UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
Tampa Division

Case No._____

US FREEDOM FLYERS, an unincorporated membership association; HEALTH FREEDOM DEFENSE FUND, INC. a Wyoming not-for-profit corporation; KRIS OWEN BOWMAN, an individual, MICHAEL ALAN GOLDSTEIN, and individual; DAVID PANZERA, an individual; KATHLEEN GOFF, an individual; ALVIN REINAUER, an individual; and KEITH SUTTON, an individual,

Plaintiffs,

v.

The UNITED STATES OF AMERICA; JOSEPH R. BIDEN, JR., in his official capacity as President of the United States; The FEDERAL ACQUISITION REGULATORY COUNCIL; LESLEY A. FIELD, in her official capacity as Acting Administrator for Federal Procurement, Office of Management and Budget; JOHN M. TENAGLIA, in his official capacity as Principal Director of Defense Pricing and Contracting, Department of Defense and as a Member of the FAR Council; JEFFREY A. KOSES, in his official capacity as Senior Procurement Executive & Deputy Chief Acquisition Officer, General Services Administration and as a Member of the FAR Council; KARLA S. JACKSON, in her official capacity as a Member of the FAR Council; SHALANDA D. YOUNG, in her official capacity as acting Director of the Office of

Management and Budget; OFFICE OF MANAGEMENT AND BUDGET; the GENERAL SERVICES ADMINISTRATION; and ROBIN CARNAHAN, in her official capacity as General Services Administrator,

Defendants.
_____/

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

US Freedom Flyers ("USFF"), Health Freedom Defense Fund, Inc. ("HFDF"), Kris Owen Bowman, Michael Alan Goldstein, David Panzera, Kathleen Goff, Alvin Reinauer, and Keith Sutton (collectively, "Plaintiffs"), by their undersigned attorneys, sue the above-named Defendants, and state:

INTRODUCTION

1. The government of the United States has only limited powers, which are enumerated in the Constitution. To the extent that Congress enacts statutes to authorize certain actions by the Executive Branch, those actions are constrained by the relevant statutory frameworks as well as by the Constitution, itself. To paraphrase the words of Benjamin Franklin, we are still a republic, if we can keep it.

2. From the time that he was President-Elect, President Biden and his administration repeatedly denied any intention of enacting a nationwide vaccination mandate for COVID-19. In a press conference in July 2021, White House Press Secretary Jen Psaki stated: "Can we mandate vaccines across the country? No, that's

not a role that the federal government, I think, even has the power to make."[1]

3. Nevertheless, on September 9, 2021, Defendant Biden scolded the nation's unvaccinated population, "We've been patient, but our patience is wearing thin. . . ."

4. Purporting to rely on his authority to "prescribe policies and directives" under the Federal Property and Administrative Services Act of 1949 ("FPASA"), 40 U.S.C. § 121(a), and his power to delegate Presidential functions pursuant to 3 U.S.C. § 301, the President issued Executive Order 14042, which seeks for compel millions of private-sector employees who happen to be employed by businesses that contract with the federal government, or that sub-contract with government contractors, to be vaccinated against COVID-19 (the "EO"). The EO instructed the Safer Federal Workforce Task Force (the "Task Force") to prepare requirements for the vaccination of employees of federal contractors, among other mandates, subject to the approval of the Office of Budget and Management ("OMB").

5. In doing so, the President arrogated to himself general police powers over the lives of millions of people, which are contemplated by neither the Constitution nor any Act of Congress.

6. The mere fact of working for a company that does business with the federal government does not confer the power on the Executive Branch to dictate

[1] https://www.whitehouse.gov/briefing-room/press-briefings/2021/07/27/press-briefing-by-press-secretary-jen-psaki-july-27-2021/

one's personal affairs, and certainly not the power to mandate that one be administered a particular medical intervention. The FPASA, on which the President relies, does not grant such power, nor could it. As the Fifth Circuit recently noted, "[a] person's choice to remain unvaccinated and forgo regular testing is noneconomic activity" that is beyond the reach of the Commerce Clause. *BST Holdings, LLC, et al v. Occupational Safety and Health Admin., et al*, Case No. 21-60845, 2021 U.S. App. LEXIS 33698, *21 (5th Cir. November 12, 2021) (quoting *NFIB v. Sebelius*, 567 U.S. 519, 522 (Roberts, C.J., concurring); *id*. at 652-53 (Scalia, J., dissenting)).

7. Even if the Constitution did confer Congress with such broad powers, the FPASA section on which the President relies, 40 U.S.C. § 121(a), only authorizes the President to "prescribe policies and directives that the President considers necessary to carry out" FPASA. The authority to promulgate regulations, on the other hand, is vested in the OMB Administrator. *Id*. at § 121(c). Thus, the President purported to delegate a power that he does not have.

8. When Congress created the Federal Acquisition Regulatory Council (the "FAR Council") in 1988, 41 U.S.C. § 1302, it gave the FAR Council exclusive authority to issue "a single [g]overnment-wide procurement regulation." *Id*. at § 1303(a)(1)-(2). The Safer Federal Workforce Task Force Guidance, issued on September 24 and updated on November 10, 2021 (the "Updated Task Force

guidance"), and the Office of Management and Budget ("OMB") rule approving same, 86 Fed. Reg. 53,691 (the "Original OMB Rule"), Revised on November 16, 2021, 86 Fed. Reg. 63,418 (the "Revised OMB Rule"), usurps that exclusive regulatory function.

9. Even if the FPASA authorized such a radical usurpation, the Administration's requirements failed to adhere to basic administrative and procurement law.

10. The Original OMB Rule, 86 Fed. Reg. 53,691, contained no reasoning at all. The Revised OMB Rule, 86 Fed. Reg. 63,418, fails to explain how enforcing a mandate for vaccination of employees of federal contractors will benefit the government through improved economy and efficiency.

11. As well, the OMB Director claims that the Revised determination is not subject to review under the Administrative Procedure Act ("APA") because it is made pursuant to a Presidential delegation under 3 U.S.C. § 301. 86 Fed. Reg. at 63,423. But President cannot shield agency action from review under the APA by purporting to delegate powers that he does not have.

12. In addition to the FAR Council being the exclusive agency for promulgating rules and regulations regarding government procurement, 41 U.S.C. § 1707 requires that the FAR Council issue notice and allow comments for any "procurement policy, regulation, procedure, or form," subject only to a narrow

"urgent and compelling circumstances" exception.

13. The OMB Director asserts in the Revised OMB Rule that "[u]rgent and compelling circumstances justify waiving" the notice and comment requirement, 86 Fed. Reg. 63,423, pursuant to § 1707(d). In support, she merely recites the CDC's statistics regarding the COVID situation, to date. But as of November 2021, we have been living with COVID-19 for over 18 months, without any declaration of such urgent or compelling circumstances.

14. The OMB Director also asserts that the minimum delay for notice and comment required by § 1707(a)&(b) must be waived because otherwise the timeline for compliance would be stretched beyond the Task Force deadline of January 18, 2022 for full vaccination of contractor employees, and that maintaining this deadline is necessary to harmonize the Revised OMB Rule with the deadlines imposed by the Occupational Safety and Health Administration's ("OSHA") ETS and the Centers for Medicare and Medicaid Services' ("CMS") rule for healthcare workers. At best, this is circular reasoning, which presupposes that the Task Force guidance, OSHA ETS, and CMS rule already have the force and effect of law. Moreover, the OSHA ETS has been suspended following the Fifth Circuit's decision in *BTS Holdings, supra*.

15. At the same time that he entered the EO, the President directed the FAR Council to amend federal procurement regulations to include a contract clause requiring federal contractors to comply with the Task Force guidance, once

approved by OMB. 86 Fed. Reg. at 50,986. Here, the FAR Council also disregarded the notice and comment provisions of § 1707 by labeling the required contract clause as "guidance." Multiple agencies are including these requirements in their contracts, including contracts with Plaintiffs' employers.

16. These multiple layers of *ultra vires* acts, usurpations, and abuses of authority have all been entirely pretextual, in that the real driving force behind them has been to compel more of the population of the United States to become vaccinated – an objective that is beyond the reach of Congress, let alone the Executive Branch.

17. The purported goal of the EO is to "decrease worker absence, reduce labor costs, and improve efficiency of contractors and subcontractors . . . where they are performing work for the Federal Government," 86 Fed. Reg. at 50,985. But the President's EO, the First and Revised OMB Rules, and the original and Updated Task Force guidance will have the opposite of that effect by forcing the termination of thousands of essential workers from critical supply-chain and transportation industries that are already over-stressed.

18. The Biden Administration tacitly acknowledged the threat of its overreaching mandate to our supply chain and travel industries when it postponed the compliance deadline to January 2022. Not wanting to be the Grinch who stole Christmas, the administration tacitly conceded it is the Grinch stealing liberty.

19. As recently noted by the Fifth Circuit, "health agencies do not make

housing policy, and occupational safety administrations do not make health policy." *BST Holdings*, 2021 U.S. App. LEXIS 33698 at *26. So it must be said that federal procurement agencies do not make public health policy.

PARTIES

20. Plaintiff USFF is an unincorporated association of individuals who are employed in various sectors of the transportation and logistics industry, and who oppose vaccination mandates. *See* Declarations of Andrew Lipina, Christian Tougas, and Megan Raebel, attached as Composite Exhibit "A". The primary purpose of USFF is to advocate for its members' rights to make their own decisions about receiving medical treatment and care, and to defend those rights from governmental overreach. USFF's members include employees of "covered contractors" across the country, a number of whom reside in this District, and who are directly affected by the subject actions of Defendants. They accordingly could have brought suit in their own right, but have chosen to rely on USFF to represent their interests in this case. The interests at stake in this case are germane to USFF's purpose, and neither the claims asserted, nor the relief requested requires the individual participation of its members.

21. Plaintiff HFDF is, and at all times relevant hereto was, a not-for-profit public benefit Wyoming corporation with its headquarters in Sandpoint, Idaho. HFDF is a member organization that seeks to advocate for and educate the public on

the topics of medical choice, bodily autonomy, and self-determination, and that opposes laws and regulations that force individuals to submit to the administration of medical products, procedures, and devices against their will. *See* Declarations of Eric Mallow, Antonio S. DiStefano, and Teresa Ricketts attached as Composite Exhibit "B". HFDF's members include employees of "covered contractors" across the country, a number of whom reside in this District, and who are directly affected by the subject actions of Defendants. They accordingly could have brought suit in their own right, but have chosen to rely on HFDF to represent their interests in this case. The interests at stake in this case are germane to HFDF's purpose, and neither the claims asserted, nor the relief requested requires the individual participation of its members.

22. Plaintiff Kris Owen Bowman is a resident of Sarasota County, and is *sui juris*. Mr. Bowman is a pilot for American Airlines, which is regarded as a "covered contractor" under the EO, Task Force Guidance, and OMB Rule. He objects to being required to be vaccinated against his will, and objects to the unlawful actions of Defendants as set forth herein.

23. Michael Alan Goldstein is a resident of Pasco County, and is *sui juris*. Mr. Goldstein is a mechanic for American Airlines, and is thus regarded as a "covered contractor" employee under the EO, Task Force Guidance, and OMB Rule. Mr. Goldstein contracted COVID-19 and fully recovered in March 2021, and

therefore has natural immunity to the virus. Because Defendants refuse to recognize natural immunity in lieu of vaccination, Mr. Goldstein is still required to be vaccinated, against his will.

24. Plaintiff David Panzera is a resident of Hernando County, Florida, and is *sui juris*. Mr. Panzera is a former military pilot and has been a commercial airline pilot for JetBlue Airways since September 2017. Because JetBlue is a "covered contractor" under the EO, Task Force Guidance, and OMB Rule, Mr. Panzera is being required to be vaccinated against his will. Mr. Panzera objects to the unlawful actions of Defendants in this matter.

25. Plaintiff Kathleen Goff is a resident of Polk County, Florida and is *sui juris*. Ms. Goff is a flight attendant for American Airlines, and is therefore a "covered contractor" employee under the EO, Task Force Guidance, and OMB Rule and is therefore required to be vaccinated. Ms. Goff was diagnosed as having COVID-19 after she administered CPR to an unresponsive passenger. While a subsequent antibody test was negative, she cared for one of her teenagers when he had COVID without contracting the disease. She objects to being required to be vaccinated against her will as a result of Defendants' unlawful actions.

26. Plaintiff Alvin Reinauer is a resident of Pinellas County, Florida, and is *sui juris*. Mr. Reinauer is a pilot for Hawaiian Airlines, which is a "covered contractor" under the EO, Task Force Guidance, and OMB Rule. Hawaiian Airlines'

contract with the federal government is for the operation of a small number of dedicated aircraft, which Mr. Reinauer has had no involvement in operating. As such, he feels that the unlawful actions of Defendants have effectively conscripted him into the role of government servant. He has had severe allergic reactions to vaccines in the past (influenza B and anthrax), but was unable to obtain a medical exemption due to the restrictive mandate of Defendants.

27. Plaintiff Keith Sutton is a resident of Pinellas County, Florida and is *sui juris*. Mr. Sutton is a customer service agent for Allegiant Airlines, which is a "covered contractor" under the EO, Task Force Guidance, and OMB Rule. Mr. Sutton objects to the unlawful actions of Defendants, as set forth herein.

28. The term, "Plaintiffs," is used herein to include USFF, HFDF, and their affected members.

29. Defendant Joseph R. Biden, Jr. is the President of the United States, and issued the challenged Executive Order. 86 Fed. Reg. 50,985.

30. Defendant OMB is an agency within the Executive Office of the President. On November 10, 2021, OMB issued the Original OMB Rule and the Revised OMB Rule, the latter of which approved the Updated Task Force guidance. 86 Fed. Reg. at 63, 418.

31. Defendant FAR Council is responsible for "manag[ing], coordinat[ing], control[ling], and monitor[ing] the maintenance of, issuance of, and changes in the

Federal Acquisition Regulation." 41 U.S.C. § 1303(d).

32. Defendant General Services Administration ("GSA") is an agency of the Executive Branch, which has responsibility for managing federal property and procurement. GSA has contractual relationships with Plaintiffs' employers, and is and will continue to seek to impose Defendants' unlawful requirements on those companies and their respective employees.

33. Defendant Shalanda D. Young is the Acting Director of OMB. She is sued in her official capacity.

34. Defendants Lesley A. Field is the Acting Administrator for Federal Procurement for OMB and a Member of the FAR Council. She is sued in her official capacities as to both OMB and the FAR Council.

35. Defendant John M. Tenaglia is the Principal Director of Defense Pricing and Contracting, and a Member of the FAR Council. He is sued in his official capacities as to both the Department of Defense and the FAR Council.

36. Jeffrey A. Koses is the Senior Procurement Executive & Deputy Chief Acquisition Officer of GSA and a Member of the FAR Council. He is sued in his official capacities as to both GSA and the FAR Council.

37. Defendant Karla S. Jackson is the Assistant Procurement Administrator for the National Aeronautics and Space Administration and a Member of the FAR Council. She is sued in her official capacity as a Member of the FAR Council.

38. Defendant Robin Carnahan is the Administrator of GSA. She is sued in her official capacity.

JURISDICTION AND VENUE

39. The Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1346, 1361 and 5 U.S.C. §§ 702–03.

40. The Court is authorized to award the requested declaratory and injunctive relief under 5 U.S.C. § 706, 28 U.S.C. §§ 1361, 2201–02, the Constitution, and the Court's equitable powers.

41. Venue lies in this district pursuant to 28 U.S.C. § 1391(e)(1) because the individual Plaintiffs, as well as members of Plaintiffs USFF and HFDF, reside in this District and in this Division.

FACTUAL ALLEGATIONS AND LEGAL BACKGROUND

42. The government of the United States is widely recognized as "the world's single largest purchaser of goods and services, spending over $650 billion in contracts in fiscal year 2020 alone."[2] The government contracts with hundreds if not thousands of private sector companies, which in turn employ millions of people. If you work for any large provider of goods or non-personal services, there is a fair chance that you work for a government contractor, even if your work never touches

[2] https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/15/fact-sheet-biden-administration-roadmap-to-build-an-economy-resilient-to-climate-change-impacts/

on government contract matters. This is especially true in the travel and logistics industries.

43. Recognizing in the aftermath of World War II that the federal government needed a more efficient system for procurement and property management, Congress enacted the FPASA in order to "to provide the Federal Government with an economical and efficient system for," among other things, "[p]rocuring and supplying property and nonpersonal services, and performing related functions including contracting, inspection, storage, issue, setting specifications, identification and classification, transportation and traffic management, establishment of pools or systems for transportation of Government personnel and property by motor vehicle within specific areas." 40 U.S.C. § 101(1).

44. By way of example, GSA awards contracts to select airlines to provide travel to government agencies, pursuant to its "City Pair Program." GSA selected eight carriers to provide air passenger transportation services to federal government travelers for fiscal year 2022: American Airlines, Delta Air Lines, Hawaiian Airlines, JetBlue Airways, Silver Airways, Southwest Airlines and United Airlines.[3]

45. According to GSA's website, "[t]he City Pair Program offers the federal government a nearly 50 percent discount on comparable commercial fares for official

[3] https://www.govconwire.com/2021/07/gsa-selects-8-airlines-for-fy-2022-city-pair-program-contracts/

travel and provides agencies flexibility in booking air travel." GSA "considers the availability of nonstop service, flight availability, total number of flights, price of service and average elapsed flight time as factors when awarding contracts to airlines through the City Pair program."[4]

46. In other words, GSA's goal is to use economies of scale to obtain predictable and deeply-discounted airfare prices for government travel. Nowhere is it mentioned that GSA considers the health of employees in evaluating whether to award a contract.

47. Many other companies are selected by GSA to provide freight, air cargo, and other logistical services to the U.S. government.

48. Congress authorized the President to "prescribe policies and directives that the President considers necessary to carry out" the provisions of FPASA. 40 U.S.C. § 121(a). However, Congress only authorized GSA's Administrator to prescribe regulations with the force and effect of law. *Id*. at § 121(c).

49. Congress established the Federal Acquisition Regulation ("FAR") Council "to assist in the direction and coordination of Government-wide procurement policy and Government-wide procurement regulatory activities in the Federal Government." 41 U.S.C. § 1302(a). The makeup of the FAR Council includes

[4] *Id*.

the Administrator of General Services. *Id*. at § 1302(b).

50. Section 1303(a)(1) exclusively directs the FAR Council to "issue and maintain . . . a single Government-wide procurement regulation, to be known as the Federal Acquisition Regulation." The FAR Council is also directed to "[e]nsure consistent regulations." *Id*. at § 1303(a)(3). Neither the President nor any other agency is authorized to issue government-wide procurement regulations.

51. As well, any new procurement policy, regulation, procedure, or form is subject to a mandatory notice and comment period of 60 days. 41 U.S.C. § 1707(a)(1). A regulation can take effect earlier than 60 days "when there are compelling circumstances . . . , but the effective date may not be less than 30 days after the publication date." *Id*. at § 1707(a)(2). A waiver of the notice and comment period can only take effect "if urgent and compelling circumstances make compliance" with the notice and comment provisions impracticable. *Id*. at § 1707(d).

The Biden Administration's Federal Contractor Vaccine Mandate

52. Notwithstanding Press Secretary Psaki's assurance that mandating vaccination is "not the role of the federal government," the Biden Administration has repeatedly overreached in seeking to use agencies of the federal government to dictate public health policy. *See BST Holdings,* 2021 U.S. App. LEXIS 33698 (granting stay of OSHA's ETS mandate for employers of 100 persons or more); *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485 (2021) (striking down CDC's eviction moratorium);

Florida v. Becerra, Case No. 8:21-cv-839, 2021 U.S. Dist. LEXIS 114297, 2021 WL 2514138 (M.D. Fla. June 18, 2021) (striking down CDC's conditional sail order restricting the operations of cruise lines). This case presents another instance of the same pattern.

53. On September 9, 2021, while expressing his anger at and loss of patience with the unvaccinated population, the President announced three new administrative actions aimed at compelling much of the adult population, including Plaintiffs, to be vaccinated against COVID-19.[5] Among these was the EO at issue, here, commanding all Executive Branch employees and employees of federal contractors be vaccinated.[6]

54. On that same day, President Biden issued the EO at issue, here. 86 Fed. Reg. at 50,985. The EO purports to rely on FPASA, the Constitution, and the President's power under 3 U.S.C. § 301 to delegate his statutory authorities. *Id*. However, § 301 only allows the President to delegate functions that have been "vested" in him by law, or that are subject to his approval by law. Congress clearly vested the Administrator of OMB, not the President, with the authority to

[5] One of those initiatives – an OSHA rule mandating that private employers with 100 or more employees require that their employees be vaccinated or submit to weekly testing – has already been stayed by the Fifth Circuit. *See BST Holdings, supra*.

[6] The mandate with respect to federal employees is also being challenged in this Division. *See Health Freedom Defense Fund, Inc., et al v. Joseph R. Biden, et al*, Case No. 8:21-cv-2679, filed November 12, 2021.

promulgate regulations to carry out Title 40 of the U.S. Code. 40 U.S.C. § 121(c).

55. The EO nevertheless claims that it will "promote[] economy and efficiency in Federal procurement by ensuring that the parties that contract with the Federal Government provide adequate COVID-19 safeguards to their workers performing or in connection with a Federal Government contract or contract-like instrument. . . ." The EO proclaims that "[t]hese safeguards will decrease the spread of COVID-19, ***which will decrease worker absence, reduce labor costs, and improve the efficiency*** of contractors and subcontractors at sites where they are performing work for the Federal Government." 86 Fed. Reg. at 50,985 (emphasis added).

56. The EO directs all agencies to ensure that "contracts and contract-like instruments [covered by the EO] . . . include a clause [that specifies] that the contractor or subcontractor shall, for the duration of the contract, comply with all guidance for contractor or subcontractor workplace locations published by the "Safer Federal Workforce Task Force," subject to that guidance being approved by the OMB Director. *Id*.

57. The EO further instructs the Task Force to develop this guidance and directs the OMB Director to determine whether the Task Force guidance "will promote economy and efficiency in Federal contracting. . . ." 86 Fed. Reg. 50,985-86. If the OMB Director makes this determination and approves the Task Force guidance, agencies are to include the clause in covered contracts.

58. The EO instructs the FAR Council to "amend the [FAR] to provide for inclusion in Federal procurement solicitations and contracts subject to" the EO the contract language set forth in the EO, and further directs agencies to seek to implement the clause in contracts not covered by the FAR.

59. The Task Force issued its initial guidance on September 24, 2021,[7] then issued an "Updated" guidance on November 10, 2021.[8] Both mandate that "Federal contractors and subcontractors with a covered contract be required to conform" to "safety protocols," including "COVID-19 vaccination of covered contractor employees, except in limited circumstances where an employee is legally entitled to an accommodation." *See* Updated Task Force Guidance. The Updated guidance also mandates compliance "related to masking and physical distancing while in covered contractor workplaces," and requires covered contractors to designate "a person or persons to coordinate COVID-19 workplace safety efforts at covered contractor workplaces." *Id*. A "Frequently Asked Questions" page states that recovery from COVID-19 does not satisfy the vaccination requirement.[9]

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[7] *See* Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors: https://www.saferfederalworkforce.gov/downloads/Guidance%20for%20Federal%20Contractors_Safer%20Federal%20Workforce%20Task%20Force_20211110.pdf

[8] Updated Task Force Guidance dated November 10, 2021 available at: https://www.saferfederalworkforce.gov/downloads/Guidance%20for%20Federal%20Contractors_Safer%20Federal%20Workforce%20Task%20Force_20211110.pdf

[9] https://www.saferfederalworkforce.gov/faq/contractors/

60. While characterized as "guidance," the Updated guidance is expressed as a mandate: "Covered contractors *shall* adhere to the requirements of this Guidance." (emphasis added).

61. The original Task Force guidance set a deadline of December 8, 2021 for all covered contractor employees to be fully vaccinated. Upon realizing that terminating thousands of transportation and logistics employees would exacerbate the ongoing logistics and transportation crisis going into the Holidays, this deadline was extended to January, 18, 2022 in the Updated guidance.[10] Because the Updated Task Force guidance defines "fully vaccinated" as being two weeks after an employee has received the second dose of a two-dose series, the effective deadline to receive a second dose is January 4, 2022.

62. On September 28, 2021, the OMB Director published a notice of determination regarding the Task Force guidance, resulting in the Original OMB Rule. 86 Fed. Reg. 53,691. Without offering any analysis or reasoning, the Director made the conclusory pronouncement that, based on her review of the Task Force guidance, and exercising the President's delegated authority, she had determined that "compliance by Federal contractors and subcontractors with" the Task Force guidance "will improve economy and efficiency by ***reducing absenteeism and***

[10] *See* Updated Guidance dated November 10, 2021: https://www.saferfederalworkforce.gov/downloads/Guidance%20for%20Federal%20Contractors_Safer%20Federal%20Workforce%20Task%20Force_20211110.pdf

decreasing labor costs for" federal government contractors and subcontractors. 86 Fed. Reg. at 53,692 (emphasis added).

63. Apart from the fact that this conclusory pronouncement usurped the exclusivity provision of § 1303, and that it was based on an *ultra vires* exercise of Presidential authority, the OMB Rule was patently deficient under the APA in that it reflected no reasoning at all.

64. The Original OMB Rule also did not allow for any notice and comments, but at the same time did not even deign to invoke the "urgent and compelling circumstances" provision of the FPASA that would allow waiver of the mandatory notice and comment period. *See* 41 U.S.C. § 1707(d). Even if the Director had invoked that provision, no such "urgent and compelling circumstances" existed. By then, we had been living with the COVID-19 pandemic for some 18 months, without any declaration from either OMB or the FAR Council that urgent and compelling circumstances existed.

65. On September 30, 2021, the FAR Council—purporting to comply with theEO—issued its "guidance" entitled "Issuance of Agency Deviations to Implement Executive Order 14042." *See* FAR Council guidance.[11] In its guidance, the FAR Council "encourage[s] [agencies] to make . . . deviations" to the FAR, which should

[11] https://www.whitehouse.gov/wp-content/uploads/2021/09/FAR-Council-Guidance-on-Agency-Issuance-of-Deviations-to-Implement-EO-14042.pdf

be "effective until the FAR is amended." *Id.* at 3.

66. A deviation clause is a clause that is inconsistent with the FAR. FAR § 1.401. The FAR prescribes procedures for both individual deviations and class deviations. *Id.* § 1.403–04. Deviations are not an appropriate manner to implement a government-wide procurement policy, and "[w]hen an agency knows that it will require a class deviation on a permanent basis, it should propose a FAR revision." *Id.* § 1.404.

67. The draft contract clause cites the EO as the sole authority for these deviations and contains little substantive content other than requiring compliance with the Task Force guidance, even if that guidance is amended during performance of the contract. FAR Council guidance at 3–5.

68. The FAR Council guidance "reminds" agencies that they are required to include an implementing clause in new contracts and new solicitations, as well as extensions or renewals of existing contracts awarded on or after October 15 and options on existing contracts exercised on or after October 15. *Id.* at 2.

The State of Florida Files Suit, and Defendants Attempt a Clean-Up

69. On October 28, 2021, the State of Florida filed suit in *State of Florida v. Nelson, et al*, Case No. 8:21-2524-SDM-TGW, in which the State pointed out the illegality of Defendants' above-described actions.

70. The Task Force published its Updated guidance on November 10, 2021,

and OMB Director Revised her determination, which was published on November 16, 2021. 86 Fed. Reg. 63,418 (the "Revised OMB Rule").

71. Tacitly recognizing the problems raised with respect to the Original OMB Rule by the State of Florida in *Nelson*, the Revised OMB Rule provides greater detail, but fails to cure the original rule's fundamental flaws. It is divided into three parts: Part I, which simply recites the language of the Updated Task Force guidance, 86 Fed. Reg. at 63,418-21; Part II, which purports to engage in an "Economy-and-Efficiency Analysis," in other words, an attempt to justify converting the Task Force guidance into a government-wide rule, *id*. at 63,421-23; and Part III, which addresses the Director's legal and procedural justifications. *Id*. at 63,423-25.

The OMB's Economy-and-Efficiency Analysis Fails to Articulate a Government Interest in Requiring Employees of Government Contractors to Be Vaccinated

72. In Part II of the Revised OMB Rule, the Director proposes a conclusory thesis that reducing COVID-19 infection by requiring vaccination, masking, and physical distancing of federal contractor employees will reduce costs for employers, and that this will somehow promote economy and efficiency in federal procurement. 86 Fed. Reg. at 63421-3. However, the Director fails to articulate any objective support for this proposition.

73. First, the Director asserts that "[t]he primary goal of the safety protocols [described in the Task Force guidance] is to reduce the spread of COVID-19 among contractor employees." 86 Fed. Reg. at 63,421. This statement simply belies the

pretextual nature of the administration's actions while failing to explain how reducing the spread of COVID-19 among contractor employees would benefit the government.

74. The Director claims that workers who are unable to work, either due to being sick or having to self-isolate, "generate substantial costs on employers." *Id*. at 63422. She proposes that "[a]n imperfect proxy for the cost to an employer of a foregone hour of work is the worker's hourly pay," which, "if borne by contractors, . . . would be expected to be passed on to the Federal Government, either in direct cost or lower quality, including delays." *Id*.

75. The Director's reasoning is nothing more than fanciful speculation. Businesses do not calculate lost productivity due to employee absenteeism simply based on what they pay their employees.[12] But even if they did, the Director utterly fails to articulate just how those "costs" would be passed on to the government. Presumably, government contracts require concrete deliverables, based on agreed rates and prices. And if civilian contractors are somehow passing on their lost productivity costs to the government, *then OMB is not doing its job*.

76. Worse, the Director's reasoning implies that OMB has the power to dictate all manner of policies to government contractors regarding worker health,

[12] To illustrate just how nonsensical OMB's reasoning is, consider a formula by which an employee who clocked in and spent the day twiddling his thumbs would not count towards lost productivity, whereas an employee who called in sick would.

productivity, and absenteeism. Why stop at COVID vaccination? Why not include mandates for flu shots, weight loss programs, cancer screenings, and bans on unhealthy habits such as smoking and consuming too much alcohol? Why not include measures to control how much time employees spend making personal phone calls, running errands, texting, or browsing the internet? The notion that OMB could have such boundless control over working conditions and employee behavior for federal contractors exposes a fundamental defect in the Director's reasoning.

77. The Director goes on to argue that, "[w]hile anecdotal reports suggest that vaccine mandates may lead some workers to quit their jobs rather than comply, . . . we know of no systematic evidence that this has been a widespread phenomenon, or that it would be likely to occur among employees of Federal contractors." *Id*. But this rationale is belied by the primary reason, if not the *sole* reason, why the Biden Administration postponed the compliance deadline until after the Holidays: Workers quitting to avoid vaccination would worsen our current transportation and supply chain crisis, right before the Holidays.[13]

78. Even considered on its own terms, the Director's reasoning fails to articulate the likely difference in lost productivity due to unvaccinated contractor

[13] *See* https://www.cnbc.com/2021/11/04/biden-vaccine-mandate-businesses-have-until-after-christmas-to-comply.html

employees quitting or being terminated *vis a vis* employees missing work due to illness. For example, assume *arguendo* that, as the Director claims, 99.7% of United Airlines' workforce is vaccinated. *Id*. If the remaining 0.3% of employees refuse to comply and are not accommodated, then it is a certainty that 0.3% of United employees will be terminated,[14] but it is far from certain that the same cohort would fall ill from COVID-19 if allowed to remain employed, or that the unvaccinated are the only cohort that is vulnerable to contracting the disease.

79. As well, the Director fails to address the stark reality that the current tight labor market, exacerbated by buyouts and early retirement incentives in 2020, will only be made worse by terminating thousands of valuable employees. This will undoubtedly drive upward pressure on wages for those who remain.

80. Finally, the Director's reasoning – that employer mandates have had great success in various industries – is no justification for such a raw exercise of government power. Just because something may seem like a good idea does not mean that the government has, or should have, the power to do it. And the question that still remains unanswered is: How would the government benefit?

The OMB's Legal Justifications for Waiving Notice and Comment Fail

81. In Part III, the Director makes the conclusory assertion that her Revised

[14] According to the website, statista.com, United Airlines shrank from over 90,000 employees in 2019 to 70,634 employees in 2020. Assuming that the latter number is still accurate (the current number is almost certainly higher), 0.3% of the workforce would be over 2,000 employees.

determination is not subject to review under the APA because the President delegated his authority to promulgate the rule under 3 U.S.C. § 301. 86 Fed. Reg. at 63,423. But the President cannot shield agency action from review under the APA by purporting to delegate powers that he does not have.

82. Under § 301, the President can only delegate a function "vested in [him] by law," or "any function which such officer is required or authorized by law to perform only with or subject to [his] approval, ratification, or other action. . . ." 3 U.S.C. § 301. Here, 40 U.S.C. § 121(c) expressly vests the authority to "prescribe regulations" under Title 40 in the "Administrator" of the GSA,[15] not the President. Thus, the Revised OMB Rule is patently amenable to review under the APA. *See* 5 U.S.C. § 702.

83. Alternatively, the OMB Director purports to invoke the "urgent and compelling circumstances" provision of 41 U.S.C. § 1707(d) and FAR section 1.501-3. First, as noted above, no such "urgent and compelling circumstances" exist. We have been living with COVID-19 for at least 18 months, and it never occurred to OMB prior to that time to decide that "urgent and compelling" circumstances justified issuing an intrusive, government-wide procurement regulation contractor employee health, let alone without notice and comment. Indeed, the Director's very

[15] Under Chapter 40, the term "Administrator" refers to the Administrator of General Services, who is the head of the GSA. *See* 40 U.S.C. § 302(a). Under Chapter 41, the term "Administrator" refers to the head of the Office of Federal Procurement Policy. *See* 41 U.S.C. § 1102(a).

reasoning here is patently undermined by the Biden Administration's decision to delay the deadline until after the Holidays. In real life, "urgent and compelling circumstances" never take a break for the Holidays.

84. The Director's reasoning also misrepresents the text of FAR 1.501-3, which provides:

> Advance comments need not be solicited when urgent and compelling circumstances make solicitation of comments impracticable prior to the effective date of the coverage, **such as when a new statute must be implemented in a relatively short period of time**. In such case, the coverage shall be issued on a temporary basis and shall provide for at least a 30 day public comment period.

FAR 1.501-3(b) (emphasis added).

85. The Revised OMB Rule clearly does not implement a new statute. As well, following the doctrine of statutory construction which holds that specific examples necessarily limit the scope of a general proposition, the Director cannot claim in good faith that her authority is any broader than circumstances similar to implementing a new statute. *See Becerra*, 2021 U.S. Dist. LEXIS 114297 at *55-56. Creating a new rule from whole cloth, where the alleged circumstances have existed for a year and a half, does not fit within this limitation.

86. As well, while the Revised OMB Rule purports to allow 30 days for comments, 86 Fed. Reg. at 63,418, and claims to be temporary, *id*. at 63,424, it contains no sunset date.

87. Even if the Director could invoke the "urgent and compelling circumstances" provisions of § 1707 and FAR section 1.501-3, her reasoning is highly strained and, frankly, difficult to comprehend. First, she seems to say that, if the rule were delayed, it would prevent the Updated Task Force guidance from taking effect on-time. 86 Fed. Reg. at 63,423-24. Second, she argues that a delay would interfere with the purpose of the Updated Task Force guidance because it would fail to harmonize with the OSHA ETS and with the Centers Medicaid & Medicare Services (CMS) rules, both of which have deadlines of January 4, 2022 for employees to receive their final dose. *Id*. at 63424.

88. Both explanations put the cart before the horse. The fact that the Task Force chose a new deadline of January 18, 2022 for employees to be fully vaccinated (two weeks after their final dose), and that OSHA and CMS chose a deadline of January 4, 2022 for employees to receive their final dose, does not create an "urgent and compelling" circumstance. To say otherwise suggests that an administration could create urgent circumstances simply by placing arbitrary deadlines on compliance with any new proposed rule.

89. The Director's rationale also presumes that the Task Force guidance, OSHA ETS, and CMS rule all had the force and effect of law from the time they were published. That is simply not correct and, even if it were, the OSHA ETS has been suspended following the 5th Circuit's stay order in *BST Holdings*.

90. The Director also, or alternatively, purports to waive the notice and comment requirement based on a strained reading of 5 U.S.C. § 553 of the APA. 86 Fed. Reg. at 63,424. Her reasoning necessarily goes through two steps, neither of which holds water. First, she claims that because the Revised OMB Rule relates to "contractors," it falls within the scope of § 553(a)(2), which includes rules governing "contracts." But the purpose of that provision is to free the government from having to go through the notice and comment procedure every time it decides to enter into, rescind, or cancel a government contract. *See Rainbow Valley Citrus Corp. v. Fed. Crop Ins. Corp.*, 506 F.2d 467, 469 (9th Cir. 1974). It is not a mandate to promulgate government-wide regulations governing contracts without notice and comment.

91. The Director next argues that the waiver provision of § 553(b)(3)(B) applies, because "[n]otice and comment is impracticable where delay would result in harm." 86 Fed. Reg. at 63,424. But, for the same reasons why the Director cannot invoke the "urgent and compelling circumstances" provisions of 41 U.S.C. § 1707(d) and FAR section 1.501-3, the Director cannot reasonably claim that any delay would result in harm. This is especially so, given the Administration's own decision to delay enforcement until after the Holidays.

92. Moreover, as already noted, government-wide procurement regulations, which the Original OMB Rule and Revised OMB Rule surely are, can only be issued by the FAR Council. 41 U.S.C. § 1303(a)(1). The scope of authority of

the Administrator (in this case, the Administrator of OFPP) is limited to ensuring, "in consultation with the [FAR] Council, . . . that procurement regulations prescribed by executive agencies are consistent with" the FAR. *Id*. § 1303(3).

Defendants' Actions Will Cause the Opposite of Their Purported Intent

93. The EO, original and Updated Task Force guidance, and the original and Revised OMB Rule all mandate that, by a specified deadline, all employees of federal contractors and subcontractors be vaccinated against COVID-19, except for employees who must be accommodated by law. The only way for contractors to comply with this mandate is to terminate unvaccinated employees who have not been fully vaccinated or obtained an accommodation. To date, some covered contractors have "accommodated" their employees by requiring them to take an unpaid leave of absence.

94. This moment is perhaps the worst possible time in our nation's history (excepting the Civil War and Word Wars I and II) to start terminating workers from the transportation and logistics industries. As the country emerges from the COVID-19 crisis, a serious workforce shortage has already wreaked havoc on the airline industry, resulting in hundreds if not thousands of flight cancellations. According to the Transportation Safety Administration's website, "TSA tracking checkpoint travel numbers," as of the date of this filing air passenger volume was nearing pre-

pandemic levels, double the volume from the same dates in 2020.[16] Airlines, which had offered early retirement and buyout programs to reduce their workforces early in the pandemic, now struggle to rebuild their workforces to accommodate a surge in demand.

95. The current supply chain crisis is also largely attributable to labor shortages in logistics industries, most acutely in trucking, freight, air cargo, and other industries relating to the distribution of goods. Anyone who has witnessed an empty grocery shelf can attest to the fact that our logistics and supply chain is currently under a great deal of stress.

96. As such, Defendants actions will actually undermine the conclusory rationale for the EO, Task Force guidance and Updated Task Force guidance, and OMB Rule and Revised OMB Rule of "reducing absenteeism" (86 Fed. Reg. 53,692) among affected transportation and logistics companies by forcing terminations of critical employees, thus threatening to exacerbate an already-critical situation.

97. Defendants' actions will also cause the opposite of "decreasing labor costs," *id*., as airlines and other transportation-related industries have been forced to *raise* wages to plug the gaps that were created when they were forced to reduce their workforces by government-mandated lockdowns and reduced travel demand.[17]

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16 *See* https://www.tsa.gov/coronavirus/passenger-throughput.

17 *See, e.g.,* https://www.cnbc.com/2021/11/19/jetblue-dangles-1000-attendance-bonuses-for-flight-attendants-ahead-of-holiday-rush.html

98. The Biden Administration is aware of this very issue. In October, the president of the National Association of Wholesaler-Distributors, Eric Hoplin, sent an open letter to the administration, stating that if the EO is enforced as written, "thousands of valued employees will be forced out of their jobs shortly before the holidays, the already compromised supply chain will be under added pressure during the busiest time of the year, and the already tight labor market will make it immeasurably more difficult to replace laid off employees, compounding supply chain disruptions."[18]

99. In a tacit acknowledgment of the problem, and not wanting the be seen as the Grinch who stole Christmas, on November 4, 2021 the administration changed the deadline for compliance to January 2022.

100. Thus, by their own tacit admission, Defendants' purported rationale for the EO, the original and Updated Task Force guidance, and the First and Revised OMB Rules – that it will promote economy and efficiency by, in part, reducing worker absenteeism and lowering labor costs – is completely untethered to reality, demonstrating beyond doubt that Defendants' reasoning is arbitrary, capricious, and pretextual.

[18] See NAW Letter at https://tt0dl1563d22haik02ol9k9a-wpengine.netdna-ssl.com/wp-content/uploads/2021/10/Ltr-to-Biden-re-EO-14042-10.20.21.pdf

Plaintiffs Will Be Irreparably Harmed by Defendants' Actions

101. Plaintiffs are employees of "covered contractors" under the EO, the Task Force guidance, and the OMB Rule. The individual Plaintiffs, as well as most members of USFF and many affected members of HFDF, work for transportation and logistics companies that directly contract with the federal government for the provision of transportation and logistics services.

102. Plaintiffs have staked their livelihoods, including years of accrued seniority and retirement plan contributions, on careers in these industries. The actions of Defendants threaten to take all of that from them by forcing them to be terminated if they do not comply or obtain an accommodation.

103. Even for those who are in a position to obtain an "accommodation," that accommodation is often illusory in that it amounts to a forced leave of absence, which is tantamount to termination. Even if the leave of absence is temporary, the result is not just lost income, but lost seniority and lost pension accruals and contributions, among other benefits.

104. Plaintiffs have no adequate remedy at law for these imminent harms, as the OMB Rule "threatens to substantially burden the liberty interests of reluctant individual recipients put to a choice between their job(s) and their jab(s)." *BST Holdings*, 2021 U.S. App. LEXIS 33698 at *24. "[T]he loss of constitutional freedoms 'for even minimal periods of time . . . unquestionably constitutes irreparable injury."

Id. (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

COUNT I
Agency action that is not in accordance with law and is in excess of authority
(Original OMB Rule, 86 Fed. Reg. 53,691)

105. Plaintiffs repeat and incorporate by reference the allegations of paragraphs 1 through 104, and further state:

106. A court must "hold unlawful and set aside agency action" that is "not in accordance with law" or "in excess of statutory . . . authority, or limitations, or short of statutory right." *See* 5 U.S.C. § 706(2)(A), (C).

107. The Original OMB Rule is unlawful for several reasons:

108. *First*, the plain intent and meaning of FPASA is to provide for efficiency in government procurement. Nowhere in the text of the statute did Congress leave any indication that it intended to authorize the President, FAR Council, OMB, GSA, or any other agency of the federal government to regulate the health of government contractor employees.

109. *Second*, the Original OMB Rule is the product of an unlawful delegation of Presidential authority under 3 U.S.C. § 301. The President was never vested by statute with the authority to regulate the health of government contractor employees.

110. *Third,* the Original OMB Rule violates the exclusivity provision of 41 U.S.C. § 1303(a) because it is a government-wide procurement regulation, which

only the FAR Council may issue, not the President or the OMB Administrator.

111. *Fourth*, the Original OMB Rule is unlawful because FPASA does not grant the President the power to issue orders with the force or effect of law. The best evidence of this is that Congress only gave the President authority to "prescribe policies and directives that the President considers necessary to carry out" FPASA. 40 U.S.C. § 121(a). By contrast, in the same section of the statute Congress authorized the GSA Administrator to "prescribe regulations." *Id*. at § 121(c).

112. *Fifth*, even if FPASA authorized the President to issue orders with the force or effect of law, it does not authorize approval of the Task Force guidance. The President seems to assume that he can rely on FPASA's prefatory language to issue any rule he deems to fit with that language. Compare 40 U.S.C. § 101 with 86 Fed. Reg. at 50, 985. FPASA's prefatory language is not a grant of authority.

113. And even if FPASA did grant the President authority to issue binding procurement orders and regulations solely because they promote economy and efficiency, the Original OMB Rule does not do so. Providing the federal government with an "economic and efficient system for" procurement is not a delegation of authority to mandate nationwide social policy that Congress has not authorized, and assuming that Congress itself had the constitutional authority to do so. *See BST Holdings; NFIB v. Sebelius, supra*.

114. The EO and Original OMB Rule will also undermine the very rationale

on which they purport to be based, in that they will interfere with procurement, exacerbate labor shortages, increase flight cancellations and/or restrict available routes, and exacerbate wage inflation.

115. *Sixth*, the Original OMB Rule violates 41 U.S.C. § 3301 by freezing out an entire class of contractors and potential contractors from bidding competition without regard to their ability to perform a government contract.

116. Because the Original OMB Rule is not authorized by FPASA, violates § 1303(a), seeks to exercise a delegated power the President does not possess, relies on a misreading of FPASA, and violates § 3301, it is contrary to law and in excess of OMB's authority.

COUNT II
Agency action that is not in accordance with law and is in excess of authority
(Revised OMB Rule, 86 Fed. Reg. 63,418)

117. Plaintiffs repeat and incorporate by reference the allegations of paragraphs 1 through 116, and further state:

118. For the same reasons recited in Count I, above, the Revised OMB Rule is contrary to law and in excess of the OMB's authority.

COUNT III
Failure to provide notice and allow comment
(Original OMB Rule)

119. Plaintiffs repeat and incorporate by reference the allegations of paragraphs 1 through 104, and further state:

120. Under 41 U.S.C. § 1707(a)–(b), procurement "polic[ies], regulation[s], procedure[s], or form[s]" must go through notice and comment, so long as they "relate to the expenditure of appropriated funds" and either (i) have "a significant effect beyond the internal operating procedures of" the issuing agency, or (ii) have "a significant cost or administrative impact on contractors or offerors."

121. The Original OMB Rule clearly satisfies these requirements. As well, the government has not invoked the "urgent and compelling circumstances" exception of § 1707(d), nor could it. The COVID-19 pandemic had been ongoing for some 18 months as to the time that the Original OMB Rule was published. There was no reason by that point to suddenly claim that anything was "urgent" or "compelling."

122. Even if OMB had invoked the "urgent and compelling circumstances" exception, no such circumstances existed at the time. As well, the decision to postpone the compliance deadline, from December 8, 2021 to January 18, 2022, patently demonstrates that no such urgency existed.

COUNT IV
Failure to provide notice and allow comment
(Revised OMB Rule)

123. Plaintiffs repeat and incorporate by reference the allegations of paragraphs 1 through 104 and 120, and further state:

124. The Revised OMB Rule was enacted without notice and comment

required by 41 U.S.C. § 1707(a)–(b), and seeks to avoid that requirement in a number of ways, none of which are legally justified.

125. *First*, the OMB Director claims that the Revised OMB Rule is not subject to review under the APA because the President delegated his authority under 3 U.S.C. § 301. But Congress never vested the President with authority to promulgate regulations governing federal procurement contracts, let alone regulations governing the health of contractor employees.

126. *Second*, the OMB Director's invocation of the "urgent and compelling circumstances" provisions of 41 U.S.C. § 1707(d) is likewise unavailing. Given the passage of time since the COVID-19 pandemic began, and given the administration's decision to postpone the effective date, no urgent and compelling circumstances exist that would justify waiving the notice and comment requirement.

127. As well, the Director's argument that any delay would interfere with the deadlines imposed by the Updated Task Force guidance, as well as the OSHA ETS and CMS rule, presumes that those measures all have the force and effect of law. They do not. The OSHA ETS has been stayed and suspended, and the CMS rule is also being challenged. But in any event, there is no basis for OMB to claim that a matter is urgent simply because other agencies have promulgated rules that contain arbitrary deadlines.

128. *Third*, the Director's reliance on FAR section 1.501-3 is unavailing

because the Revised OMB Rule exceeds the authority of that provision.

129. *Fourth*, the Director's purported waiver under 5 U.S.C. § 553 is unavailing, because that waiver provision does not extend broadly to the type of government-wide regulation created by the Revised OMB Rule.

130. *Fifth*, the Director's contention that further delay would result in harm is unavailing, for the same reasons that her invocation of the "urgent and compelling circumstances" provision of § 1707(d).

COUNT V
Arbitrary and capricious agency action
(Original OMB Rule)

131. Plaintiffs repeat and incorporate by reference the allegations of paragraphs 1 through 104, and further state:

132. Under the APA, a court must "hold unlawful and set aside agency action" that is "arbitrary [or] capricious." 5 U.S.C. § 706(2)(A).

133. An agency action is arbitrary or capricious if it fails to "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

134. The original OMB Rule contains no explanation or reasoning at all. All the OMB Director offered was a rote, conclusory recitation of the Task Force guidance:

> I have determined that compliance by Federal contractors and subcontractors with the COVID–19- workplace safety protocols detailed in that 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. at 53, 692.

135. First, this sort of conclusory recitation fails to articulate how the guidance will improve economy and efficiency. More to the point, this purported "rationale" is arbitrary and capricious because the Task Force guidance does not actually promote economy and efficiency. If anything, it will damage economy and exacerbate inefficiency by freezing out potential bidding competitors, and will wreck the economy by exacerbating the current supply chain and transportation crisis. It also fails to address likely compliance costs for contractors.

136. The OMB Director's conclusion that the Task Force guidance will improve procurement efficiency by reducing absenteeism and decreasing labor costs is clearly pretextual. As Plaintiffs have explained, it will have the opposite effect by exacerbating workforce shortages and driving up labor costs in the most highly-stressed sectors of the U.S. economy: transportation and logistics.

137. Indeed, Defendants tacitly acknowledged the inherent defect in their rationale when they postponed the compliance deadline to January 18, 2022.

138. Lacking any realistic connection to its purported rationale, the Original OMB Rule is clearly a pretext for federal regulation of public health, something that

Congress never purported to authorize OMB to do. This is further evidenced by the President's own remarks of September 9, 2021, as well as the FAR Council's admission that the goal is "getting more people vaccinated and decreas[ing] the spread of COVID-19." *See* Updated Task Force Guidance, dated November 10, 2021 (stating that "[o]ne of the main goals of [the President's] science-based plan is to get more people vaccinated. As part of that plan, the President signed Executive Order 14042.").

139. Accordingly, the Original OMB Rule is arbitrary and capricious.

COUNT VI
Arbitrary and capricious agency action
(Revised OMB Rule)

140. Plaintiffs repeat and incorporate by reference the allegations of paragraphs 1 through 104 and 132 through 133, and further state:

141. The Revised OMB Rule is arbitrary and capricious for the following reasons:

142. *First*, the Revised OMB Rule fails to provide a coherent explanation as to how a vaccination mandate for federal contractor employees will improve worker productivity and reduce costs and, most critically, how those savings would be passed on to the federal government. The reasoning provided amounts to fanciful speculation. The proxy used for calculating losses due to worker absenteeism is patently deficient, and even if reasonably accurate, fails to articulate how those

losses would be incurred by the government.

143. Indeed, if government contractors are failing to provide agreed, concrete deliverable at agreed prices, then *OMB is not doing its job*.

144. *Second*, the Director's reasoning is arbitrary and capricious in that it implies a power for OMB to dictate all manner of policies regarding the health and productivity of government contractor employees, the implication being that OMB has boundless authority over the health and behavior of every person who happens to be employed by a federal contractor, even those who never work on government business or enter a federal worksite.

145. *Third*, the Revised OMB Rule fails to provide a coherent explanation as to why enforcement of the vaccination mandate will not result in significant worker attrition at a time when our national supply chain and transportation carriers are already over-stressed. In fact, the Biden Administration tacitly conceded that mass terminations of employees will likely result in further stresses on the supply chain and transportation services when it postponed enforcement until after the Holidays. The Rule also fails to provide any analysis of any likely difference in lost productivity due to worker illness versus employee attrition resulting from the vaccination requirement.

146. *Fourth*, the Revised OMB Rule utterly fails to address the likelihood that induced worker attrition will contribute to driving up labor costs, which the

government will, at some point, almost certainly have to absorb.

147. *Fifth,* the Revised OMB Rule espouses the view that it is a good idea because it has been successful in the private sector. But again, this fails to explain any benefit to the federal government.

148. Like the Original OMB Rule, the Revised OMB Rule is clearly a pretext for federal regulation of public health, something that Congress never purported to authorize OMB to do. This is further evidenced by the President's own remarks of September 9, 2021, as well as the FAR Council's admission that the goal is "getting more people vaccinated and decreas[ing] the spread of COVID-19." *See* Updated Task Force Guidance, dated November 10, 2021 (stating that "[o]ne of the main goals of [the President's] science-based plan is to get more people vaccinated. As part of that plan, the President signed Executive Order 14042."). *See also* Revised OMB Rule, 86 Fed. Reg. at 63,421 (stating that "[t]he primary goal of the safety protocols [described in the Task Force guidance] is to reduce the spread of COVID-19 among contractor employees.").

149. Accordingly, the Revised OMB Rule is arbitrary and capricious.

COUNT VII
Agency action that is not in accordance with law and is in excess of authority
(FAR Council Guidance)

150. Plaintiffs repeat and incorporate by reference the allegations of paragraphs 1 through 118, and further state:

151. The FAR Council claims to be issuing only "guidance," but that "guidance" is being applied in a way that indicates it is binding, and is therefore reviewable.

152. The guidance does not explain what authority was permit the FAR Council to create a government-wide procurement regulation mandating vaccination the employees of federal contractors and subcontractors. However, to the extent that the FAR Council relies on FPASA, it lacks the authority to do so for the reasons articulated in Counts I and II.

COUNT VIII
Failure to conduct notice and comment
(FAR Council Guidance)

153. Plaintiffs repeat and incorporate by reference the allegations of paragraphs 1 through 104, and further state:

154. As set forth in Count II, 41 U.S.C. § 1707(a)–(b) requires procurement "polic[ies], regulation[s], procedure[s], or form[s]" to go through notice and comment.

155. Even if the FAR Council guidance is not being treated as binding – and it is – the guidance is a procurement policy.

156. Congress required notice and comment for government-wide pronouncements, whether binding or not, to notice and comment. The FAR Council guidance is therefore invalid.

157. As well, the draft contract language in the guidance is a procurement form subject to notice and comment.

158. For these reasons, and the reasons addressed in Counts III and IV, the FAR Council guidance is invalid.

COUNT IX
Arbitrary and capricious agency action
(FAR Council Guidance)

159. Plaintiffs repeat and incorporate by reference the allegations of paragraphs 1 through 104, and further state:

160. The FAR Council guidance is arbitrary and capricious for the reasons set forth in Counts V and VI.

COUNT X
Ultra vires act of the President

161. Plaintiffs repeat and incorporate by reference the allegations of paragraphs 1 through 104, and further state:

162. For the reasons set forth in Counts I and II, the President lacks any statutory authority to issue the EO.

163. As well, the President lacks any authority under Article II of the Constitution of the United States to issue the EO.

COUNT XI
Violation of separation of powers

164. Plaintiffs repeat and incorporate by reference the allegations of

paragraphs 1 through 104, and further state:

165. Article I, § 1 of the U.S. Constitution vests "[a]ll legislative powers" in Congress.

166. The EO, the Original OMB Rule, the Revised OMB Rule, and the FAR Guidance usurp the powers of the Legislative Branch under Article I of the United States Constitution, thereby violating the Constitution's Separation of Powers.

COUNT XII
Violation of the non-delegation doctrine

167. Plaintiffs repeat and incorporate by reference the allegations of paragraphs 1 through 104, and further state:

168. Article I, § 1 of the U.S. Constitution vests "[a]ll legislative powers" in Congress.

169. Should the Court conclude that FPASA authorizes the President to require government contractors to mandate vaccination to their employees, FPASA represents an unconstitutional delegation of legislative authority.

COUNT XIII
Violation of substantive due process under the Fifth Amendment

170. Plaintiffs repeat and incorporate by reference the allegations of paragraphs 1 through 104, and further state:

171. Plaintiffs have a fundamental substantive due process right to bodily integrity and against forced medical treatment.

172. The EO, the First and Revised OMB Rules, and the FAR Council Guidance are not narrowly tailored to achieve a compelling interest of the government of the United States.

173. *First*, the United States has no general police power, and therefore cannot claim *any* interest in requiring employees of private companies who happen to contract with the federal government to be vaccinated against COVID-19.

174. *Second*, to the extent that the United States claims such an interest, the interest is not compelling. As set forth above, the United States has not made *any* showing that the forced vaccination of persons who happen to work for government contractors will materially benefit the government in any way. To the contrary, the challenged actions of Defendants are likely to harm government interests by causing further disruptions to transportation and supply chains, and by driving up wages of contractor employees.

175. *Third*, even if the United States had shown a compelling interest in requiring the vaccination of employees of government contractors, the solution is not sufficiently narrowly-tailored. As one example, the government refuses to recognize natural immunity in lieu of vaccination, which forces those who already have COVID antibodies to accept all of the *risk* of vaccination without any of the purported benefit.

176. Alternatively, Plaintiffs have a protected liberty interest in bodily

autonomy and against forced medical treatment.

177. For the reasons set forth herein, the United States government has not demonstrated a rational basis for violating Plaintiffs' protected liberty interest.

COUNT XIV
Declaration that the challenged actions are unlawful and/or unconstitutional

178. Plaintiffs repeat and incorporate by reference the allegations of paragraphs 1 through 177, and further state:

179. For the reasons set forth in each of the previous counts, Plaintiffs are entitled to a declaratory judgment that Defendants are violating the law and/or the Constitution of the United States.

PRAYER FOR RELIEF

For the foregoing reasons, Plaintiffs ask that the Court;

a) Hold as unlawful and/or unconstitutional and set aside the Executive Order, the Original and Revised OMB Rules, and the FAR Council guidance.

b) Issue preliminary and injunctive relief enjoining Defendants from enforcing the Executive Order, the Original and Revised OMB Rules, and the FAR Council guidance.

c) Issue declaratory relief that Defendants' actions are unlawful and/or unconstitutional.

d) Award Plaintiffs their costs and reasonable attorney's fees.

e) Award such other relief as the Court deems equitable and just.

Filed this 22nd day of November, 2021.

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