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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; and John Doe,

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 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; and Tae Johnson in his official capacity as Senior Official Performing the Duties of Director of U.S. Immigration and Customs Enforcement; United States Office of Personnel Management; Kiran Ahuja in her official capacity as director of the Office of Personnel Management and as co-chair of the Safer Federal Workforce Task Force; General Services Administration; Robin

No. 2:21-cv-01568-MTL

MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Carnahan in her official capacity as administrator of the General Services Administration and as co-chair of the Safer Federal Workforce Task Force; 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 Safer Federal Workforce Task Force; Safer Federal Workforce Task Force; Jeffrey Zients in his official capacity as co-chair of the Safer Federal Workforce Task Force and COVID-19 Response Coordinator.

Defendants.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

Constitutional Provisions

INTRODUCTION

The State of Arizona, its Attorney General, and John Doe (collectively, the "State") seek a temporary restraining order ("TRO") and preliminary injunction against two unprecedented vaccination mandates. Those mandates—one relating to federal contractors and subcontractors ("Contractor Mandate") and another relating to all federal employees ("Employee Mandate")—transgress numerous constitutional and statutory requirements. They are, in other words, patently unlawful. But if they are permitted to go into effect, contractors and employees will rapidly be forced to comply with these illegal mandates and this Court's power to prevent harms resulting from those illegal mandates will rapidly diminish into near-nothingness. A TRO is thus appropriate to prevent irreversible harm while the State's request for a preliminary injunction is decided. And such a preliminary injunction is warranted here, since the mandates violate both constitutional and statutory provisions, will cause irreparable harm, and the balance of harms and public interest favor enjoining these illegal mandates.

The Contractor Mandate is unlawful both procedurally and substantively. The President's power over contractors is derived from the federal procurement statutes that only permit him to impose obligations through notice-and-comment procedures—which Defendants did not even *attempt* to comply with. Moreover, under the Major Questions Doctrine and related case law, Defendants lack statutory authority to enact the sweeping social changes they seek for which they have no explicit statutory mandate. Instead, Defendants' mandates essentially assert far-reaching authority based upon finding hidden "elephants in mouseholes." *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001). But that is precisely how Congress does *not* convey unheard-of powers. Defendants thus do not have delegated authority to impose these unprecedented mandates, the likes of which no prior Administration has ever attempted. Moreover, while the President has power to employ procurement authority to improve efficiency of federal contracting, there is every reason to believe that these mandates will lead to *in*efficiency: particularly as they are likely to provoke employee resignations that will increase expenses, particularly in the

current tight labor market already undergoing a "Great Resignation." *See, e.g.,* First Amended Complaint ("FAC") ¶¶83-84.

Both the Contractor and Employee Mandates also violate the Emergency Use Authorization ("EUA") statute, which expressly requires disclosure of "the option to accept *or refuse* administration" of a product approved only under an EUA. 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(III) (emphasis added). But the whole point of the Mandates is to deny any such "option" to those governed by them. Notably, only the Pfizer vaccine has received FDA approval, and none of the stock of it in the U.S. is actually the FDA-approved version (and instead is entirely under the EUA label subject to the EUA-mandated conference of choice). Defendants' mandates thus violate the EUA statute.

Both of these mandates also violate the Equal Protection Clause, because Defendants have issued them as part of a policy of unconstitutional favoritism towards non-citizens not lawfully present in the U.S. (hereinafter, "unauthorized aliens"). Defendants have expressly refused to impose any vaccination mandates on unauthorized aliens, instead offering them a completely uncoerced choice as to whether to accept vaccination or not. But they have no equivalent respect for the rights of U.S. citizens and lawful permanent residents, who are the target of numerous such mandates.

Defendants have been completely forthright about this favoritism and their inexplicable preference for those entering the U.S. illegally over lawful residents and entrants. Defendants have announced, for example, that "[f]oreign nationals flying to the U.S. will be required to be fully vaccinated." Rogers Decl. Ex. A. But for those illegally crossing the northern and southern borders, they will not be subject to any vaccination mandates even when *apprehended* by Defendants and set to be released into the United States. *Id.* In other words, the *only* individuals whose personal autonomy is respected by Defendants are those that have elected to break U.S. immigration laws. U.S. citizens, lawful permanent residents, and those lawfully entering the U.S. (including through international flights) enjoy no equivalent respect. That favoritism is unconstitutional.

The State, its citizens, and John Doe will also suffer irreparable harm absent a TRO

and preliminary injunction. The harms at issue here cannot be remedied by money damages, which are not available in any event against Federal Defendants due to sovereign immunity. *See East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 677 (9th Cir. 2021) (irrecoverable harms are irreparable harms). Nor does this Court have the medical power to remedy any potential side effects caused by vaccines taken purely as a result of compliance with these illegal mandates. If such harms are permitted to occur, they will not be remediable from subsequent judicial actions. Nor are the violations of constitutional rights here remediable by monetary damages.

The balance of harms and public interest also favor issuance of a TRO and preliminary injunction. As the United States itself told the Supreme Court just this week, "there is 'no harm' from the 'nonenforcement of invalid legislation.'" Application of the United States, *United States v. Texas*, No. 21A85 (U.S. Oct. 18, 2021) (attached here to as Rogers Decl. Ex. B.) (quoting *United States v. Alabama*, 691 F.3d 1269, 1301 (11th Cir. 2012)). And the "public interest [is served] in having governmental agencies abide by the federal laws that govern their existence and operations." *Texas v. Biden*, 10 F.4th 538, 559 (5th Cir. 2021); *accord League of Women Voters of United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016).

Because the Contractor and Employee Mandates will soon compel individuals to comply with those mandates or suffer grievous financial harm, this Court should immediately issue a TRO while awaiting Defendants' response (which should be expedited), so that it can decide Plaintiffs' request for a preliminary injunction without enormous harms occurring in the interim, which it would lack the power to remedy. Put simply, absent expeditious action by this Court, Defendants will be able to effectuate the vast majority of their aims—despite the unlawfulness of their Mandates—simply by default. This Court should grant the State's motion to prevent such harms from occurring.

FACTUAL BACKGROUND

On September 9, 2021, President Biden gave remarks at the White House announcing plans for COVID-19 vaccination mandates for federal workers and certain

businesses, including healthcare facilities receiving federal funding, and all businesses with more than 99 employees. Rogers Decl. Ex. C. In that announcement, President Biden announced several categories of vaccination requirements, including those for (1) federal contractors, (2) federal employees, (3) employers with 100 or more employees, and (4) health care providers. This suit challenges the first and second mandates because these are the two about to take effect.

Federal Contractor Mandate

On September 9, 2021, President Biden signed Executive Order ("EO") 14042, imposing on federal contractors "COVID [s]afety [p]rotocols" to be established and issued by the Safer Federal Workforce Task Force ("SFWTF")[1] by September 24, 2021. On September 24, 2021 the SFWTF released on its website guidance to federal agencies for implementing Defendants' vaccine mandate on contractors and subcontractors (the "Contractor Mandate"). This guidance was never published to the Federal Register for public comment. Attached to the First Amended Complaint as Exhibit 1 is a copy of that guidance. Among other things, the guidance included the following:

- A deadline of December 8, 2021 for "covered contractor employees" to be fully vaccinated.
- A deadline of November 24, 2021 for employees of contractors or subcontractors to receive their final vaccination (or only vaccination, in the case of the Johnson & Johnson vaccine), because the guidance defines "fully vaccinated" to mean two weeks after receiving the requisite number of doses of an approved COVID-19 vaccine. The guidance defines "fully vaccinated" to include vaccines approved only by Emergency Use Authorization ("EUA").

[1] President Biden established the SFWTF on January 20, 2021 through Executive Order 13,991 (86 Fed. Reg. 7045 (Jan. 25, 2021)). He tasked the SFWTF with "provid[ing] ongoing guidance to heads of agencies on the operation of the Federal Government, the safety of its employees, and the continuity of Government functions during the COVID–19 pandemic." The SFWTF is headed by three co-chairs: (1) the Director of OPM; (2) the Administrator of GSA; and (3) the COVID–19 Response Coordinator. The Director of OPM is also a member of the SFWTF. The EO also required that GSA "provide funding and administrative support for the" SFWTF. 85 Fed. Reg. at 7046.

- A definition of the term "covered contractor employee" to "include[] employees of covered contractors who are not themselves working on or in connection with a covered contract" if they are working at the same location, thus imposing vaccine requirements on employees of contractors and subcontractors who are not even working on federal contracts.
- A requirement that the Federal Acquisition Regulatory Council ("FAR Council") conduct rulemaking to amend the Federal Acquisition Regulation ("FAR") to impose the Contractor Mandate.
- A deadline of October 8, 2021 for the FAR Council to develop a contract clause to implement the Contractor Mandate for agencies to include in contracts. The guidance also instructs the FAR Council to "recommend that agencies exercise their authority to deviate from the FAR" and use the vaccination mandate clause in contracts even before the FAR is amended.
- A deadline of October 15, 2021 for agencies to include that contractual clause in solicitations.
- A deadline of November 14, 2021 after which awarded contracts must include that contractual clause. For contracts entered into between October 15 and November 14 and for which the solicitation was issued before October 15, the guidance states that agencies are encouraged to include the clause, but are not required to do so.
- A requirement that, for contracts awarded "prior to October 15 and where performance is ongoing," the vaccine mandate clause "must be incorporated at the point at which an option is exercised or an extension is made."
- Requirements that the Contractor Mandate must apply even to: 1) persons who have already been infected with COVID-19; 2) workplace locations that are outdoors; and 3) contractor employees who are working remotely full time.
- A statement asserting that the guidance supersedes legal requirements in States or localities that prohibit vaccine mandates.

On September 28, 2021, Shalanda Young, the Acting Director of the Office of

Management and Budget, published a notice in the Federal Register in which Ms. Young made the conclusory contention that "compliance with COVID–19-related safety protocols improves economy and efficiency by reducing absenteeism and decreasing labor costs for contractors and subcontractors working on or in connection with a Federal Government contract." 86 Fed. Reg. 53,691 (Sept. 28, 2021). She further stated that she had "determined that compliance by Federal contractors and subcontractors with the COVID–19-workplace safety protocols detailed in [the SFWTF] guidance 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.*

Ms. Young did not cite to any information or evidence that would support the claims in her determination, nor did she explain how she reached her conclusion. Furthermore, Ms. Young's notice was not subject to public commenting. Ms. Young's determination did not claim there were any urgent and compelling circumstances that warranted foregoing notice-and-comment procedures, and her Federal Register notice did not include a 41 U.S.C. § 1707(d) waiver of the Procurement Policy Act requirement that a procurement policy may not take effect until 60 days after it is published for public comment in the Federal Register. Nor did Ms. Young's notice invoke the good cause exception (5 U.S.C. § 553(b)(3)(B)) to the APA's notice-and-comment requirements.

Federal authorities have already communicated with some Arizona State agencies, including public universities, claiming that the agency is subject to the Contractor Mandate and must impose vaccine mandates on their employees. This creates a significant conflict, as mandates are illegal under State law. *See* FAC ¶57.

Federal Employee Mandate.

Also on September 9, 2021, President Biden signed EO 14043, which required that "[e]ach agency shall implement ... a program to require COVID-19 vaccination for all of its Federal employees." The EO also required the SFWTF to issue guidance for agencies by September 16, 2021. Exec. Order No. 14043, 86 Fed. Reg. 50,989, "Requiring

Coronavirus Disease 2019 Vaccination for Federal Employees" (Sept. 14, 2021).

On September 16, 2021 the SFWTF updated the "Frequently Asked Questions" ("FAQ") section of its website, in an attempt to fulfill the EO's guidance requirement. Among other things, the updated FAQ included the following:

- A deadline of November 22, 2021 for federal employees to be "fully vaccinated" and also after which new federal employees would need to be fully vaccinated before starting work.
- A deadline of November 8, 2021 for employees to receive their final vaccination (or only vaccination, in the case of the Johnson & Johnson vaccine), because the FAQ defines "fully vaccinated" to mean "2 weeks after [employees] have received the requisite number of doses of a[n approved] COVID-19 vaccine." The FAQ defines "fully vaccinated" as including vaccines approved only by EUA.
- Imposition of the Employee Mandate 1) for federal employees who are working remotely full-time and thus do not pose any risk of exposing other federal employees to COVID-19 and 2) for federal employees who have already been infected with COVID-19 and thus already have natural immunity.
- A warning to agencies to allow exemptions from the Employee Mandate only "in limited circumstances where the law requires an exception." (emphasis added).

Attached to the First Amended Complaint as Exhibit 2 is a copy of the updated FAQ. The SFWTF has never issued official, formal guidance to agencies; has never published its guidance in the Federal Register; and has not followed any notice-and-comment procedures before issuing its guidance.

LEGAL STANDARD

Plaintiffs seek a preliminary injunction under Rule of Civil Procedure 65(a) for the purpose of "preserv[ing] the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). As the moving party, a plaintiff can obtain a preliminary injunction by showing that (1) it is likely to succeed on the merits, (2) it is likely to suffer irreparable harm in the absence of preliminary relief,

(3) the balance of equities tips in [its] favor, and (4) an injunction is in the public interest. *Winter v. NRDC*, 555 U.S. 7, 20 (2008); *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

ARGUMENT

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

The Contractor Mandate violates both the Constitution and federal statutory law. Specifically, it is unconstitutional because 1) it violates the Tenth Amendment and principles of federalism because it attempts to usurp the States' police powers and 2) it violates the Equal Protection Clause by conferring preferential treatment upon unauthorized aliens as a favored class. The mandate is also unlawful because it violates 1) the Federal Property and Administrative Services Act (the "Procurement Act"), 40 U.S.C. §§ 101 and 121; 2) the Office of Federal Procurement Policy Act ("Procurement Policy Act"), 41 U.S.C. § 1707; and 3) the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 360bbb-3 ("the EUA statute").

A. The Contactor Mandate Is Unconstitutional

The Contractor Mandate is unconstitutional, and the Plaintiffs are likely to succeed on the merits of their constitutional challenge to it.

In our federal republic, powers are divided between the States and the Federal government. The Federal government possesses only those powers specifically enumerated in the Constitution. And at all levels of government, powers are further limited by the natural rights retained by the people.

The Contractor Mandate is unconstitutional because it violates the Tenth Amendment and the Equal Protection Clause.

1. The Contractor Mandate Violates The Tenth Amendment

The Contractor Mandate violates the Tenth Amendment and principles of federalism. The Tenth Amendment states that "[t]he 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." U.S. Const. amend. X.

Under principles of federalism, the federal government has only enumerated powers and not the sort of general police power reserved *solely* to the States under the Tenth Amendment. "Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, § 8, which implication was rendered express by the Tenth Amendment's assertion that '[t]he 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.'" *Printz v. United States*, 521 U.S. 898, 919 (1997).

As James Madison explained, "[t]he powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." The Federalist No. 45 (James Madison). Thus, the "police power" is "inherent in the states" and is "reserved from the grant of powers to the federal government by the Constitution." *United States v. Constantine*, 296 U.S. 287, 295–96 (1935).

It is well-settled that the power to impose vaccine mandates, to the extent that such power exists at all, is part of the police powers reserved to the States. *See*, *e.g.*, *Zucht v. King*, 260 U.S. 174, 176 (1922) ("[I]t is within the police power of a *state* to provide for compulsory vaccination" (emphasis added)). Thus, Defendants' attempts to impose the Contractor Mandate on private companies is an unconstitutional usurpation of the States' police powers and Plaintiffs are likely to succeed on the merits of their federalism challenge to the mandate.

2. The Contractor Mandate Violates The Equal Protection Clause

Defendants' Contractor Mandate (and Employee Mandate as well) would require vaccination of U.S. citizens (and also lawful permanent residents and other aliens lawfully employed by qualifying employers), but not of unauthorized aliens. This violates the Equal Protection Clause because it confers preferential treatment upon unauthorized aliens as a favored class without a valid basis to do so.

The Supreme Court established in *Bolling v. Sharpe*, 347 U.S. 497, 498 (1954) that the Equal Protection Clause of the Fourteenth Amendment is incorporated against the federal government through the Fifth Amendment's Due Process Clause. *See also Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1686 n.1 (2017) (the Supreme Court's "approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment").

Aliens and citizens are protected classes in equal protection jurisprudence, triggering strict scrutiny when the government has a differential policy based on such classifications. *See Graham v. Richardson*, 403 U.S. 365, 371, 375–376 (1971); *Application of Griffiths*, 413 U.S. 717, 721 (1973). Generally, prior case law in this area has involved discrimination *against* aliens as a class. But the reverse preference in *favor* of unauthorized aliens is just as constitutionally suspect.

This unlawful discrimination is occurring at the applicable decision-making level here. All of the decisions regarding the vaccination mandates and non-mandates have been made by the President himself and the Executive Office of the President ("EOP"), with individual agencies then given commands to implement their respective mandates/non-mandates. And the President/EOP have (1) expressly decided to impose a variety of vaccination mandates that will fall overwhelmingly or exclusively upon U.S. citizens, lawful permanent residents, and aliens otherwise lawfully present in the United States and (2) simultaneously decided to *decline* to impose any vaccination mandates upon migrants unlawfully entering the United States even when in U.S. custody. The EOP has been explicit about its refusal to impose mandates on unauthorized aliens and instead giving them a true choice about whether to accept the U.S. government's offer of vaccination. For example, during a September 10, 2021 press conference, White House Press Secretary Jen Psaki had the following exchange with a reporter:

> Q Okay. And then why is it that you're trying to require anybody with a job or anybody who goes to school to get the COVID-19 vaccine, but you're not requiring that of migrants that continue walking across the southern border into the country?
>
> MS. PSAKI: Well, look, our objective is to get as many people vaccinated

> across the country as humanly possible. And so the President's announcement yesterday was an effort to empower businesses, to give businesses the tools to protect their workforces. That's exactly what we did.
>
> But certainly we want everybody to get vaccinated. And more people who are vaccinated, whether they are migrants or whether they are workers, protects more people in the United States.
>
> Q But it's a requirement for people at a business with more than 100 people, but it's not a requirement for migrants at the southern border. Why?
>
> MS. PSAKI: That's correct.[2]

At a press briefing on September 20, the issue came up again. Psaki announced that "in early November, we'll be putting in place strict protocols to prevent the spread of COVID-19 from passengers flying internationally into the United States by requiring that adult foreign nationals traveling to the United States be fully vaccinated."[3] When Psaki was questioned about the different policy for unauthorized aliens crossing the border illegally, Psaki said "[a]s individuals come across the border and — they are both assessed for whether they have any symptoms. If they have symptoms, they are — the intention is for them to be quarantined; that is our process. They're not intending to stay here for a lengthy period of time. I don't think it's the same thing."[4] Psaki never explained that putative difference, particularly given that most international air travelers are temporary visitors who are also "not intending to stay here for a lengthy period of time."

U.S. citizens, lawful permanent residents, lawfully present migrants, and unauthorized aliens are all similarly situated for purposes of the relevant decisions here. Coronavirus is an equal opportunity infector that is completely indifferent to the nationality/citizenship status of any human being. It will happily infect them all. Unauthorized aliens do not spread coronavirus any better or worse than those lawfully present in the United States. But the Biden Administration has unlawfully exempted

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[2] Jen Psaki, White House Press Briefing (Sept. 10, 2021), https://www.whitehouse.gov/briefing-room/press-briefings/2021/09/10/press-briefing-by-press-secretary-jen-psaki-september-10-2021/ (accessed Oct. 20, 2021)

[3] Jen Psaki, White House Press Briefing (Sept. 20, 2021), https://www.whitehouse.gov/briefing-room/press-briefings/2021/09/20/press-briefing-by-press-secretary-jen-psaki-september-20-2021/ (accessed Oct. 20, 2021); *see also* Rogers Decl. Ex. A.

[4] *Id.*

authorized aliens from all of its vaccination mandates, while imposing an array of unprecedented, overlapping, and extensive mandates that fall almost exclusively upon U.S. citizens and lawful permanent residents. This preference for unauthorized aliens violates the Equal Protection Clause.

There is no justification under a strict scrutiny standard that could possibly justify vaccine mandates for citizens but not for aliens. And even if a rational basis standard applied, there still would be no valid justification for affording more favorable treatment to aliens than citizens. Plaintiffs are thus likely to succeed on the merits of their Equal Protection challenge to the Contractor and Employee Mandates.

B. The Contractor Mandate Violates The Procurement Act

EO 14042 cites the Procurement Act as the basis for its authority for the Contractor Mandate. But the Procurement Act confers no such authority. Congress adopted the Act in 1949 with the stated statutory purpose "to provide the Federal Government with an economical and efficient system for" procurement. 40 U.S.C. § 101. The Procurement Act states that "[t]he President may prescribe policies and directives that the President considers necessary to carry out" the Procurement Act, but requires that the President's "policies must be consistent with" the Act. 40 U.S.C. § 121(a).

Defendants' attempts to use the Procurement Act as justification for the Contractor Mandate is akin to the Federal government's recent attempt at using the Public Health Safety Act as justification for a far-reaching nationwide eviction moratorium. That attempt was swiftly struck down by the Supreme Court, which held that the text of the statute clearly did not grant such sweeping authority to the government and that "[e]ven if the text were ambiguous, the sheer scope of the CDC's claimed authority ... would counsel against the Government's interpretation. We expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance.'" *Alabama Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021). (quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)). Particularly relevant was that "[t]he moratorium intrude[d] into an area that is the particular domain of state law." *Id.* That is just so here,

intruding upon the State's traditional police powers over public health issues. The Supreme Court's "precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property." *Id.* The Procurement Act has no such language.

Congress enacted the Procurement Act to ensure the efficient purchase of goods and services, not to empower the Executive Branch to engage in far-reaching public health programs that are either unrelated to—or outright contrary to—the explicit efficiency rationale. "The text of the Procurement Act and its legislative history indicate that Congress was troubled by the absence of central management that could coordinate the entire government's procurement activities in an efficient and economical manner. The legislative history is replete with references for the need to have an 'efficient, businesslike system of property management.'" *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1333 (D.C. Cir. 1996) (citation omitted)). The Procurement Act does not give the President "unlimited authority to make decisions he believes will likely result in savings to the government.... The procurement power must be exercised consistently with the structure and purposes of the statute that delegates that power." *Id*. at 1330–31 (citation omitted).

Federal government spending typically accounts for about a quarter of the U.S. economy. Since the COVID-19 pandemic, that share has likely increased substantially. *See* FAC ¶85. Congress did *not* enact the Procurement Act to give the President sweeping power to issue decrees over one-quarter of the economy, like a Politburo ordering citizens to obey or starve. Nowhere in the Procurement Act is there any mention of vaccination, or even of a disease prevention objective of any kind. The Contractor Mandate could only be held permissible under an extraordinarily expansive interpretation of the Procurement Act that would give the government "a breathtaking amount of authority" over the economy, thus making it "hard to see what measures this interpretation would place outside [Defendants'] reach." *Alabama Realtors*, 141 S. Ct. at 2489.

Just as in *Alabama Realtors*, the statute confers no such authority. The Procurement Act is "a wafer-thin reed on which to rest such sweeping power." *Id.* "[O]ur system does

not permit agencies to act unlawfully even in pursuit of desirable ends," even in the face of "a strong [public] interest in combating the spread of the COVID–19 Delta variant." *Id.*at 2490.

1. There Is No Nexus Between The Contractor Mandate And Procurement

The Supreme Court's test for whether Executive Branch procurement requirements are permissible under the Procurement Act is whether there is a "nexus" with "some delegation of the requisite legislative authority by Congress ... reasonably within the contemplation of that grant of authority." *Chrysler Corp. v. Brown*, 441 U.S. 281, 304, 306 (1979). In *Chrysler*, a corporation sued to prevent disclosure of information it had given to the government about its employment of women and minorities. The disclosures were required by regulations adopted by the Department of Labor pursuant to an EO that claimed to be authorized by civil rights statutes and by the Procurement Act. The Court struck down the regulations because there was no "nexus" between the regulations and statutes involved. The Court explained that "it is clear that when it enacted these statutes, Congress was not concerned with public disclosure of trade secrets or confidential business information, and, unless we were to hold that any federal statute that implies some authority to collect information must grant *legislative* authority to disclose that information to the public, it is simply not possible to find in these statutes a delegation of the disclosure authority asserted by the" government. *Id*. at 306 (emphasis in original).

The Court went on to explain that for there to be a valid "grant of legislative authority to a federal agency" to promulgate regulations, "the reviewing court [must] reasonably be able to conclude that the grant of authority contemplates the regulations issued." *Id*. at 308. Even when the D.C. Circuit upheld a broad Carter Administration mandate imposing wage and price controls under the Procurement Act, it emphasized "the importance to our ruling today of the nexus between the wage and price standards and likely savings to the Government. As is clear from the terms and history of the [Procurement Act] and from experience with its implementation, our decision today *does*

not write a blank check for the President to fill in at his will." *AFL-CIO v. Kahn*, 618 F.2d 784, 793 (D.C. Cir. 1979) (en banc) (emphasis added).

Particularly relevant to the *Chrysler* Court's determination that there was no "nexus" to the Procurement Act was that "nowhere in the Act is there a specific reference to employment discrimination." *Chrysler*, 441 U.S. at 306 n.34. So too here—nowhere in the Procurement Act is there a specific reference to vaccination or even to disease prevention more generally. There is thus no authority to impose far-reaching mandates on millions of individuals[5] in an attempt to achieve broad public health social objectives.

The Contractor Mandate is on even shakier ground in its extension to subcontractors, as subcontractors have "no direct connection to federal procurement." *Liberty Mut. Ins. Co. v. Friedman*, 639 F.2d 164, 171 (4th Cir. 1981). At issue in *Liberty Mutual* was EO 11246, which imposed affirmative action racial mandates on government contractors and subcontractors. The Social Security Administration claimed that Liberty Mutual Insurance Company was subject to the EO's requirements because it provided workers' compensation insurance to federal contractors and thus qualified as a subcontractor under Department of Labor regulations adopted pursuant to the EO. Applying the Supreme Court's holding in *Chrysler*, the Fourth Circuit rejected the government's argument that the Procurement Act conferred on the President the authority to impose affirmative action mandates on subcontractors, holding "that application of the Executive Order to plaintiffs is not reasonably within the contemplation of any statutory grant of authority." *Liberty Mut. Ins. Co.*, 639 F.2d at 168.

The Contractor Mandate as applied to direct contractors also has no nexus with any delegation of legislative authority by Congress. Defendants claim as their purported justification for the Contractor Mandates that COVID-19 vaccination of contractors and subcontractors will reduce "absenteeism and decreas[e] labor costs for contractors and subcontractors working on or in connection with a Federal Government contract." 86 Fed.

[5] Rogers Decl. Ex. D (characterizing EO 14042 as plan "[r]equiring [v]accinations for ... [m]illions of [c]ontractors")

Reg. 53,691, 53,692 (Sept. 28, 2021). Defendants, however, have made no administrative "findings that suggest what percentage of the total price of federal contracts may be attributed" to the effect of COVID-19 vaccination on reduced absenteeism and labor costs. *Liberty Mut. Ins. Co*., 639 F.2d at 171. Indeed, Defendants have not even made any specific administrative findings at all about how COVID-19 vaccination might affect absenteeism and labor costs, let alone whether any costs would translate into changed Federal government contract costs.

Apart from making a bare allegation unsupported by any facts, Defendants failed to even make specific administrative findings that establish whether COVID-19 vaccination would increase or decrease absenteeism and labor costs. When the Executive Branch tries to impose procurement requirements targeted at achieving "social objectives," yet fails to make specific quantitative factual findings that demonstrate a nexus with procurement, "the connection ... is simply too attenuated to allow a reviewing court to find the requisite connection between procurement costs and social objectives," and the procurement policy is unlawful under the Procurement Act. *Id*.

The heavy-handed and illogical requirements of the SFWTF contractor guidance illustrate just how attenuated the connection is between the Contractor Mandate and economy and efficiency in procurement. For example, the SFWTF contractor guidance requires contractors to impose vaccine mandates on employees who are not even working on federal contracts. Rogers Decl. Ex. H at 3-4 ("[t]his includes employees of covered contractors who are not themselves working on or in connection with a covered contract"). The SFWTF contractor guidance also explicitly states that its vaccine mandate applies in a number of situations where solid science,[6] basic logic,[7] and even the CDC's own guidance,[8]

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[6] Rogers Decl. Ex. E ("This study demonstrated that natural immunity confers longer lasting and stronger protection against infection, symptomatic disease and hospitalization caused by the Delta variant of SARS-CoV-2, compared to the BNT162b2 two-dose vaccine-induced immunity."); Rogers Decl. Ex. F ("Here, we evaluate 254 COVID-19 patients longitudinally up to 8 months and find durable broad-based immune responses.").

[7] It is impossible for employees working 100% remotely to infect co-workers.

[8] *E.g.*, Rogers Decl. Ex. G ("COVID-19 spreads more easily indoors than outdoors.... You are less likely to be exposed to COVID-19 when you [a]ttend outdoor activities.");

has established that the risk of COVID-19 infection or transmission to other contractor employees is exceedingly low, or even impossible, such as to 1) persons who have already been infected with COVID-19 and thus have natural immunity, *id*. at 10; 2) workplace locations that are outdoors, i*d*.; and 3) contractor employees who are working remotely full time, *id*. at 11.

As in *Liberty Mutual*, so too here: the connection between COVID-19 vaccination rates "and any increase in the cost of federal contracts that could be attributed to" vaccination "is simply too attenuated," and there is thus no nexus with economic and efficient procurement. *Liberty Mut. Ins. Co*, 639 F.2d at 171. The Procurement Act is about ensuring the government's efficient and economic acquisition of goods and services, not about achieving broad social public health objectives. The Procurement Act does not confer on Defendants the power to impose COVID-19 vaccination mandates on contractors and subcontractors. Accordingly, the Contractor Mandate is unlawful.

2. Defendants Lack Authority To Impose The Contractor Mandate Under The Major Questions Doctrine

Courts will not assume that Congress has assigned to the Executive Branch questions of "deep economic and political significance" unless Congress has done so expressly. *King v. Burwell*, 576 U.S. 473, 486 (2015); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000). By Defendants' own estimates, the Contractor Mandate will affect "millions" of individuals.[9] Indeed, on average, federal government spending accounts for 20% to 25% of the U.S. economy, and has been even higher during the COVID-19 pandemic. Defendants' vaccine mandates will thus have deep economic and political significance on a significant portion of the economy.

Congress did not intend, nor does the Procurement Act allow, the President to exercise such sweeping authority under the pretext of efficient procurement. In the absence of clear and explicit congressional authorization, the Procurement Act's purpose of achieving economy and efficiency does not grant the federal government power to usurp

[9] Rogers Decl. Ex. D at 3 (characterizing EO 14042 as a plan "[r]equiring [v]accinations for ... [m]illions of [c]ontractors").

the States' traditional police power over public health and vaccination requirements (to the extent any such power exists).

3. The Contractor Mandate Is Unlawful Because It Conflicts With Anther Federal Statute

"The President's authority [under the Procurement Act] to pursue 'efficient and economic' procurement" does not extend to EOs that "conflict with another federal statute." *Chamber of Commerce*, 74 F.3d at 1333.

The Contractor Mandate accordingly fails because it conflicts with the EUA Statute, 21 U.S.C. § 360bbb-3, under which the vaccines at issue are available. Because the EUA statute mandates that individuals have the right to refuse EUA-approved product and the Contractor Mandate denies them that choice, it is unlawful.[10]

C. The Contractor Mandate Is Unlawful Under The Procurement Policy Act

The Office of Federal Procurement Policy Act ("Procurement Policy Act") requires that a procurement "policy, regulation, procedure, or form (including an amendment or modification thereto) may not take effect until 60 days after it is published for public comment in the Federal Register ... if it--(A) relates to the expenditure of appropriated funds; and (B)(i) has a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure, or form; or (ii) has a significant cost or administrative impact on contractors or offerors." 41 U.S.C. § 1707(a). "[T]he language of [§ 1707] is broad" and applies not only to Federal Acquisition Regulations, but to all procurement policies, regulations, procedures, and forms "'on down to the lowest level.'" *Munitions Carriers Conf., Inc. v. United States*, 932 F. Supp. 334, 338 (D.D.C. 1996), *rev'd on other grounds*, 147 F.3d 1027 (D.C. Cir. 1998).

The notice-and-comment requirement of § 1707 may only be "waived by the officer authorized to issue a procurement policy, regulation, procedure, or form if urgent and compelling circumstances make compliance with the requirements impracticable." 41

[10] As explained below at 22-23, while the FDA has granted approval to the Pfizer Comirnaty vaccine, the FDA-approved version of the vaccine is not yet available, and the only version of the Pfizer vaccine available for administration to individuals is the version approved and labeled under the EUA and to which the EUA statute therefore still applies.

U.S.C. § 1707(d). And even when Section 1707 has been waived, the Procurement Policy Act implementing regulations require that revisions subject to a waiver "shall be issued on a temporary basis and shall provide for at least a 30 day public comment period." 48 C.F.R. § 1.501-3(b).

The SFWTF guidance qualifies both as a "policy" and a "procedure" under the Procurement Policy Act. The Act does not define the terms policy, regulation, procedure, or form, and "in the absence of a statutory definition [courts] 'start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.'" *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 47 (1989) (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)). Black's Law Dictionary defines "policy" to mean "[a] standard course of action that has been officially established by an organization," and it defines "procedure" to mean "[a] specific method or course of action." *Policy* and *Procedure*, *Black's Law Dictionary* (11th ed. 2019). The SFWTF Contractor Mandate establishes an official standard course of action and specific methods for imposing COVID-19 vaccine mandates. The SFWTF guidance therefore qualifies as both a procurement "policy" and "procedure," under the ordinary meanings of those terms.

Furthermore, the requirements of Section 1707 apply to the SFWTF contractor guidance because it relates to the expenditure of appropriated funds, has a significant effect beyond internal operating procedures, and imposes significant costs and administrative impacts on contractors and offerors. As discussed above, by their own estimates, Defendants expect that the Contractor Mandate will affect "millions" of individuals. The Procurement Policy Act implementing regulations confirm that the SFWTF guidance is the type of procurement change to which Section 1707 applies. The regulations explain that the types of changes that do not require notice and comment are "editorial, stylistic, or other revisions that have no impact on the basic meaning of the coverage being revised." 48 C.F.R. § 1.501-1. But the SFWTF guidance is nothing of the sort.

Defendants never published the SFWTF contractor guidance "for public comment in the Federal Register," as required by Section 1707. Instead, they released the guidance

only on the SFWTF website.[11] The only Federal Register publication related to the SFWTF contractor guidance was a short notice published on September 28, 2021 in which Defendant Young made the conclusory contention that she had "determined that compliance by Federal contractors and subcontractors with the COVID–19-workplace safety protocols detailed in [the SFWTF] guidance 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." 86 Fed. Reg. 53,691, 53,692 (Sept. 28, 2021). Ms. Young did not cite to any information or evidence that would support the claims in her determination, nor did she explain how she reached her conclusion. *See id.* Furthermore, Ms. Young's notice was not open to public comment. Nor did she claim there were any urgent and compelling circumstances preventing compliance with notice-and-comment requirements or justifying a 41 U.S.C. § 1707(d) waiver of the requirement that procurement policies not take effect for 60 days.

Because the SFWTF Contractor Guidance was never published for public comment in the Federal Register, and because Defendants never waived the application of Section 1707, the SFWTF is unlawful and "may not take effect." Plaintiffs are therefore likely to succeed on the merits of their Procurement Policy Act challenge.

D. The Contractor Mandate Is Unlawful Under The Emergency Use Authorization Statute

Under 21 U.S.C. § 360bbb-3, the Secretary of Health and Human Services "may authorize the introduction ... of a drug, device, or biological product intended for use in an actual or potential emergency" before such products receive full FDA approval. Such Emergency Use Authorizations ("EUAs") are subject to strict requirements, including that "individuals to whom the product is administered are informed ... of the *option to accept or refuse administration of the product*." 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(III) (emphasis added).

The SFWTF contractors guidance states that "people are considered fully

[11] *See* Rogers Decl. Ex. H.

vaccinated if they have received COVID-19 vaccines currently approved or authorized for emergency use by the U.S. Food and Drug Administration (Pfizer-BioNTech, Moderna, and Johnson & Johnson [J&J]/Janssen COVID-19 vaccines)." Rogers Decl. Ex. H at 4. The Moderna and Janssen vaccines are still only available under EUAs. *See* Rogers Decl. Exs. I, J. The part of the Contractor Mandate that requires administration of the Moderna or the Janssen vaccine is therefore unlawful under 21 U.S.C. § 360bbb-3 because it does not afford to contractors and subcontractors a meaningful opportunity to refuse them.

On August 23, 2021, the FDA approved the Biologics License Application ("BLA") for the Comirnaty vaccine jointly made by Pfizer and BioNTech. Rogers Decl. Ex. K. But there is no indication when the Comirnaty vaccine will become available, or indeed, when production of it would even begin. An NIH notice from September 13, 2021 states that "[a]t present, Pfizer does not plan to produce any [Comirnaty] product with these new NDCs and labels over the next few months while EUA authorized product is still available and being made available for U.S. distribution."[12] On September 22, 2021, the FDA issued an updated EUA letter for the prior Pfizer-BioNTech COVID-19 that explained that while "COMIRNATY (COVID-19 Vaccine, mRNA) is now licensed for individuals 16 years of age and older," "[t]here remains, however, a significant amount of Pfizer-BioNTech COVID-19 Vaccine that was manufactured and labeled in accordance with this emergency use authorization. The authorization remains in place with respect to the Pfizer-BioNTech COVID-19 Vaccine." Rogers Decl. Ex. L. The FDA-approved Comirnaty vaccine is not yet available in the United States. The only Pfizer-BioNTech vaccine currently available is of the prior EUA version of the vaccine.

The same FDA letter also acknowledges that the "licensed vaccine" and "the EUA-authorized vaccine ... are legally distinct...." *Id*. at 3 n.10.[13] The legal distinctions between

[12] Rogers Decl. Ex. V.

[13] And while the letter also claims that the Pfizer-BioNTech EUA vaccine and Comirnaty have "the same formulation," *id.*, the FDA released together with its Comirnaty approval a document titled "Summary Basis for Regulatory Action" that acknowledges that there is at least one compositional difference: as opposed to the EUA version of the vaccine, "COMIRNATY includes the presence of optimized codons to improve antigen

the two versions of the Pfizer-BioNTech vaccine are relevant here, because the requirements of 21 U.S.C. § 360bbb-3 still apply to the EUA version of the vaccine. Defendants are therefore required to afford to all individuals subject to the Contractor and Employee Mandates the "option to ... refuse administration of the product."

1. Legislative History And Agency Interpretation Establish That The EUA Statute Creates A Right To Refuse EUA Products

Beyond just the clear statutory language requiring that individuals have the "option to ... refuse," the legislative history and agency interpretation also establish that the EUA statute creates a right to refuse EUA products.

When Congress adopted the EUA statute, it interpreted the statute as conferring "the *right* ... to refuse administration of a product." H.R. Conf. Rep. No. 108-354, at 782 (2003) (emphasis added). The FDA's interpretation of the statute also agrees that the EUA statute means that "[r]ecipients *must have an opportunity to accept or refuse the EUA product*" and that this right to refuse can only be waived if the President makes a specific determination in writing, and only with respect to members of the armed forces.[14]

A specific statute, 10 U.S.C. § 1107a, gives the President the power to waive the right to refuse of members of the armed forces. He may waive their right, however, only if

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expression." Rogers Decl. Ex. M at 14.

[14] FDA, *Guidance Emergency Use Authorization of Medical Products*, 2007 WL 2319112, at *15 and n.16 (acknowledging that "Congress authorized the President to waive, under certain circumstances, the option for members of the armed forces to accept or refuse administration of an EUA product") (emphasis added); *see also*, FDA, *Emergency Use Authorization of Medical Products and Related Authorities: Guidance for Industry and Other Stakeholders*, OMB Control No. 0910-0595 at 24 n.46, 2017 WL 345587, at *31 n.46 (Jan. 2017) (characterizing the requirements of 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(III) as "the option ... to accept or refuse administration of an EUA product" and explaining that "[t]he President may under certain circumstances waive the option for members of the armed forces"); 10 U.S.C. § 1107a(a) (stating that the requirements of 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(III), as applied to the armed forces, "may be waived only by the President only if the President determines, in writing, that complying with such requirement is not in the interests of national security"); *Authorization of Emergency Use of Anthrax Vaccine Adsorbed for Prevention of Inhalation Anthrax by Individuals at Heightened Risk of Exposure Due to Attack With Anthrax; Availability*, 70 Fed. Reg. 5452-02, 5455 (Feb. 2, 2005) (creating EUA for anthrax vaccine for members of the armed forces, and stating that "[i]ndividuals who refuse anthrax vaccination will not be punished").

he makes a specific determination in writing "that complying with such requirement is not in the interests of national security." 10 U.S.C. § 1107a(a)(1). A parallel statute, 10 U.S.C. § 1107, imposes similar requirements for investigational drugs. That Congress adopted these statutes makes clear that Congress meant for the "option to ... refuse" to be just that. Otherwise, there would be no reason to enact statutes allowing the President to waive those requirements when national security so requires.

At least one District Court interpreting Section 1107 has held that its requirements meant that the military could not require that personnel receive an investigational vaccine "absent informed consent or a Presidential waiver." *Doe v. Rumsfeld*, 341 F. Supp. 2d 1, 16 (D.D.C. 2004), *modified sub nom. John Doe No. 1 v. Rumsfeld*, No. CIV.A. 03-707 (EGS), 2005 WL 774857 (D.D.C. Feb. 6, 2005), and *modified* 2005 WL 1124589 (D.D.C. Apr. 6, 2005); *see also John Doe No. 1 v. Rumsfeld*, No. 03-707, 2005 WL 774857, at *1 (D.D.C. Feb. 6, 2005) (ordering that administration to military personnel of experimental anthrax vaccine subject to an EUA was permitted, but only "on a *voluntary* basis, pursuant to the terms of a *lawful* emergency use authorization" (emphasis in original)). The FDA's own regulations specifically state that one of the elements of "informed consent" is that "participation [be] voluntary" and "that refusal to participate will involve *no penalty or loss of benefits* to which the subject is otherwise entitled." 21 C.F.R. § 50.25 (emphasis added).

The court's reasoning in *Doe* applies here. The only exception to the EUA statute's informed consent requirement is for members of the armed forces, and only when the President has issued a specific determination. Getting fired is a "penalty or loss of benefits to which the subject is otherwise entitled." 21 C.F.R. § 50.25. The mandates' coercive threat of "get the jab or get fired" means that individuals subject to the mandates do not have a meaningful "option to . . . refuse" the vaccine. The mandates are therefore unlawful under 21 U.S.C. § 360bbb-3.The Contractor (and Employee) Mandates thus violate the EUA statute.

2. Canons Of Construction Make Clear That The EUA Statute Creates A Right To Refuse EUA Products

The canons of construction confirm what Section 360bbb-3's text already makes plain. Two are critical here: avoidance of surplusage and *expressio unius*.

1) Avoidance Of Surplusage. "It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citation omitted). If Section 360bbb-3 were interpreted to allow Defendants to require that contractors fire employees who refuse to take EUA vaccines, it would render a nullity the statutory language providing for the "option to accept or refuse administration of the product."

2) Expressio Unius. Under the venerable *expressio unius* canon, "[t]he expression of one thing implies the exclusion of others." *Jennings v. Rodriguez*, 138 S.Ct. 830, 844 (2018). Thus, "[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." *Christensen v. Harris Cty.*, 529 U.S. 576, 583 (2000) (cleaned up) (citation omitted). As explained above, Congress provided for only one exception to the right to refuse: when the President makes a national security determination in writing and waives the requirement as it applies to members of the military. Application of the e*xpressio unius* canon is particularly appropriate here, as "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *TRW Inc.* 534 U.S. at 28 (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–617 (1980)). And there is no "evidence of a contrary legislative intent" here.

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

A. The Employee Mandate Violates The Equal Protection Clause And The EUA Statute

For all the same reasons discussed above with respect to the Contractor Mandate, the Employee Mandate also violates the Equal Protection Clause and the EUA statute. The

State is therefore likely to prevail on its challenges to the Employee Mandate on those bases as well. *Supra* at 10-12, 21-25.

B. The Federal Employee Mandate Violates Employees' Constitutional Right To Bodily Integrity And To Refuse Medical Procedures

"[E]ven in a pandemic, the Constitution cannot be put away and forgotten." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020). And under Supreme Court precedent, Defendants' Employee Mandate is an unconstitutional violation of the Due Process Clause and the right to bodily integrity.

"[A] competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment." *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 278 (1990). This right is rooted in "the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment." *Washington v. Glucksberg*, 521 U.S. 702, 725 (1997).

Closely related to the right to refuse unwanted medical treatment is the right to bodily integrity. "[D]ue process ... substantively protects a person's rights to be free from unjustified intrusions to the body, to refuse unwanted medical treatment and to receive sufficient information to exercise these rights intelligently." *Benson v. Terhune*, 304 F.3d 874, 884 (9th Cir. 2002) (citations omitted). Individuals thus have a "constitutional right to be free from state-imposed violations of bodily integrity." *Plumeau v. Sch. Dist. No. 40 Cty. of Yamhill*, 130 F.3d 432, 438 (9th Cir. 1997).

Defendants may not evade these constitutional requirements by claiming to be acting merely as an employer or participant in the market economy. Under the unconstitutional conditions doctrine, the government may not condition employment "on a basis that infringes [an employee's] constitutionally protected interests." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *see also*, *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606 (2013) ("[T]he unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them...."); *Koontz*, 570 U.S. at 604 ("[A]n overarching principle, known

as the unconstitutional conditions doctrine, ... vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up.") The unconstitutional conditions doctrine also applies to government contracts. *Bd. of Cty. Comm'rs, Wabaunsee Cty., Kan. v. Umbehr*, 518 U.S. 668, 678 (1996).

1. The Employee Mandate Is Subject To Strict Scrutiny

The "rights to determine one's own medical treatment[] and to refuse unwanted medical treatment" are fundamental rights, and individuals have "a fundamental liberty interest in medical autonomy." *Coons v. Lew*, 762 F.3d 891, 899 (9th Cir. 2014), *as amended* (Sept. 2, 2014) (cleaned up). Similarly, the right to "bodily integrity" is also "fundamental" and is "deeply rooted in this Nation's history and tradition." *Franceschi v. Yee*, 887 F.3d 927, 937 (9th Cir. 2018) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)). "Every violation of a person's bodily integrity is an invasion of his or her liberty. The invasion is particularly intrusive if it creates a substantial risk of permanent injury and premature death. Moreover, any such action is degrading if it overrides a competent person's choice to reject a specific form of medical treatment." *Washington v. Harper*, 494 U.S. 210, 237 (1990) (Stevens, J., concurring in part).

"Governmental actions that infringe upon a fundamental right receive strict scrutiny." *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1208 (9th Cir. 2005), *as amended by* 447 F.3d 1187 (9th Cir. 2006). Accordingly, the Employee Mandate is subject to strict scrutiny and must be struck down unless it "advance[s] a compelling state interest by the least restrictive means available." *Bernal v. Fainter*, 467 U.S. 216, 219 (1984).

In this case, the Employee Mandate fails the strict scrutiny test because it is both under- and over-inclusive. It is overinclusive because it applies to persons and situations where risk of infection is either extremely low or nonexistent such as to employees who are working remotely full-time and thus do not pose any risk of exposing other federal employees to COVID-19 and to federal employees who have already been infected with COVID-19 and thus already have natural immunity. *See supra* at 17. The Employee Mandate is under-inclusive because it does not apply to unauthorized aliens, even though

they can become infected with, and carriers of, COVID-19 just like U.S. citizens and lawful permanent residents. Indeed, the Employee Mandate's parameters are so irrational and arbitrary that they would fail even under a rational basis standard.

2. *Jacobson* Does Not Command A Different Result

Public debate about government vaccine mandates has often focused on the Supreme Court's decision in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905). That case, however, has little applicability here for four reasons.

First, it was addressing whether *States* have the power to impose vaccine mandates. The Court never considered the constitutionality of the Federal government imposing such mandates, which have always been considered as being part of the police power held exclusively by the States, to the extent that such power exists at all.

Second, *Jacobson* was decided 116 years ago, just months before the Court issued its decision in *Lochner v. New York*, 198 U.S. 45 (1905), which is now widely regarded as having been relegated to the ash heap of jurisprudential history. Needless to say, a lot has changed doctrinally since then. As one district court has explained:

> There is no question, therefore, that even under the plain language of *Jacobson*, a public health measure may violate the Constitution.
>
> *Jacobson* was decided over a century ago. Since that time, there has been substantial development of federal constitutional law in the area of civil liberties. As a general matter, this development has seen a jurisprudential shift whereby federal courts have given greater deference to considerations of individual liberties, as weighed against the exercise of state police powers. That century of development has seen the creation of tiered levels of scrutiny for constitutional claims. They did not exist when *Jacobson* was decided. While *Jacobson* has been cited by some modern courts as ongoing support for a broad, hands-off deference to state authorities in matters of health and safety, other courts and commentators have questioned whether it remains instructive in light of the intervening jurisprudential developments....
>
> The permissive *Jacobson* rule floats about in the air as a rubber stamp for all but the most absurd and egregious restrictions on constitutional liberties, free from the inconvenience of meaningful judicial review. This may help explain why the Supreme Court established the traditional tiers of scrutiny in the course of the 100 years since *Jacobson* was decided.

Cty. of Butler v. Wolf, 486 F. Supp. 3d 883, 897 (W.D. Pa. 2020) (cleaned up).

Third, as Justice Gorsuch recently explained, it is important to "consider the

different nature of the restriction" in *Jacobson* versus Defendants' mandate. *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 70 (Gorsuch, J., concurring). "In *Jacobson*, individuals could accept the vaccine, pay the fine [$5, or about $140 today], or identify a basis for exemption. The imposition on Mr. Jacobson's claimed right to bodily integrity, thus, was avoidable and relatively modest. It easily survived rational basis review, and might even have survived strict scrutiny, given the opt-outs available to certain objectors." *Id*. at 70-71. There is nothing "avoidable" or "relatively modest" about Defendants' draconian "get the jab or get fired" mandate. Curiously, the modest penalties involved in *Jacobson* were aimed at fighting a significantly more deadly disease: the death rate for smallpox infection is about 30%,[15] whereas the death rate for COVID-19 is about 0.15%,[16] which is 200 times lower than the death rate for smallpox.

Fourth, while *Jacobson* has never been formally abrogated, its doctrinal underpinnings have been cut out from under it. *Jacobson* was the only citation that Justice Holmes provided to support his now-infamous statement that "[t]hree generations of imbeciles are enough," in his opinion in *Buck v. Bell* upholding compulsory eugenics-based sterilization laws as both constitutional and socially desirable. 274 U.S. 200, 207 (1927). The full quotation in context shows how essential *Jacobson* was to Justice Holmes's opinion:

> The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. *Jacobson v. Massachusetts*, 197 U. S. 11, 25 S. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765. Three generations of imbeciles are enough.

Id. While *Buck v. Bell* has never been overruled, its inapplicability today is not seriously disputed. The same result should obtain for *Jacobson*.

III. All The Other Requirements For An Injunction Are Met

A. Plaintiffs Will Suffer Irreparable Harm If An Injunction Is Not Granted

Plaintiffs are likely to suffer irreparable harm in the absence of the requested preliminary injunction because the harms incurred from vaccination compelled by

[15] Rogers Decl. Ex. T.
[16] Rogers Decl. Ex. U.

Defendants' Mandates—including the potential for well-documented side-effects—cannot be remedied through monetary damages or other *post hoc* judicial relief. Irreparable harm exists where there is no adequate legal remedy to cure the harm. *See Arizona Recovery House Ass'n v. Arizona Dep't of Health Services*, 462 F. Supp. 3d 990, 997 (D. Ariz. 2020). "[A] regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220–21 (1994) (Scalia, J., concurring) (emphasis in original).

Moreover, "where parties cannot typically recover monetary damages flowing from their injury … economic harm can be considered irreparable" and "[i]ntangible injuries may also qualify as irreparable harm, because such injuries 'generally lack an adequate legal remedy.'" *East Bay*, 950 F.3d at 1280 (9th Cir. 2020) (quoting *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018) and *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014)). "The mere fact that the damages are susceptible to quantification, however, does not necessarily mean that a preliminary injunction will not lie." *Arizona Recovery Hous. Ass'n*, 462 F. Supp. 3d at 997; *City & County of San Francisco v. United States Citizenship & Immigration Services*, 981 F.3d 742, 762 (9th Cir. 2020) ("There is no dispute that such economic harm is sufficient to constitute irreparable harm because of the unavailability of monetary damages.") (citing *Azar*, 911 F.3d at 581).

Defendants' Mandates will also cause substantial harm to Arizona's economy and to Arizona businesses that will either have to fire valuable employees, or give up lucrative government contracts. The Society for Human Resource Management conducted a survey of businesses subject to Defendants' Mandates and found that "85 percent said the anticipated requirement will make retaining employees more difficult. Eighty-nine percent said some of their employees will quit due to the new mandate." FAC ¶83. Similarly, a leading trade publication covering the construction industry has predicted that more than 40% of employees in the construction industry, "when faced with the choice between the vaccine and their job with a federal contractor, will quit and go to work for another

contractor that does not have such a mandate" *Id*. This is particularly true as the U.S. economy is currently undergoing the so-called "Great Resignation," where employee attrition is already at extraordinary high levels.[17] Furthermore, the confusion and dislocation caused by mass layoffs and possible labor actions by affected employees threaten to cause substantial economic loss. The recent chaos faced by Southwest Airlines (*see infra* at 32-34) is an example of the widespread harm that Arizona faces.

Additionally, the State of Arizona will suffer direct economic loss. Since some Arizona state agencies are federal contractors, they face the loss of federal funds and contracts. And if State agencies were able to impose the mandate, it would force many State employees to resign or get fired. In the current tight labor market, this will cause significant harm to the State's operations through the loss of institutional knowledge and human capital. It will also cause the State to incur significant recruitment, on-boarding, and training costs to replace lost employees.

Similarly, Plaintiff Doe faces the heavy economic harm of losing his job, and thus his income.

B. The Balance Of Harms And Public Interest Support A Preliminary Injunction

The third and fourth *Winter* factors, the balance of the equities and public interest factors, also weigh in favor of Plaintiffs, and are properly considered together here. "When the Government is a party to a case, the balance of the equities and public interest factors merge." *Doe #1 v. Trump*, 984 F.3d 848, 861–62 (9th Cir. 2020) (internal quotation marks omitted). The "purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex.*, 451 U.S. at 395; *Doe #1 v. Trump*, 957 F.3d 1050, 1068 (9th Cir. 2020). Here, as "often happens … this purpose is furthered by the status quo," *Doe #1*, 957 F.3d at 1068, which in this case is the regime prior to September 9, under which there were no federal vaccination mandates (with Defendants themselves having admitted that the federal government

[17] Rogers Decl. Exs. W, X.

lacked authority to impose them, FAC ¶74).

In *Doe #1*, plaintiffs challenged a presidential proclamation affecting immigration policy and obtained a preliminary injunction. In reviewing the federal government's request for a stay of the injunction, the Ninth Circuit held that "it was the Proclamation that altered the *status quo*," rejecting the federal government's argument that the status quo is the "Proclamation as implemented." *Id.* The same analysis controls here as the discriminatory vaccine mandate presents the anomaly in the normal course of business.

And enjoining an unconstitutional and discriminatory mandate poses no harm to Defendants. They have no legitimate interest in the implementation of an unlawful policy. *See N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013) (recognizing that government officials "do[] not have an interest in the enforcement of an unconstitutional law"). In contrast, the public interest is served by an injunction because maintaining the status quo will prevent further disruption in the delivery of goods and services dependent upon industries already experiencing a labor shortage that will be predictably exacerbated by additional conditions on employment.

This has been prominently displayed in the case of Southwest Airlines, which had to cancel over 2000 flights in the past ten days as pilots refused to work in the wake of the company's vaccine mandate and the pilot's union's suit to stop it.[18] "The key driver for such cancellations is likely the COVID-19 vaccine mandate for its employees. Southwest employees are expressing their concern in droves by simultaneously and strategically using their sick time benefits."[19] What's more, estimates indicate that such a massive impact can be felt by the action of "just over 2 percent of their employees being unavailable. This illustrates how vulnerable the airline is to organized worker shortages even among a small group of potentially disgruntled employees."[20] And the company would not have put a vaccine requirement in place but for the Biden administration's mandate, as Southwest's

[18] Rogers Decl. Exs. N, O.
[19] Rogers Decl. Ex. O.
[20] *Id.*

CEO Gary Kelly has "never been in favor of corporations imposing that kind of a mandate. I'm not in favor of that, never have been."[21] In addition to being consumer airlines, "Southwest Airlines and American Airlines are among the carriers that are federal contractors and subject to" the Contractor Mandate, so their employees may not utilize "regular Covid testing as an alternative to a vaccination" as other large, non-contractor business employees may.[22] And while the airline claims weather and air traffic control issues as its official justification for the unprecedented disruption in service, it is telling that in response, it has dropped one of its major enforcement mechanisms for the mandate: forced unpaid leave.[23]

As other industries lose workers to the mandate, similar to Southwest's experience, the already-ongoing labor shortage will only deepen, impacting multiple industries and disrupting the supply chain.[24] This is predicted to have a significant impact on the availability of goods, increase consumer prices, and cost billions of dollars in trade, as workers pull out of critical industries or switch to jobs without such mandates:

> Biden's vaccine mandates are one reason that our ports, clogged with stacked-up ships waiting to disgorge needed goods, may not be freed up any time soon. There are currently an unprecedented 62 cargo ships awaiting unloading at the Los Angeles and Long Beach, Calif., docks. The back-up, said likely to disrupt $90 billion in trade and possibly cause holiday-season goods shortages, is partly because of the sheer volume of goods being pushed through the supply chains as stores and manufacturers try to dig out from the COVID-related shut-downs.[25]

This is why the pre-mandate status quo of vaccine choice should be maintained: Entering a preliminary injunction will put these ill effects on hold until the illegality of the mandate orders can be properly reviewed. Thus, the public interest will be served as employees can continue working with job security regardless of vaccine choice, allowing the economy

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[21] Rogers Decl. Ex. P.
[22] Rogers Decl. Ex. Q.
[23] *Id.*; Massie, n. 10, *supra*.
[24] Rogers Decl. Ex. R.
[25] *Id.*

and supply chains to continue recovering without disruptions caused by the predictable protest actions some have already seen.

IV. Plaintiffs Request a Temporary Restraining Order

Plaintiffs request that this Court immediately issue a temporary restraining order ("TRO") while this Motion for Preliminary Injunction is pending for the purpose "of preserving the status quo and preventing [the] irreparable harm" that is occurring and will continue to occur if Defendants' Mandates are allowed to remain in effect, as the next vaccination deadline is just days away. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers Local No. 70 of Alameda Cnty.*, 415 U.S. 423, 439 (1974).

"The standard for issuing a TRO is the same as that for issuing a preliminary injunction." *Spears v. Arizona Bd. of Regents*, 372 F. Supp. 3d 893, 926 (D. Ariz. 2019). As demonstrated above, Plaintiffs are likely to succeed on the merits, are likely to suffer irreparable harm in the absence of a TRO, and the balance of equities and public interest favor a TRO.

What makes a TRO especially necessary here are the proximity of vaccination deadlines to the filing of the Motion, many of which are likely to come and go before the preliminary injunction will be fully briefed, and the irreversibility of receiving a vaccine. The Contractor and Employee Mandates seek to coerce certain categories of individuals into undergoing an invasive medical procedure, an experience that cannot be undone. The deadline for federal contractors to receive their first vaccine is approaching as early as October 27, 2021, so time is of the essence. The deadline for federal employees to receive their first Pfizer or Moderna vaccine has already passed, but the November 8 deadline for them to receive their second dose (or their first and only dose of the Johnson & Johnson vaccine) is just weeks away. As a consequence of the mandate's timeline, Plaintiffs are suffering, and will continue to suffer, irreparable harm in the absence of a TRO. These factors and the disruption in business and travel linked to the application of federal COVID-19 vaccine mandates emphasize that the public interest favors a TRO because it

will preserve the status quo until this Motion for Preliminary Injunction can be reached by this Court.

CONCLUSION

Plaintiffs respectfully request that the Court issue a temporary restraining order and preliminary injunction enjoining enforcement of the Contractor and Employee Mandates.

RESPECTFULLY SUBMITTED this 22nd day of October, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of October, 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 parties are registered CM/ECF users and will be served by the CM/ECF system pursuant to the notice of electronic filing.

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