination under Title VII and the Washington Law Against
18 Discrimination, breach of contract, intentional or negligent infliction of emotional
19 distress, and the freestanding claim for violation of 42 U.S.C. § 1983. *Compare* ECF
20 No. 60 *with* ECF No. 74. But for the remaining claims, the underlying procedural and
21 jurisdictional flaws remain the same.² Plaintiffs wholly fail to sufficiently plead facts
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25 ² The Second Amended Complaint also reincorporates an error from the initial
26 Complaint, in that it again fails to name all parties in the caption in compliance with
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1 to support their individualized claims, and they fail to articulate their constitutional
2 arguments through a viable cause of action. In a case with 314 individual plaintiffs
3 asserting both facial and as-applied challenges, Plaintiffs’ failures to meet basic
4 pleading standards are fatal. Even accepting Plaintiffs’ current factual allegations as
5 true, Plaintiffs’ Second Amended Complaint should be dismissed, as all causes of
6 action asserted are either nonjusticiable or fail to state a claim.³
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9 **II. Motion to Dismiss Standard**

10 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) is
11 addressed to the court’s subject matter jurisdiction. Questions of justiciability are
12 “inherently jurisdictional.” *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 981 (9th Cir.
13 2007). A court may not hear claims over which it lacks subject-matter jurisdiction.
14 Fed. R. Civ. P. 12(h)(3). A Rule 12(b)(1) motion may be classified as either facial, in
15 which case the court’s inquiry is limited to the allegations in the complaint, or factual,
16 in which case the court may consider extrinsic evidence. *Safe Air for Everyone v.*
17 *Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). “In resolving a factual attack on
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22 Fed. R. Civ. P. 10(a). The Court previously identified this deficiency for Plaintiffs at
23 the TRO stage. ECF No. 58 at 3–4.
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25 ³ Federal Defendants also move the Court to strike Plaintiffs’ jury demand, as
26 Plaintiffs identify no relevant waiver of sovereign immunity that entitles them to a
27 jury trial. Fed. R. Civ. P. 39(a)(2).
28

1 jurisdiction, the district court may review evidence beyond the complaint without
2 converting the motion to dismiss into a motion for summary judgment.” *Id.* The
3 party asserting jurisdiction bears the burden of proof on the issue. *See Lujan v. Defs.*
4 *of Wildlife*, 504 U.S. 555, 561 (1992).

6 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) is
7 addressed to the sufficiency of the pleading of claims in the complaint. Federal Rule
8 of Civil Procedure 8(a)(2) requires “a short and plain statement of the claim showing
9 that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). To proceed past the
10 pleading stage, the plaintiff’s factual allegations, accepted as true, must state a claim
11 that is “plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).
12 A claim is plausible when the plaintiff pleads facts that allow the court to “draw the
13 reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft*
14 *v. Iqbal*, 556 U.S. 662, 678 (2009). While detailed factual recitations are not required,
15 the plaintiff must come forward with more than “unadorned, the-defendant-
16 unlawfully-harmed-me” allegations. *Id.* Formulaic recitations of the elements of a
17 claim, supported by mere labels and conclusions, are not sufficient. *Twombly*, 550
18 U.S. at 555.

23 **III. Argument**

24 **A. Plaintiffs fail to state any claim against Secretary Granholm or Brian** 25 **Vance.**

26 As the Court correctly ruled at the TRO stage, Plaintiffs did not state a claim for
27 relief against Mr. Vance in their initial Complaint. ECF No. 58 at 4. Plaintiffs’
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1 Second Amended Complaint still fails to state any claim against Mr. Vance, and it
2 similarly fails to state a claim against Secretary Granholm. The Second Amended
3 Complaint identifies Brian Vance as the manager of the Hanford Site and Secretary
4 Granholm as the Secretary of Energy. ECF No. 74 at ¶¶ 13–14. But Plaintiffs still
5 have not alleged any facts to indicate how Secretary Granholm or Mr. Vance are
6 plausibly liable for any of the specific causes of action asserted, beyond the
7 conclusory allegation that they have “adopted and implemented” the two Executive
8 Orders. ECF No. 74 at ¶ 347. In failing to make any other factual allegation
9 regarding Secretary Granholm or Mr. Vance, Plaintiffs fail to offer more than
10 insufficient “unadorned, the-defendant-unlawfully-harmed-me” allegations. *Iqbal*,
11 556 U.S. at 678. Additionally, Secretary Granholm and Mr. Vance appear to be the
12 only defendants for Plaintiffs’ remaining Section 1983 claims (Counts 1 and 3), as
13 President Biden is unquestionably immune from those claims. *Forrester v. White*, 484
14 U.S. 219, 225 (1988). But federal actors are only subject to Section 1983 liability in
15 limited circumstances, which Plaintiffs have not alleged here. *See Cabrera v. Martin*,
16 973 F.2d 735, 741 (9th Cir. 1992). The Court should dismiss all claims asserted
17 against Secretary Granholm and Mr. Vance.

23
24 B. The overwhelming majority of Plaintiffs lack standing to sue.

25 Federal Defendants previously submitted detailed briefing challenging every
26 Plaintiff’s standing to sue in this case. ECF No. 59 at 4–11. As with the First
27 Amended Complaint, the Second Amended Complaint now alleges sufficient facts to
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1 indicate, accepting those allegations as true, that seven Plaintiffs have suffered an
2 actual and concrete injury, not of their own making, that supports their standing to
3 sue. ECF No. 74 at ¶¶ 53, 65, 67, 78, 130, 171, 251. However, the remaining 307
4 Plaintiffs continue to lack standing, and the Court lacks jurisdiction over their claims.
5 Although the Second Amended Complaint makes different specific factual allegations
6 regarding the individual Plaintiffs' circumstances, these Plaintiffs' claims still largely
7 fall into the same categories of being unripe, lacking injury, facing self-inflicted
8 injuries, or insufficiently pleading their claims.
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11 Article III courts are courts of limited jurisdiction, and questions of
12 justiciability are “inherently jurisdictional.” *See Corrie*, 503 F.3d at 981. Challenges
13 to standing are properly asserted in a Rule 12(b)(1) motion. *Chandler v. State Farm*
14 *Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010). The “irreducible
15 constitutional minimum of standing” requires that the plaintiff suffer an “injury in
16 fact” that is “concrete and particularized” and “actual or imminent,” that there is a
17 “causal connection between the injury and the conduct complained of,” and that it is
18 “likely” that the injury is redressable by a favorable decision. *Lujan*, 504 U.S. at 560–
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22 61 (citations omitted).

23 Plaintiffs' alleged injuries in this case are based on their supposed forced choice
24 between receiving an unwanted vaccine or jeopardizing their continued employment.
25 They explicitly identify their “imminent and wrongful termination” as the harm they
26 face. ECF No. 74 at ¶ 8. But as in the initial and First Amended Complaints, the vast
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1 majority of Plaintiffs do not presently face this injury, and if they do, that injury is
2 self-inflicted. Accepting as true at this stage of the proceedings that Plaintiffs have
3 good-faith medical or religious objections to vaccination, Plaintiffs are able to pursue
4 an exception and accommodations from the vaccine mandates. Based on the
5 allegations now raised in the Second Amended Complaint, Plaintiffs have generally
6 pursued that option as follows: (1) some have not applied for an exception to the
7 vaccination requirement; (2) some are already vaccinated or have been granted an
8 accommodation; (3) some have not alleged the status of any request for an exception;
9 and (4) some have sought an exception but have not yet had accommodations
10 determined. For slightly different reasons, each of these plaintiff categories lack
11 standing to pursue their claims.
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16 *i. Plaintiffs who have not applied for any exception face self-inflicted*
17 *injuries that cannot support standing.*

18 Three Plaintiffs in this case affirmatively pled that they have not applied for an
19 exception to their employers' implementation of the vaccine mandates. ECF No. 74 at
20 ¶¶ 46, 173, 223. One other Plaintiff alleges he moved out of state before his
21 accommodation request was determined, and he has since been terminated because he
22 cannot telework from out of state. ECF No. 74 at ¶ 37. These Plaintiffs lack standing
23 because their injuries are self-imposed.
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26 In order to meet the causation requirement of the standing test, a plaintiff's
27 injury must be "fairly traceable to the challenged action." *Monsanto Co. v. Geertson*
28

1 *Seed Farms*, 561 U.S. 139, 149 (2010). Plaintiffs “cannot manufacture standing
2 merely by inflicting harm on themselves,” as such harms are not fairly traceable to the
3 defendant’s conduct. *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 416 (2013). The
4 Executive Orders challenged here implement vaccination requirements, but they allow
5 for exceptions as required by law. Plaintiffs who have good-faith medical or religious
6 objections to vaccination have the ability to seek exceptions from the requirement by
7 seeking accommodations from their employers. But the three Plaintiffs who have
8 declined to pursue exceptions, and the one who disqualified himself from employment
9 before completing that process, do not face potential termination because the vaccine
10 mandates unduly burden their legal rights; rather, they are facing potential
11 termination, or actual termination, because they declined to fully pursue the exception
12 and accommodation process available to them. That injury is not traceable to
13 Defendants. Because these Plaintiffs’ claimed injuries are self-inflicted, they are
14 insufficient to support standing to sue and these Plaintiffs should be dismissed from
15 this case.
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21 *ii. Plaintiffs who have already been vaccinated or who have been*
22 *provided accommodations do not face an injury that gives them*
23 *standing.*

24 The Plaintiffs in this case who are already vaccinated, and those who have
25 received accommodations from their employers, do not have standing in this case
26 because they are fully compliant with the vaccination mandates and do not face the
27 injuries alleged in the Amended Complaint.
28

1 The “injury in fact” component of standing “requires that the party seeking
2 review be himself among the injured.” *Lujan*, 504 U.S. at 563 (citation omitted). Of
3 the 314 Plaintiffs in this case, 56 have alleged that they have been granted some form
4 of accommodation by their employer. ECF No. 74 at ¶¶ 21–23, 31, 34, 39, 41, 45, 49,
5 50, 52, 59, 63, 69, 73, 80, 88, 91, 94, 115, 117, 122, 126, 127, 134, 140, 143, 146,
6 160–62, 170, 176, 184, 186, 194, 202, 219, 222, 224, 227, 229, 239, 264, 268, 269,
7 272, 288, 301–04, 310–12, 322. Three other Plaintiffs have alleged that they are
8 already fully vaccinated and are therefore compliant with the vaccination mandate.
9 ECF No. 74 at ¶¶ 70, 104, 172. Together, these 59 Plaintiffs do not face termination
10 from their employment based on the challenged vaccination mandates because they
11 are fully compliant with the vaccination requirement, either by becoming fully
12 vaccinated or by obtaining a legal exception from the policy. These Plaintiffs
13 therefore do not face the injury they allege to support their standing to sue in this case,
14 and their claims should be dismissed.

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20 *iii. Plaintiffs who have not alleged their exception status have not met*
21 *their burden of establishing jurisdiction.*

22 Some Plaintiffs have not alleged any information about whether they have
23 sought exception requests, and therefore have not sufficiently pled information to
24 establish that they have standing to sue. “The party invoking federal jurisdiction bears
25 the burden of establishing standing.” *Clapper*, 568 U.S. at 411–12 (citation and
26 quotation marks omitted). Since standing is “an indispensable part of the plaintiff’s
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1 case, each element must be supported in the same way as any other matter on which
2 the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence
3 required at the successive stages of the litigation.” *Lujan*, 504 U.S. at 561.
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5 Twenty Plaintiffs here have alleged their job titles, but have alleged no
6 information about their vaccination status, the nature of their objection, or whether
7 they have pursued an exception from the vaccination requirement. ECF No. 74 at
8 ¶¶ 32, 99–101, 109, 120, 135, 149, 183, 191, 209, 213, 220–21, 226, 275, 278, 305,
9 314, 321. Three others have alleged that they are partially vaccinated, but do not
10 indicate whether they have pursued an exception from the remainder of the
11 vaccination requirement. ECF No. 74 at ¶¶ 114, 130, 254. These allegations are
12 insufficient to meet Plaintiffs’ burden of establishing they have standing. If any of
13 these Plaintiffs who have good-faith religious or medical objections did not apply for
14 an exception from the vaccination requirement, they fall into the first category of
15 plaintiffs whose injuries are self-inflicted and not traceable to the challenged
16 Executive Orders. If any of these Plaintiffs are granted accommodations, they will be
17 compliant with the vaccination requirement and will fall into the second category of
18 plaintiffs who do not face any imminent injury in fact. Without alleging more
19 information, it is impossible to tell whether these Plaintiffs have standing.⁴ They
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25 ⁴ As was true in the First Amended Complaint, eight Plaintiffs fail to identify their
26 employers, so it is impossible to determine from the pleadings whether these Plaintiffs
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1 therefore fail to meet their burden of establishing standing at this stage in the
2 proceedings, and their claims should be dismissed.

3
4 *iv. Plaintiffs who have not yet had their accommodation requests
5 determined raise unripe claims.*

6 The remainder of the individually named Plaintiffs allege that they have not yet
7 been granted accommodations, generally following the pattern pleading that the
8 Plaintiff has “submitted a religious and/or medical exemption, “accepted by” the
9 employer, “but has been provided no accommodation” or “was originally not provided
10 an accommodation.” The Court should dismiss these claims as unripe.

11
12 The ripeness doctrine guards against “premature adjudication” of abstract
13 disagreements and theoretical harms. *Nat’l Park Hosp. Ass’n v. Dep’t of Interior*, 538
14 U.S. 803, 807–08 (2003) (citation omitted). Ripeness contains both a constitutional
15 and a prudential component. *Coons v. Lew*, 762 F.3d 891, 897 (9th Cir. 2014). The
16 constitutional component derives from Article III, which limits the jurisdiction of
17 federal courts to deciding actual cases or controversies. *Id.* A case is not
18 “constitutionally” ripe when the plaintiff’s entitlement to relief depends on
19 “contingent future events that may not occur as anticipated, or indeed may not occur
20 at all.” *Trump v. New York*, 141 S. Ct. 530, 535 (2020) (per curiam) (citation
21 omitted). The prudential component of the ripeness inquiry focuses on whether the
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26 are even subject to either Executive Order, let alone which one. ECF No. 74 at ¶¶ 27,
27 72, 80, 146, 159, 258, 305, 314.
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1 issues in the case are “fit for review” on the record presented. *Nat’l Park Hosp. Ass’n*,
2 538 U.S. at 812. The key consideration is whether “further factual development
3 would significantly advance [the Court’s] ability to deal with the legal issues
4 presented.” *Id.* (quotation and citation omitted); *see also In re Coleman*, 560 F.3d
5 1000, 1009 (9th Cir. 2009) (prudential considerations allow courts to “delay
6 consideration of the issue until the pertinent facts have been well-developed in cases
7 where further factual development would aid the court’s consideration”).
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10 As the Court previously recognized at the TRO stage, Plaintiffs’ misleading
11 pleading language reveals that their claims are unripe. ECF No. 58 at 12–14.
12 Plaintiffs still do not allege that their requested accommodations have been denied,
13 and therefore they do not face their alleged “imminent and wrongful termination”
14 from employment with DOE or a Hanford contractor. ECF No. 74 at ¶ 8. Although
15 Plaintiffs’ word choice has changed between versions of the complaint, the
16 jurisdictional flaws remain the same: allegations that a Plaintiff “was not provided an
17 accommodation” or “was not originally provided an accommodation” are still not
18 allegations that the Plaintiff was actually denied an accommodation.⁵ As both a
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24 ⁵ In fact, the allegation that certain Plaintiffs were not “originally” accommodated can
25 alternatively be read to mean that the accommodation is either still pending or has
26 already been granted. If these Plaintiffs have actually been granted accommodations,
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1 constitutional and prudential matter, Plaintiffs have failed to allege claims that are ripe
2 for review. The Court should dismiss these claims for lack of standing.

3
4 C. Plaintiffs do not state a viable cause of action for violation of the
5 Procurement Act and their arguments fail on the merits (Count 4)

6 Plaintiffs purport to assert a statutory cause of action for violation of the
7 Procurement Act, 40 U.S.C. §§ 101, 121. ECF No. 74 at ¶¶ 369–83. But Plaintiffs
8 fail to identify any authority that permits them to assert the Procurement Act itself as a
9 privately enforceable cause of action. The Court should dismiss this claim as
10 improperly pled.
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12 Moreover, Plaintiff’s arguments about the Procurement Act fail on the merits.
13 The Contractor Order is a valid exercise of the President’s authority to direct federal
14 contracting.⁶ The purpose of the Procurement Act is “to provide the Federal
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18 then they fall into the category of Plaintiffs who do not face an injury supporting
19 standing.

20 ⁶ The Contractor Order presently remains enjoined on a nationwide basis while an
21 appeal of the preliminary injunction is pending in the Eleventh Circuit Court of
22 Appeals. *Georgia v. Biden*, No. 21-14269. Oral argument is scheduled for April 8,
23 2022. Plaintiffs note that a number of other federal district courts have similarly
24 found other plaintiffs are likely to succeed on similar legal challenges to the
25 Contractor Order under the Procurement Act. ECF No. 74 at ¶ 371. Those decisions
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1 Government with an economical and efficient system” for, among other things,
2 “procuring and supplying property and nonpersonal services.” 40 U.S.C. § 101. The
3 Procurement Act empowers the President to “prescribe policies and directives that the
4 President considers necessary to carry out” the Act’s provisions, so long as the
5 directives are “consistent” with the Act. 40 U.S.C. § 121(a).

7 Presidential directives are consistent with this authority if they are “reasonably
8 related to the Procurement Act’s purpose of ensuring efficiency and economy in
9 government procurement.” *Liberty Mut. Ins. Co. v. Friedman*, 639 F.2d 164, 170 (4th
10 Cir. 1981). Courts have “emphasized the necessary flexibility and ‘broad-ranging
11 authority’” that the Procurement Act provides. *UAW-Labor Emp. and Training Corp.*
12 *v. Chao*, 325 F.3d 360, 366 (D.C. Cir. 2003) (quoting *AFL-CIO v. Kahn*, 618 F.2d
13 784, 789 (D.C. Cir. 1979) (en banc)). The standard is “lenient” and can be satisfied
14 even when “the order might in fact increase procurement costs” in the short run. *Id.* at
15 366–67. Courts find a nexus even when “[t]he link may seem attenuated” and even if
16 one can “advance an argument claiming opposite effects or no effects at all.” *Id.*

17
18 “[T]his close nexus requirement [] mean[s] little more than that President’s
19 explanation for how an Executive Order promotes efficiency and economy must be
20 reasonable and rational.” *Chamber of Com. of U.S. v. Napolitano*, 648 F. Supp. 2d
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27 are inconsistent with this Court’s prior findings on this issue, ECF No. 58 at 15–17,
28 and they are not binding on this Court.

1 726, 738 (D. Md. 2009) (one sentence explanation sufficient); *see also Chamber of*
2 *Com. of U.S. v. Reich*, 74 F.3d 1322, 1333 (D.C. Cir. 1996) (“The President’s
3 authority to pursue ‘efficient and economic’ procurement . . . certainly reach[es]
4 beyond any narrow concept of efficiency and economy in procurement.”). And
5 indeed, the Procurement Act has been interpreted to allow the President to direct
6 federal contracting as it relates to a variety of substantive issues. *See, e.g., City of*
7 *Albuquerque v. U.S. Dep’t of Interior*, 379 F.3d 901 (10th Cir. 2004) (urban renewal);
8 *Chao*, 325 F.3d 360 (collective bargaining rights); *Am. Fed’n of Gov’t Emps., AFL-*
9 *CIO v. Carmen*, 669 F.2d 815 (D.C. Cir. 1981) (energy conservation during an oil
10 crisis); *Kahn*, 618 F.2d at 790 (noting multiple Presidents “prominent[ly]” used
11 FPASA to impose “a series of anti-discrimination requirements for Government
12 contractors”); *Napolitano*, 648 F. Supp. 2d at 729 (assessing employee work
13 eligibility through E-Verify). The Procurement Act “emphasiz[es] the leadership role
14 of the President in setting Government-wide procurement policy on matters common
15 to all agencies” and expects “the President [to] play a direct and active part in
16 supervising the Government’s management functions.” *Kahn*, 618 F.2d at 788.

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22 As this Court has already recognized, the Contractor Order “easily satisfies the
23 nexus requirement” of the Procurement Act. ECF No. 58 at 16. The President
24 explained in Section 1 of the Contractor Order:
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26 This order promotes economy and efficiency in Federal procurement by
27 ensuring that the parties that contract with the Federal Government provide
28 adequate COVID-19 safeguards to their workers performing on or in

1 connection with a Federal Government contract These safeguards will
2 decrease the spread of COVID-19, which will decrease worker absence, reduce
3 labor costs, and improve the efficiency of contractors and subcontractors at sites
4 where they are performing work for the Federal Government.

5 86 Fed. Reg. at 50,985.

6 The Contractor Order is concerned with protecting the federal government's
7 financial and operational interests as a contracting party. Ensuring that its contractors
8 do not suffer major disruptions from COVID-19 accomplishes just that. COVID-19 is
9 an airborne disease that spreads quickly, so in order to ensure that contractors do not
10 spread COVID-19 to one another, all contractors working in any given physical
11 workspace must be vaccinated. This is fully explained by the OMB Determination's
12 approval of the Safer Federal Workforce Taskforce's COVID-19 safety protocols,
13 which lays out that increased vaccinations will "decrease the spread of COVID-19,
14 which will in turn decrease worker absence, save labor costs on net, and thereby
15 improve efficiency in Federal contracting." Determination of the Acting OMB
16 Director Regarding the Revised Safer Federal Workforce Taskforce Guidance for
17 Federal Contractors, 86 Fed. Reg. 63,418, 63,421–22 (Nov. 16, 2021). To anyone
18 who has lived through the COVID-19 pandemic and its resulting economic turmoil,
19 the nexus between reducing the spread of COVID-19 and economic efficiency should
20 be self-evident. While Plaintiffs may disagree with the President's policy or consider
21 it unwise, the Executive Order's explanation is sufficient to show the required nexus
22 between the policy and promoting economy and efficiency.
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1 Plaintiffs’ reliance on the Supreme Court’s recent decision in *National*
2 *Federation of Independent Business v. Occupational Safety and Health*
3 *Administration (NFIB)*, 142 S. Ct. 661 (2022) (per curiam) is misplaced. ECF No. 74
4 at ¶¶ 5–7. The Supreme Court’s statutory analysis in *NFIB* rested on principles of
5 statutory construction that apply only where an administrative agency’s action would
6 bring about an enormous and transformative expansion of its regulatory authority—
7 not where, as here, the President exercises well-established power to manage the
8 federal government’s proprietary interests. In *NFIB*, the Supreme Court considered
9 whether the Occupational Safety and Health Act (“OSH Act”), 29 U.S.C. § 651 *et*
10 *seq.*, authorized the Occupational Safety and Health Administration (“OSHA”) to
11 issue an emergency temporary standard requiring “virtually all employers with at least
12 100 employees” to impose COVID-19 vaccination-or-testing obligations on their
13 employees. 142 S. Ct. at 662, 665. Based on its observation that OSHA’s mandate
14 applies to “84 million Americans” and represents a significant expansion of OSHA’s
15 regulatory authority, the Court relied on the proposition that Congress is expected “to
16 speak clearly when authorizing an agency to exercise [such] powers of vast economic
17 and political significance.” *Id.* at 665 (quoting *Ala. Ass’n of Realtors v. Dep’t of*
18 *Health and Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam)). The Court held
19 that Congress had not “plainly authorized” OSHA’s vaccination-or-test standard
20 because the OSH Act permits OSHA to regulation only “*occupational hazards*,” and
21 COVID-19 is not a hazard unique to the workplace. *Id.* at 665–66.
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1 The “major questions” principles applied in *NFIB* are relevant only when an
2 administrative action represents an “enormous and transformative expansion in [an
3 agency’s] *regulatory* authority.” *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 324
4 (2014) (emphasis added); *accord NFIB*, 142 S. Ct. at 665 (“Permitting OSHA to
5 regulate the hazards of daily life . . . would significantly expand OSHA’s regulatory
6 authority”); *see also, e.g., Ala. Ass’n of Realtors*, 141 S. Ct. at 2489; *King v.*
7 *Burwell*, 576 U.S. 473, 485–86 (2015); *Gonzales v. Oregon*, 546 U.S. 243, 267–68
8 (2006); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000). In
9 promulgating the Contractor Order, the President did not exercise “*regulatory*
10 authority” of any kind. Rather, the President exercised the federal government’s
11 *proprietary* authority, as the purchaser of goods and services from those with whom it
12 contracts. *See Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940) (“Like private
13 individuals and businesses, the Government enjoys the unrestricted power . . . to
14 determine those with whom it will deal, and to fix the terms and conditions upon
15 which it will make needed purchases.”). Unlike OSHA’s vaccination-or-test standard,
16 which directly regulated private employers pursuant to Congress’ Commerce Clause
17 authority, the Contractor Order imposes no generally applicable regulation on any
18 industry, entity, or individual. Instead, as an exercise of Congress’ powers under
19 distinct constitutional provisions, including the Spending Clause, the Contractor Order
20 reflects the President’s management decision to do business with only those entities
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1 willing to perform work for the federal government under certain contractual
2 standards.

3 The Supreme Court’s other recent COVID-19 vaccination decision in *Biden v.*
4 *Missouri*, 142 S. Ct. 647 (2022) (per curiam), provides this Court with relevant
5 instruction by analogy: namely, that the President’s “longstanding practice” of using
6 his authority under the Procurement Act to address a wide range of concerns related to
7 federal contractor operations is a strong indication that the Contractor Order is a
8 legitimate exercise of such authority. *Cf. Missouri*, 142 S. Ct. at 652. In *Missouri*, the
9 Supreme Court reviewed a Department of Health and Human Services (“HHS”)
10 regulation requiring hospitals and other healthcare facilities that participate in
11 Medicare or Medicaid to ensure that their staff are either vaccinated against COVID-
12 19 or receive a religious or medical exception. 142 S. Ct. at 650. Like this case,
13 *Missouri* involved a broad grant of statutory authority related to the expenditure of
14 federal funds. *Compare id.* at 652 (“Congress has authorized the Secretary to impose
15 conditions on the receipt of Medicaid and Medicare funds that ‘the Secretary finds
16 necessary in the interest of the health and safety of individuals who are furnished
17 services.’” (quoting 42 U.S.C. § 1395x(e)(9))), *with* 40 U.S.C. §§ 101, 121
18 (authorizing the President to “prescribe policies and directives that the President
19 considers necessary” to promote “an economical and efficient system” for federal
20 procurement). Crucially, in determining the scope of HHS’s authority, the Supreme
21 Court looked to the agency’s “longstanding practice . . . in implementing the relevant
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1 statutory authorities.” *Missouri*, 142 S. Ct. at 652. Based on HHS’s historical
2 practice of imposing “conditions that address the safe and effective provision of
3 healthcare, not simply sound accounting,” the Court rejected a narrow reading of the
4 statute’s broad language because it was inconsistent with this historical precedent. *Id.*

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6 Here, the Executive Branch’s longstanding practice of issuing executive orders
7 regarding federal procurement is similarly instructive and underscores the validity of
8 the Contractor Order. As the cases cited *supra* at p. 17 demonstrate, the Procurement
9 Act has long been understood to grant the President broad authority and discretion to
10 manage the federal procurement system, and the Contractor Order is a permissible
11 exercise of that authority. Just as the Supreme Court concluded that the Executive
12 Branch may make COVID-19 vaccination a “condition of participation” in Medicare
13 and Medicaid, 142 S. Ct. at 654, this Court should hold that the President, like any
14 other contractor, may make COVID-19 vaccination a condition of participation in
15 federal contracting.
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20 D. The President is statutorily not subject to the Office of Federal
21 Procurement Policy Act (Count 5).

22 Plaintiffs’ claims for violation of federal procurement policy are unchanged
23 from the initial complaint and still fail as a matter of law. Plaintiffs seek to hold the
24 President liable for failing to comply with the notice and comment provisions of the
25 Office of Federal Procurement Policy (“OFPP”) Act. ECF No. 74 at ¶¶ 384–93
26 (citing 41 U.S.C. § 1707(a)(1)). Plaintiffs again identify no legal authority that allows
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1 them to assert the OFPP Act itself as a privately enforceable cause of action.

2 Moreover, the OFPP Act’s notice and comment provision only applies to “executive
3 agencies,” which does not include the President or the White House in its statutory
4 definition. 41 U.S.C. § 133. Because the President is not bound by the OFPP Act’s
5 notice and comment procedures, this claim should be dismissed.
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8 E. Plaintiffs’ constitutional structural arguments (Counts 6–9, 13) are not
9 standalone causes of action and are insufficiently pled.

10 Plaintiffs raise a series of constitutional structural arguments seeking to
11 invalidate the Executive Orders as generally violating principles of federalism and
12 separation of powers. These claims should be dismissed for several reasons.

13 First, Plaintiffs’ abstract legal arguments are untethered to any specific cause of
14 action. Plaintiffs are certainly entitled to assert arguments about the constitutionality
15 of the Executive Orders, but in order to state a plausible claim for relief, they must
16 assert those arguments via an actual cause of action. These claims should be
17 dismissed for failure to state a claim upon which relief can be granted.
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20 Second, Plaintiffs’ arguments are insufficiently pled. Plaintiffs’ pleading of
21 these claims is difficult to discern at best. While Plaintiffs have recited a series of
22 constitutional terms of art, their pleadings jumble multiple distinct constitutional
23 principles in such an incomprehensible way that none of their claims are plausible on
24 their face. *Twombly*, 550 U.S. at 570.
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1 As an example, Count 13 of the Second Amended Complaint purports to raise a
2 Commerce Clause challenge to the Executive Orders. But the substance of Count 13
3 is devoted to arguments about federalism and the anticommandeering principle. ECF
4 No. 74 at ¶¶ 455–57. Count 7 of the Second Amended Complaint purports to claim
5 that the Executive Orders violate separation of powers and federalism principles, but
6 the substance of Count 7 seems to challenge the constitutionality of the Procurement
7 Act itself under Article I, Section 8 of the Constitution. ECF No. 74 at ¶¶ 408–16.
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9 Count 8 of the Complaint purports to assert that the Executive Orders violate
10 federalism principles by intruding on states’ police powers, but it is unclear how this
11 cause of action is different from the federalism claims that are also asserted in Count 7
12 and argued in support of Count 13. *Compare* ECF No. 74 at ¶¶ 417–22 *with* ¶¶ 456–
13 57. While Plaintiffs have recited constitutional law buzzwords, their pleadings are
14 substantively incomprehensible. The Court should dismiss these constitutional
15 structural arguments as insufficiently pled.
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20 F. Plaintiffs’ APA claims (Counts 10–12) fail for lack of a proper
21 defendant.

22 Plaintiffs raise three claims that the Federal Acquisition Regulatory (“FAR”)
23 Council’s class deviation, the OMB Determination, and the Executive Orders
24 themselves all violate the APA. ECF No. 74 at ¶¶ 427–54. Presumably Plaintiffs
25 intended to assert all three APA claims against President Biden, as Secretary
26 Granholm and Mr. Vance have no connection to the promulgation of the Executive
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1 Orders, the FAR deviation, or the OMB determination. But the President cannot be
2 sued under the APA. *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992). Because
3 Plaintiffs’ APA claims fail to name a proper defendant, they should be dismissed for
4 failure to state a claim.
5

6 G. Plaintiffs fail to adequately plead their equal protection challenge (Count
7 2).

8 Plaintiffs assert that their equal protection rights are being violated on the basis
9 of their status as having “natural immunity” against COVID-19. ECF No. 74 at ¶ 362.
10 Again, aside from the basic problem that still only a handful of Plaintiffs have alleged
11 their “natural immunity” status, a term that they also fail to define, Plaintiffs fail to
12 articulate an equal protection claim. “Natural immunity” is not a suspect class, so
13 Plaintiffs’ equal protection claim is subject to rational basis review. *See Tandon v.*
14 *Newsom*, 992 F.3d 916, 930 (9th Cir. 2021). And while Plaintiffs assert generally that
15 they are not receiving equal protection under the law, they fail to plead with any
16 specificity how they are being treated differently than other similarly situated
17 individuals on the basis of their status. *See City of Cleburne, Tex. v. Cleburne Living*
18 *Center*, 473 U.S. 432, 439 (1985) (“The Equal Protection Clause . . . is essentially a
19 direction that all persons similarly situated should be treated alike.”) Plaintiffs’ equal
20 protection claim should be dismissed for failure to state a claim.
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1 H. The vaccination mandates do not violate Plaintiffs’ substantive due
2 process rights (Count 3).

3 Plaintiffs’ substantive due process claim asserted in Count 3, and also argued in
4 Count 2, remains foreclosed by longstanding precedent. ECF No. 74 at ¶¶ 359, 364–
5 68. As the Supreme Court explained in addressing another vaccine mandate over 115
6 years ago, “the liberty secured by the Constitution of the United States to every person
7 within its jurisdiction does not import an absolute right in each person to be, at all
8 times and in all circumstances, wholly freed from restraint.” *Jacobson v.*
9 *Massachusetts*, 197 U.S. 11, 26 (1905). The Court continued, “[r]eal liberty for all
10 could not exist under the operation of a principle which recognizes the right of each
11 individual person to use his own, whether in respect of his person or his property,
12 regardless of the injury that may be done to others.” *Id.*

13 Courts today continue to rely on *Jacobson* to find that vaccination requirements
14 such as those at issue here do not burden any “fundamental right ingrained in the
15 American legal tradition.” *Klaassen v. Tr. of Ind. Univ.*, 7 F.4th 592, 593 (7th Cir.
16 2021). As the cases cited in Federal Defendants’ TRO opposition brief demonstrate,
17 Plaintiffs do not have a fundamental liberty interest in avoiding vaccination, their
18 claims should be evaluated under rational basis review, and numerous courts,
19 including this Court, have recognized that stemming the spread of COVID-19 is a
20 legitimate state interest. *See* ECF No. 41 at 28–30.

21 Plaintiffs’ citation to inapplicable privacy case law does not change this legal
22 landscape. ECF No. 74 at ¶ 366. These “unadorned, the-defendant-unlawfully-
23 FEDERAL DEFENDANTS’ MOTION TO DISMISS SECOND AMENDED COMPLAINT - 24

1 harmed-me” allegations are insufficient to meet Plaintiffs’ pleading burden. *Iqbal*,
2 556 U.S. at 678. The Court should dismiss Plaintiffs’ substantive due process claims
3 for failure to state a claim.
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5 I. Plaintiffs’ free exercise claim is unripe and insufficiently pled (Count 1).

6 The Second Amended Complaint’s free exercise claim contains the same flaws
7 as the first two complaints. To the extent Plaintiffs intended to assert a facial First
8 Amendment challenge to the Executive Orders, such claim would fail on its face
9 because the vaccination mandates each provide for exceptions “as required by law.”
10 86 Fed. Reg. at 50,990; 86 Fed. Reg. at 50,985. And to the extent the Plaintiffs assert
11 an as-applied challenge to the vaccination mandate, their claims remain unripe and
12 insufficiently pled.
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15 Plaintiffs purport to assert a claim under the Religious Freedom Restoration Act
16 (“RFRA”), but they fail to allege any specific facts that would allow this Court, and
17 Defendants, to evaluate their claims under RFRA’s legal framework. ECF No. 74 at
18 ¶¶ 348–56. “To establish a prima facie RFRA claim, a plaintiff must present evidence
19 sufficient to allow a trier of fact rationally to find the existence of two elements. First,
20 the activities the plaintiff claims are burdened by the government action must be an
21 ‘exercise of religion.’ Second, the government action must ‘substantially burden’ the
22 plaintiff’s exercise of religion.” *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058,
23 1068 (9th Cir. 2008) (en banc) (citations omitted). Even under the deferential Rule 12
24 standard, the Court is not required to accept the sincerity of Plaintiffs’ asserted
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1 religious objections absent *any* supporting factual allegations. *See Burwell v. Hobby*
2 *Lobby Stores, Inc.*, 573 U.S. 682, 717 n. 28 (2014) (“To qualify for RFRA’s
3 protection, an asserted belief must be ‘sincere’; a [claimant’s] pretextual assertion of a
4 religious belief in order to obtain an exemption . . . would fail.”).

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6 This case involves 314 individual Plaintiffs. Not one of them has pleaded any
7 factual allegation to indicate what the nature of their asserted religious belief is, what
8 activity they assert qualifies as an “exercise of religion,” or how the Executive Orders
9 create a “substantial burden,” within the Ninth Circuit’s definition of that term of art,
10 on that exercise of religion. *Navajo Nation*, 535 F.3d at 1068. To proceed past the
11 pleading stage, the plaintiff’s factual allegations, accepted as true, must state a claim
12 that is “plausible on its face.” *Twombly*, 550 U.S. at 570. Having failed to allege
13 sufficient factual support for their free exercise claims, the Court should dismiss this
14 claim for failure to state a claim.
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18 J. Plaintiffs Should Not Be Granted Leave to Amend.

19 Plaintiffs’ Second Amended Complaint should be dismissed with prejudice and
20 without leave to amend. The Federal Rules of Civil Procedure encourage leave to
21 amend be “freely given,” Fed. R. Civ. P. 15(a)(2), and “[d]ismissal without leave to
22 amend is improper unless it is clear, upon de novo review, that the complaint could
23 not be saved by any amendment.” *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519
24 F.3d 1025, 1031 (9th Cir. 2008) (citation omitted). But this case fits the bill.
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1 Plaintiffs have now had three opportunities to meet basic minimal pleading
2 standards, and they have failed to do so on each occasion. Defendants have
3 consequently filed three motions to dismiss focused on the same fundamental
4 procedural and jurisdictional flaws in this case. Those deficiencies have not been
5 meaningfully addressed in Plaintiffs' ongoing amendments.⁷ The result is a now-third
6 attempt at a civil complaint which recycles the same grievances over the Executive
7 Orders but fails to conform to the basic pleadings requirements to file a lawsuit in
8 federal court. The Court noted as early as the TRO stage that many Plaintiffs assert
9 unripe claims, but Plaintiffs have failed upon repeated amendment to either plead
10 sufficient facts to correct their standing issues or to trim the Plaintiffs who lack
11 standing from the case. ECF No. 58 at 10–14. Plaintiffs continue to allege no facts to
12 support their individual free exercise claims. And while Plaintiffs seek to make
13 abstract arguments about the legality of the Executive Orders, they have repeatedly
14 failed to assert those arguments through cognizable causes of action or against proper
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21 ⁷ As a notable example, Defendants twice moved to dismiss the state law claims being
22 asserted against the federal actors, being sued in their official capacities, as barred by
23 sovereign immunity. Plaintiffs have eliminated those claims from the Second
24 Amended Complaint, but not before stating that they would reassert those claims in
25 state court, again in blatant disregard of the fundamental sovereign immunity issue.
26 ECF No. 71 at 10.
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1 defendants. To be sure, those causes of action do exist and have been properly pled
2 by other plaintiffs raising similar challenges to these Executive Orders in other federal
3 district courts. But Plaintiffs' ongoing refusal to conform their pleadings to Article
4 III's justiciability requirements and the Federal Rules of Civil Procedure, despite the
5 Court's early identification of many of these foundational issues, demonstrates their
6 Complaint cannot be saved by ongoing amendment. Defendants should not be made
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8 to continue expending public resources in defense of these improper pleadings. The
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10 Court should dismiss the Second Amended Complaint with prejudice.

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12 **IV. Conclusion**

13 For the reasons set forth above, Defendants respectfully request that Plaintiff's
14 claims be dismissed with prejudice either for lack of subject matter jurisdiction
15 pursuant to Fed. R. Civ. P. 12(b)(1) or for failure to state a claim pursuant to Fed. R.
16 Civ. P. 12(b)(6), and that Defendants be dismissed as parties to this suit.
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18
19 DATED this 18th day of March 2022.

20 *Vanessa R. Waldref*
21 United States Attorney

22 *s/Molly M.S. Smith*
23 John T. Drake
24 Molly M.S. Smith
25 Assistant United States Attorneys
26 *Attorneys for Federal Defendants*
27
28

CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2022, I caused to be delivered via the method listed below the document to which this Certificate of Service is attached (plus any exhibits and/or attachments) to the following:

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Simon Peter Serrano Silent Majority Foundation 5426 N. Rd. 68, Ste. D, Box 105 Pasco, WA 99301 pete@silentmajorityfoundation.org	<input checked="" type="checkbox"/> CM/ECF System <input type="checkbox"/> Electronic Mail <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Other: _____

s/Molly M.S. Smith
 Molly M.S. Smith